PAROLE BOARD CONFERENCE

10th May 2018

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RECENT CASES
Themes / Issues

- Importance of rehabilitation in European law
- Clarity, transparency and foreseeability
- Difficulty for foreign nationals
- Prisoner's right of autonomy

Balc v. Minister for Justice
Court of Appeal, 7th March 2018

- Importance of rehabilitation as an aspect of EU free movement
- Directive 2004/38
- Sexual assault – three years, 18 months suspended on conditions
- Removal order with five year exclusion period
- Internal review – affirmation

Balc v. Minister for Justice
Court of Appeal, 7th March 2018

Para. 112, refers to *Land Baden Wurtenberg v. Tsakouridis Case* C-145/09 [2010] E.C.R 1-11979).

"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 … 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 … 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."

Balc v. Minister for Justice
Court of Appeal, 7th March 2018

Para. 113, refers to the A-G's Opinion in *Land Baden Wurtenberg v. Tsakouridis*:

"95. In my view, when that authority takes an expulsion decision against a Union citizen following the enforcement of the criminal sanction imposed, it must state precisely in what way that decision does not prejudice the offender's rehabilitation. Such a step, which relates to the individualisation of the sanction of which it is an extension, seems to me to be the only way of upholding the interests of the individual concerned as much as the interests of the Union in general. Even if he is expelled from a Member State and prohibited from returning, when released the offender will be able, as a Union citizen, to exercise his freedom of movement in the other Member States. It is therefore in the general interests that the conditions of his release should be such as to dissuade him from committing crimes and, in any event not risk pushing him back into offending."[Emphasis provided]

Balc v. Minister for Justice
Court of Appeal, 7th March 2018

"121. In the present case there is certainly nothing in the consideration of the review decision to indicate that this type of balancing exercise was carried out as required by *Tsakouridis*, even though there are comments made in reliance on his failure to take part on a programme offered to him. The Governor had expressed himself as being satisfied that Mr Balc had engaged with what was the first part of that programme, namely a risk assessment. The carrying out of this exercise did not require evidence from Mr Balc's solicitor to be provided in order to carry out that exercise. The Minister was aware that conditions for suspending the sentence were in place. It was clear from these that they were intended to enable Mr Balc attempt to rehabilitate himself. I do not believe that the failure by Mr Balc's solicitor to make submissions by reference to the *Tsakouridis* exercise absolves the Minister from undertaking it as part of her consideration of proportionality.

Balc v. Minister for Justice
Court of Appeal, 7th March 2018

"Without carrying out the exercise, it cannot be said that this element of the consideration of proportionality was completed. Expulsion is an extreme measure which interferes significantly with the free movement and residence rights of a European citizen. They are rights to be interfered with to the minimum extent necessary in order to, *inter alia*, protect the public from re-offending on the part of Mr Balc. It will be relevant also on any fresh consideration of proportionality to consider Mr Balc's likelihood of re-offending having regard to the length of time that had passed since these offences were committed, and that they appear to be isolated offences or 'once-off' as described by Mr Balc's solicitor, in an otherwise unblemished life. That is not in any way to diminish the seriousness of the offences committed, or to ignore the fact that it is widely recognised that a person who has committed an offence of a sexual nature has a propensity to do so again. But Mr Balc must be considered individually, so that his particular circumstances are taken into account."

Vinter v. United Kingdom
ECtHR (Grand Chamber), 17th 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
ECtHR (Grand Chamber), 17th July, 2013

- Rule 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), 17th July, 2013

German Constitutional Court in the *Life Imprisonment* case, 21st 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
ECtHR (Grand Chamber), 17th July, 2013

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).

Vinter v. United Kingdom
ECtHR (Grand Chamber), 17th July, 2013

- 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)

Vinter v. United Kingdom
ECtHR (Grand Chamber), 17th July, 2013

The International Covenant on Civil and Political Rights 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).

Vinter v. United Kingdom
ECtHR (Grand Chamber), 17th July, 2013

"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 … 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)."

Vinter v. United Kingdom
ECtHR (Grand Chamber), 17th July, 2013

"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)."

Vinter v. United Kingdom
ECtHR (Grand Chamber), 17th July, 2013

"122. … A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration."

Hutchinson v. United Kingdom
ECtHR (Grand Chamber), 17th Jan 2017

- "43. As recently stated by the Court, in the context of Article 8 of the Convention, "emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies" (*Khoroshenko v. Russia* [GC], no. 41418/04, § 121, ECHR 2015; see also the cases referred to in *Murray*, cited above, § 102). Similar considerations apply under Article 3, given that respect for human dignity requires prison authorities to strive towards a life sentenced prisoner's rehabilitation (see *Murray*, cited above, §§ 103-104). It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds (*Vinter and Others*, cited above, §§ 113-116). A review limited to compassionate grounds is therefore insufficient (ibid., § 127).

Hutchinson v. United Kingdom
ECtHR (Grand Chamber), 17th Jan 2017

"44. The criteria and conditions laid down in domestic law that pertain to the review must have a sufficient degree of clarity and certainty, and also reflect the relevant case-law of the Court. Certainty in this area is not only a general requirement of the rule of law but also underpins the process of rehabilitation which risks being impeded if the procedure of sentence review and the prospects of release are unclear or uncertain. Therefore prisoners who receive a whole life sentence are entitled to know from the outset what they must do in order to be considered for release and under what conditions. This includes when a review of sentence will take place or may be sought (*Vinter and Others*, cited above, § 122) …

"45. … it is not [the ECtHR's] task to prescribe whether it should be judicial or executive …"

Hutchinson v. United Kingdom
ECtHR (Grand Chamber), 17th Jan 2017

"52. … the Secretary of State's decisions on possible release are subject to review by the domestic courts … The Court notes here the Government's statement that judicial review of a refusal by the Secretary of State to release a prisoner would not be confined to formal or procedural grounds, but would also involve an examination of the merits. Thus the High Court would have the power to directly order the release of the prisoner, if it considered this to be necessary in order to comply with Article 3 …"

Our scope of judicial review, in respect of a decision to refuse temporary release is, as the law currently stands, extremely limited : is the decision arbitrary or capricious ? A merits review is not possible.

Murray v. the Netherlands
ECtHR (Grand Chamber), 26th April 2016

The applicant murdered a six-year-old girl, the niece of an ex-girlfriend, in revenge for the ex-girlfriend ending their relationship.

A number of reports diagnosed him as having a personality disorder. For example, one stated:

"*the applicant was not suffering from any psychosis, depression or anxiety, but that he did have a serious narcissistic personality disorder*"

He did not wish to engage with treatment or therapy.

However, the ECtHR held there was a violation of Article 3 of the ECHR because the lack of treatment meant that he could not make the progress required towards rehabilitation.

Murray v. the Netherlands
ECtHR (Grand Chamber), 26th April 2016

"124. … although the applicant in the present case was indeed initially, prior to being sentenced to life imprisonment, assessed as requiring treatment, it does not appear that any further assessments were carried out – either when he started serving his sentence or thereafter – of the kind of treatment that might be required and could be made available or of the applicant's aptitude and willingness to receive such treatment. In the Court's view, very little, if any, relevance falls to be attached to the fact that the applicant himself had not apparently been concerned about procuring treatment and had preferred to be transferred from Curaçao to Aruba where the availability of psychiatric help was (even more) limited. It must be borne in mind that persons with mental health problems may have difficulties in assessing their own situation or needs, and may be unable to indicate coherently, or even at all, that they require treatment (see also paragraph 106 above)." (underlining added)

Murray v. the Netherlands
ECtHR (Grand Chamber), 26th April 2016

"125. Having regard to the foregoing, the Court finds that the lack of any kind of treatment or even of any assessment of treatment needs and possibilities meant that, at the time the applicant lodged his application with the Court, any request by him for a pardon was in practice incapable of leading to the conclusion that he had made such significant progress towards rehabilitation that his continued detention would no longer serve any penological purpose. This finding likewise applies to the first, and in fact only, periodic review that was carried out of the applicant's life sentence. This leads the Court to the conclusion that the applicant's life sentence was not de facto reducible as required by Article 3."

Koroshenko v. Russia
ECtHR (Grand Chamber), 30th June 2015

The applicant was convicted in 1995 of aggravated murder. A death sentence was handed down, but commuted to life imprisonment.

A special detention regime was imposed, which included heavily restricted access to family visits.

He complained of a violation of Article 8.

The ECtHR includes rehabilitation as an aspect of an offender's rights under Article 8.

Koroshenko v. Russia
ECtHR (Grand Chamber), 30th June 2015

"121. … the approach to assessment of proportionality of State measures taken with reference to "punitive aims" has evolved over recent years, with a heavier emphasis now having to be placed on the need to strike a proper balance between the punishment and rehabilitation of prisoners … In this connection, the Court recalls its observations, firstly, in the Dickson [GC] judgment (cited above, § 75), where it noted the general 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, and, secondly, in Vinter and Others v. the United Kingdom [GC], … and Harakchiev and Tolumov v. Bulgaria … where it insisted that the emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies."

Koroshenko v. Russia
ECtHR (Grand Chamber), 30th June 2015

"122. The regime and conditions of a life prisoner's incarceration cannot be regarded as a matter of indifference in that context. They need to be such as to make it possible for the life prisoner to endeavour to reform himself, with a view to being able one day to seek an adjustment of his or her sentence (see Harakchiev and Tolumov, cited above, § 265)."

Koroshenko v. Russia
ECtHR (Grand Chamber), 30th June 2015

"144. … [The Court] finds that the very strict nature of the applicant's regime prevents life-sentence prisoners from maintaining contacts with their families and thus seriously complicates their social reintegration and rehabilitation instead of fostering and facilitating it (see Vinter and Others, cited above, §§ 111-116). In this connection, the Court also attaches considerable importance to the recommendations of the CPT, which noted that long-term prison regimes "should seek to compensate for [the desocialising effects of imprisonment] in a positive and proactive way" (see paragraph 67 above)."

Koroshenko v. Russia
ECtHR (Grand Chamber), 30th June 2015

"145. This goal is consonant with Article 10 § 3 of the International Covenant on Civil and Political Rights, in force with respect to Russia since 1973, which provides that the essential aim of the treatment of prisoners is their reformation and social rehabilitation (see paragraph 69 above). It is also present in several other international instruments which emphasise that efforts need to be made by the prison authorities for the reintegration and rehabilitation of all prisoners, including those serving life sentences (Rules 6, 102.1 and 102.2 of the 2006 European Prison Rules, points 6 and 11 of Resolution 76 (2) of the Committee of Ministers, and paragraphs 2 in fine, 5, 22 and 33 of Recommendation 2003 (23) on the management by prison administrations of life-sentence and other long-term prisoners, see paragraphs 58-64 above)."

ISSUES

- Is our system sufficiently clear and certain, reflecting the case law of the ECtHR ?

- Would full legal representation not add to clarity and certainty, and consistency with the ECHR ?

  NB – *Boyle v. Minister for Justice*, High Court, 16th April 2015

- Foreign nationals – uncertainty re repatriation/deportation

PRISONER'S AUTONOMY

- *Governor of X Prison v. P McD.* [2016] 1 I.L.R.M. 116.
- *A.B. v. C.D.* [2016] 3 I.R. 598
- Europe / U.S.
- Solitary confinement / Isolation
  - *Attorney General v. Damache*, High Court, 21st May 2015 [NB – very recent Ct of Appeal judgment]
  - *McDonnell v. Governor of Wheatfield Prison* [2015] 2 I.L.R.M. 361
  - *S.F. v. Director of Oberstown*, High Court, 6th Nov 2017
  - P McD. v. Governor of Mountjoy