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Judgment: approved by the Court for handing down | *Delivered:* **06/01/06**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JUSTIN MARTIN

Plaintiff;

and

NORTHERN IRELAND PRISON SERVICE

Defendant.

GIRVAN J

[1] The applicant as a sentenced prisoner serving part of his term at HMP Magilligan ("Magilligan") initiated proceedings by seeking judicial review of the Prison Service's sanitation procedures at Magilligan. In his application he sought an order of mandamus requiring the Prison Service to stop the procedure of requiring the applicant to urinate and defecate into a pot in his cell and of requiring the applicant to slop out the contents of the waste pot in a communal area with other prisoners and without the use of any or adequate cleaning materials or equipment. He sought related declaratory relief. Subsequently the proceedings were converted into a plenary action. In his amended statement of claim the applicant, now as plaintiff in the action, claimed damages for the alleged breach by the Prison Service of Articles 3 and 8 of the Convention taken separately or together with Article 14. He also sought declaratory relief.

[2] Magilligan forms part of the estate of the Prison Service. It was used during the period of internment as an internment campus but in due course this was closed. It was replaced with a cellular brick built prison, the cells being the form of the letter H, each block with four landings. The individual cells do not have in-cell sanitation facilities with the exception of a small number. This meant that when prisoners were locked into their cells if they needed to urinate or defecate during periods of lock-up they had to use a pot provided and the contents of that pot had to be disposed of by a process

called slopping out. Slopping out was at one time a regular feature of prison life throughout the prison system. With improving standards of hygiene and increasing respect for the privacy of prisoners it became clear to prison authorities that in the modern age slopping out is undesirable. Modern prisons are now designed and built in such a way that there is in-cell sanitation. Thus, for example, in the case of the new prison at Maghaberry prisoners have such in-cell sanitation. The older prison stock such as that at Magilligan built before the current policy throughout the United Kingdom did not have such facilities. H-blocks at Magilligan were built in the 1980s and at that time a decision was taken not to provide in-cell sanitation facilities as slopping out was never viewed as a norm at that time. The sewage facilities at Magilligan comprise a bio-aeration plant which lacks the capacity to handle the demands which were placed on it if in-cell sanitation was installed. At the time of the events giving rise to the plaintiff's claim the population of the prison was some 335 prisoners, the operational capacity of the prison being 412 prisoners. Prisoners were thus able to occupy individual cells on their own.

[3] In 1994 a working group was established to examine the options for improving the sanitation arrangements. This followed comments by HM Inspectorate of Prisons in a 1993 report reviewing night-time access to sanitation for inmates in prison. It was decided that the cost of providing in-cell sanitation by the conversion of a group of three cells into two cells each with adjoining en suite sanitation facilities was prohibitively high and the decision was made to go for an electronic system under which prisoners during lock-up periods could be unlocked when they wished to leave their cells to use the toilet facilities located in the ablutions area. The longer term proposals are to redevelop the prison and new accommodation will include direct access sanitation facilities in-cell. This work will not start before 2008/2009 on the current planning and the infrastructure of the prison in terms of water, electricity, drainage and sewage works will have to be upgraded.

[4] The plaintiff was a prisoner at Magilligan from 12 February 2004 to 8 October 2004. During the period of the plaintiff's imprisonment, a total of 239 days, he was locked up in the cell between the hours of 12.30 and 14.00 hours (lunchtime lock-up); between 16.30 and 17.30 (teatime lock-up); and between 20.30 and 08.30 hours (a 12 hour period overnight). On Saturdays the lock-up commenced at 16.30 and went through to 08.30, a total of 16 hours. During the relevant time of the plaintiff's imprisonment at Magilligan there was no facility for unlocking the prisoner at lunchtime or at teatime to go to the toilet. That system has subsequently changed. During those periods at lunchtime and teatime the applicant would have to use the pot for excretion if he needed to although they were relatively short periods of incarceration in his cell and he could use the ordinary toilet facilities before and after the lock-up.

Hence the need to use the pot during lunchtime and teatime would be restricted to unexpected bodily requirements.

[5] The night-time unlock system worked in the following way. Each cell contains a buzzer. If the prisoner needs to go to the toilet at night-time he presses the buzzer and a light goes on outside the cell drawing attention to the prisoner's need. The buzzer also sounds and a light appears in a control console in the block control room. A prisoner officer will go to the cell and find out what the prisoner needs. The cell door is operated on a double lock. One lock is manual and the other lock is electronic. The prison officer has to manually unlock the door which, however, remains locked until the electronically unlocked system is put into operation. The prison officer reports back to the control room which will then release the second block. By then the guard will have withdrawn from the landing and the prisoner can proceed to the toilet. If the prisoner has had to use his pot on release he can leave the cell and go to discharge the contents of the pot, clean it and return to the cell. The system is designed to minimise the security risks to prison officers at night and only one prisoner will be let out at one time in the relevant landing. If overnight the prisoner has had to use his pot and has not already discharged its contents, on release in the morning he will have to carry the pot down the corridor and to discharge and slop out its contents. On each landing a sluice is provided for this purpose. The sluice has a faucet over which the pot can be held for cleaning purposes. The Prison Service's evidence on the procedures relating to the sluice included a video purporting to show the operation of the system. The Prison Service's case was that the task of emptying out a chamber-pot in the sluice was not a complicated one and there would be no occasion for splashing of contents and there would be no overcrowding in the sluice area. The sluice area is 10 feet away from the ablutions area. In either the sluice area or the ablutions area detergent and toilet brushes are available according to the Prison Service and prisoners can bring detergents and brushes from the ablutions to the slop-house if they are not already there. Many prisoners as a matter of custom having emptied and rinsed the chamberpot in the sluice area for the purpose of rinsing the pot out in a Belfast sink. The Belfast sink is in close proximity to the wash hand basins where other prisoners would be washing, cleaning their teeth or shaving.

[6] Having briefly set out the procedure involved in the system as operated I turn now to consider the plaintiff's complaints as to the way in which the system operated and draw conclusions in relation to his complaints in the light of other evidence and in particular in the light of the evidence called by the Prison Service.

[7] The plaintiff complained that he had no access to the toilet during the lock-up at lunchtime and at teatime and there was no access to the toilet during the hour or so before release in the morning. On the evidence he was

correct in saying that during those periods if he had a call of nature he had to use the pot. The Prison Service has since changed the position in relation to lunch time and tea time and an unlocking facility is now available for prisoners during that period although for operational reasons there remains a problem in the period leading up to the release of the prisoners in the morning.

[8] When the unlock system is in operation, the plaintiff complained that on occasions a prisoner might have to wait from thirty minutes to one hour to go to the ablutions while other prisoners are ahead of him in the queue of prisoners waiting release to go to the toilet where released one at a time. Some prison officers, he said, might ignore the prisoner buzzing. In the circumstances of being ignored or having to wait one's turn in a queue, on occasion, he had to use the pot for urination or defecation. Defecation is particularly unpleasant since it causes bad odours within the cell. The Prison Service did accept that on occasions there would be delays while other prisoners took their turn at going to the toilet. Some prison officers (such as Prison Officer Atkinson) would sympathetically try to expedite release of a prisoner desperately needing to defecate. On the evidence I am satisfied that there was no consistent practice by any prison officer to ignore prisoners requesting a release. On occasions this may well have happened but if there was a consistent pattern then it would have featured in prisoners' complaints and in complaints to the Board of Visitors. The light that comes on when a buzzer is pressed would be visible on cameras within the command room and if lights were left unattended to that would have been visible to those observing in the command room. There is, however, justification in the complaint that there was an absence of clear directions to prison staff as to how the system should be operated as to how they should handle and expedite particularly pressing requirements. The system leaves much to the discretion of the individual prison officers some of whom may be prepared in certain circumstances to cut corners or to ignore prisoners on occasions even if that is not a consistent pattern. It was clear from the evidence that there were periods of industrial action on part of the prison staff and I accept the evidence that during those periods the prisoners were the ones who suffered as a result of the industrial action.

[9] The plaintiff complained in relation to the problem of smell and the embarrassment of having to carry pots containing excretions, particularly when this had to be done in front of female staff who, somewhat surprisingly, appeared to have been on duty during the unlock time in the morning when prisoners would have been having recourse to the sluice area and the ablutions area. The plaintiff complained of splashes occurring form the contents of the pots and he described with some justification that the whole process was disgusting and filthy. The question of reducing smell within the cell in the event of a prisoner having to defecate does not appear to have been considered by the Prison Service. As a result of the trial thought appears now

to be given to making available some form of deodorant within the cell. I am satisfied that on occasion spillages will have occurred. Having regard to the amount of movement of prisoners emerging from their cells at the one time, some carrying pots, others going to the ablutions and others preparing for jobs for the day it is entirely probable that on occasions prisoners knock into each other and spillages occur.

[10] The plaintiff complained of not being able to properly wash his hands after using the pot. The criticism is well founded. It is surprising that each prisoner is not routinely given at least a plastic basin with antibacterial soap as part of the cell equipment together with an adequate supply of water within the cell. In the course of the trial the Prison Service has belatedly recognised the need for this and is now issuing basins and water gallons which should become standard equipment. The suggestion made to the plaintiff by a prison governor that he could wash his hands in the sluice was rightly accepted by the Prison Service to be entirely unacceptable. This suggestion was made in the plaintiff's adjudication for throwing a pot towards a prison officer which he did on one occasion after a general search when the prisoners had all been locked in their cells for a period of time. The plaintiff alleged that he was angry because he was not been allowed to wash his hands. It is surprising that an officer as senior as a governor made a suggestion which the Prison Service now roundly condemns. Indeed the terms in which the governor had expressed himself in the course of the judication reveals how the entire slopping out system can have a coarsening effect both on prisoners and staff alike.

[11] The plaintiff complained that on occasions prisoners were given black bin bags into which they were expected to defecate. I am satisfied that on occasions black bin bags were made available to prisoners the circumstances implying that a prisoner could use the bag to defecate into. One prisoner, Mr Turner, whom I considered to be a reliable and honest witness gave his evidence with fairness and balance, described how he was given a black bin bag by a senior officer during a period of industrial action by the prison staff. The fact that a senior officer was involved shows that the practice was recognised and sanctioned at a level about that of ordinary prison officers. The witness described the attitude of the prison staff as unsympathetic to the prisoners concerns about the disgusting and unhygienic nature of the use of black bin bags in such circumstances. While this did happen in the course of 2004 during the period of the plaintiff's imprisonment I am satisfied that it was not as widespread or common at that stage as it had been previously. The plaintiff himself did not have to use a black bag in such circumstances (notwithstanding the fact that the pleadings in the particulars had suggested that he had). The Prison Service in the course of the trial accepted that the practice was disgusting and unacceptable and steps had been taken to ensure that black bin bags are no longer available in circulation amongst prisoners.

[12] In relation to the sluice arrangements the plaintiff said that the pot could not be held over the faucet with precision. Water could be sprayed out and prisoners splashed. The pot would then be rinsed in the Belfast sink. It does not appear that prisoners were given any training or instruction on the proper use of the sluice. I am satisfied on the evidence that the sluice on occasions could be dirty and smelly. Disinfectant should always have been available in the sluice area but it is clear from the Prison Service's own evidence that on occasions it would not and a prisoner would have to go to the ablutions area to find disinfectant. Similarly proper toilet brushes should always have been available in the sluice area but on occasions would have to be located in the ablutions area. It seems highly likely that some prisoners would not bother to go and get detergent or a toilet brush in such circumstances. I am satisfied that the management of the sluice area and the supervision of the sluicing arrangements were inadequate and not properly thought through. Having regard to the fact that the prisoners were left to get on with their own arrangements about slopping out it is hardly surprising that there could on occasions be accidents in the sluice area and inadequate cleaning and hygiene.

[13] Although the plaintiff did not himself refer to the frequent use of WC's in the ablutions area as a place to slop out the contents of pots other witnesses referred to that happening very regularly, in particular the prison officers who gave evidence. The Prison Service accepted that this was entirely inappropriate and unhygienic, particularly because it meant that only partially clean pots would then be rinsed under the Belfast sink down which, on occasions, according to the evidence the urine contents of pots were poured. The practice of cleaning out pots smeared with excrement and urine in a sink in close proximity to basins where prisoners were expected to wash their faces, hands and teeth and shave was rightly accepted in the course of the trial by the Prison Service as unacceptable. The recognition now by the Prison Service of the unacceptability of such arrangements and its failure to have seen that those arrangements had become a common practice showed a failure on the part of the Prison Service to properly keep the sanitation procedures under review and to ensure the adequacy and suitability of the slopping out procedures.

[14] Reference was made to the throwing out through cell windows of containers containing urine or parcels or bags containing excrement. I am satisfied that this did occur on occasions. It appears to have been a much more common practice before the relevant period of the plaintiff's imprisonment in Magilligan. It is understandable that prisoners would want to exclude from their cells foul smelling material. The fact that this happened on occasions points to the fact that on occasions prisoners did face a situation in which they felt compelled to exclude material from the cell and that the unlock system was not working effectively enough to allow them to promptly

remove offending material from the cell to the sluice area.

[15] It was the plaintiff's case that he was really only allowed out once a night and not after midnight. The records do show that on a couple of occasions he got out twice on one night but on all the other occasions recorded he was only allowed out one a night. Furthermore, the records do bear out the proposition that he did not leave the cell after midnight except on one occasion when he left very close to midnight. This may have been due to the fact that he did not need to excrete after midnight or that he was content to use the pot or that he did not need to defecate after midnight. It would seem likely that defecation for a prisoner after midnight would be a rare enough event. Some prisoners were doubtless happy enough to use a chamberpot in the cell to urinate at night. Such a practice was once very common a generation ago in private homes. On a balance of probabilities I think it likely that there was a practice among prison officers of refusing prisoners to go to the toilet after midnight during the period of the plaintiff's imprisonment at Magilligan.

[16] There was a small number of occasions when for mechanical reasons the unlock system did not function. In such an event a prisoner would be locked into his cell and in the event of a call of nature he would have to use the pot. If the period of lock-up was lengthy it would follow that before that period he could be in his cell with foul smelling matter. In such circumstances there would clearly be an increased temptation to dispose of the matter out the window.

[17] The plaintiff also complained that the sluice area was frequently crowded and congested and that this congestion increased the risk of spillages and splashing from the sluice. Governor Norman Woods who was residential governor at Magilligan during the period of the plaintiff's imprisonment in an affidavit sworn to December 2004 stated that he carried out observations in relation to H3 landings A and B between 8.00am and 9.00am on 24 November 2004 and on 29 November 2004. On 24 November he said he saw 13 prisoners slop out and 12 on 29 November. He said there was no congestion in the slop house or in the ablutions and said he had a clear view of the slop house and access to the ablutions area. He also said that on each occasion he checked the slop house and there was no stench. Governor Woods accepted that his affidavit was wrong to give the impression that he had been present at the slopping out. He was observing from a bank of cameras in the command room. He could not say if there were queues within the ablutions area. He did not record what he saw in any document. His presence in the command room should have been noted in the relevant records kept by the staff there but his presence was not noted. He accepted that this was bad record keeping. Prisoner Officer Haughtier gave evidence confirming Governor Wood's presence on 29 November to observe the slopping out. I am satisfied that Governor Wood's did carry out observations

and that he did not observe congestion. He could not comment on what was going on within the ablutions area since he could not see that area. Prisoner Officer McVeigh, whom I found to be a generally reliable and fair witness, gave evidence that he did not experience congestion in the sluice area. I do accept that there will have been occasions when there would have been a number of people with pots to empty in and around the sluice area. It is likely, however, that WC's were very regularly used to dispose of the material and Prison Officer McVeigh's experience clearly showed that that was happening. This may explain why he did not see a congestion in the area of the sluice. It is likely that different practices occurred on different landings in relation to where matter was disposed off. If everyone was using the sluice then there was likely to have been occasions when there could have been a number of people in close proximity around the sluice area. It is a question of fact and the degree and of impression whether that constituted congestion. The presence of a number of people in the facility some of them possibly jostling would, as I have indicated, increase the risk of spillage accidents.

[18] In the course of the evidence reference was made to a Parliamentary answer given by Mr Pearson the relevant minister in the House of Commons on 4 November 2004. Asked by Mr Liddington whether slopping out was still required in any prisons in Northern Ireland Mr Pearson's answer was:

> "Generally daily slopping out of cells is no longer required in any prisons in Northern Ireland. Maghaberry has in-cell sanitation and both Hydebank and Magilligan operate an electronic unlock to facilitate access to toilets. Both of the latter establishments do provide plastic chamberpots if requested but these are for emergencies only and are seldom asked for or used."

[19] The answer given by the Minister was given on advice supplied to him by the Prison Service. The answer was positively misleading and wrong. Firstly, at Magilligan plastic chamberpots were always and routinely supplied to all prisoners. It was not a case of a prisoner requesting a post. Secondly, it was quite wrong to state that the pots were seldom used. The evidence of prison officers clearly showed that they were frequently in use and indeed routinely used. Thirdly, on a daily basis slopping out at Magilligan was carried out by a significant number of prisoners either because they had to use pots because they could not get out of the cell in time or because they elected to do so.

[20] None of the prison officers or governors who gave evidence in the matter would accept responsibility for the provision of false and misleading information to the Minister. A e-mail from David Wilson in Establishment Section to Anne Clarke with a copy inter alia to Mr Thomas Woods attached a

document containing the information that the Minister received. The e-mail stated that Thomas Woods had "cleared the responses". It would appear that the response was prepared by Mr Gary Alcock who did not give evidence. Thomas Woods is Deputy Director of Operations. He accepted that he would be concerned that Parliament was given incorrect information. He disclaimed responsibility for the misleading information since the document merely "crossed his desk". Mr Maxwell Murray, Director of Prison Operations, in his evidence accepted that the Parliamentary answer was entirely incorrect. He said the error only came to his attention during the course of the trial. He accepted that the information needed to be corrected and that the current Minister was being informed of the error.

[21] It is clear that Parliament was misled and it is equally clear that this should not have happened. It is entirely regrettable that no senior officer within the Prison Service is prepared to take responsibility for this erroneous information. Mr Alcock in his written note formulated an answer for the Minister, he must have received the information which was misleading from Magilligan itself. Incorrect information was either deliberately provided or the supplier or suppliers of the information did not know what was going on within the prison. Whatever the true position, it reflects ill on management at higher levels within Magilligan.

[22] Another issue of relevance which arose in the evidence and which was pursued at some length by Mr Larkin on behalf of the plaintiff was the level of the prison staff's awareness of the human rights obligations imposed on the Prison Service and on prison officers under section 6 of the Human Rights Act 1998. As a public authority the Prison Service has a duty to ensure that it acts in a way which is compatible with the Convention rights. Prison officers, exercising their duties, have the same obligations. Records show that Governor Woods attended human rights training in September 2000 and Prison Officer McVeigh in December 2000. The powerpoint documentation used at the training showed a general education on the implications of the 1998 Act and the Convention. The Prison Service witnesses, however, revealed a somewhat cursory and unparticularised knowledge of the Convention. They all accepted the need to uphold the dignity of prisoners. It is not at all apparent that those carrying out functions, in particular, in formulating policy and devising administrative procedures at Magilligan in the context of sanitation were sufficiently trained in relation to human rights obligations.

[23] Mr Larkin on behalf of the applicant contended that the sanitation regime at Magilligan was an unjustified and disproportionate interference with the applicant's private life for the purposes of article 8. He relied on the Scottish decision of Lord Bonomy in Napier, Petition for Judicial Review [2004] Scot.CS. That decision found the conditions at Barlinnie Prison infringed the prisoners article 8 rights. Counsel also relied on article 3 and

contended that the slopping out arrangements amounted to sufficiently serious ill treatment to be a breach of article 3. The operation of the sanitation regime was also, it was argued, a breach of paragraph 2(b) (c) and (j) of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 and were contrary to Rule 64 and 65 of the European Prison Rules (1987) recommendations no. R(87) (3) ("the EPR"). The 1995 Rules provide:

> "2(1) These rules are made with regard to the following general principles -
>
> (b) the treatment of prisoners shall be such as to sustain their self respect and health and to encourage them to develop a self of personal responsibility;
>
> (c) prisoners' living conditions shall be compatible with human dignity and acceptable standards in the community;
>
> (j) prisoners should retain all rights and privileges except those removed as a necessary consequence of their imprisonment."

Rules 64 and 65 of the EPR provide:

> "Treatment Objectives and Regimes
>
> 64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regime shall not therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.
>
> 65. Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as -
>
> (a) to ensure that the conditions of life are compatible with human dignity and acceptable standards in the community;
>
> (b) to minimise the detrimental effects of imprisonment and the differences between prison life and life at liberty which tend to diminish the self respect or sense of personal responsibility of prisoners."

Mr Larkin contended that article 14 was also breached. He argued that the facts fell within the ambit of articles 8 and 3. There was differential treatment between that accorded to the applicant and prisoners housed elsewhere in the jurisdiction and those other prisoners were in a analogous situation to the appellant. There had been no coherent formulation of policy. Even if there had been it could not be seriously suggested that the policy at issue had a legitimate aim and was proportionate to any aim sought to be achieved. The policy at Magilligan had not been formulated with any acknowledgment of the Convention rights at issue or with a view to securing the least intrusive means of reconciling policy with Convention rights of the applicant and his fellow inmates.

[24] Mr Larkin relied on the approach adopted by the Court of Appeal in AR v Homefirst Community Trust [2005] NICA 8, Re Jennifer Connor Application [2004] NICA and Re Misbehavin' Limited [2005] NICA 35. In Re Jennifer Connor the relevant decision related to whether the applicant as a person suffering from intellectual impairment as a result of long term alcohol abuse should be permitted to live on a full term basis with her husband. The relevant Trust decided that the wife should live at Chisholm House as a detained person. The trial judge concluded that the Trust had failed to analyse the applicant's situation through the prism of the European Convention and that there was no analysis of the alternatives that might be open to the Trust. He concluded that nevertheless the requirement that Mrs Connor should reside at Chisholm was necessary and justified and proportionate to her needs and circumstances. The Court of Appeal however held that the public authority must recognise that there is an interference with the applicant's article 8 rights and satisfy itself that interference was essential in order to fulfil the objective that had prompted it. The consideration of whether interference with the Convention right can be justified involves a different approach from an assessment at large of what is best for the person affected. In that case it was impossible to say that if the Trust had recognised its obligations not to interfere more than was necessary with Mrs Connor's rights it would have been bound to have come to the conclusion which it reached. The evaluation of what lay in the interests protected was primarily one for the public authority subject to the superintendents were a challenge to its assessment of those interests had been made. When an appraisal of the interest had been made by the public authority the court could only conclude that the interference was justified if on analysis it determined that it was inevitable that the decision maker would have decided that the article 8 rights of the individual would have to yield to protect the wider interests outlined in article 8.2 (per Kerr LCJ in Re Misbehavin' Limited [2005] NICA 35). Mr Larkin argued that the Prison Service having failed to recognise the engagement of article 8 in relation to the sanitation arrangements of prisoners at Magilligan failed to view those arrangements through the prism of the Convention and in the result it was

operating a sanitation system that failed to have due and proper regard to the article 8 rights of the plaintiff.

[25] As I pointed out in paragraph 13 of Re Karen Carson in considering whether a person had been subjected to inhuman or degrading treatment one must consider the totality of the circumstances. A particular act on its own may constitute treatment but the concept of treatment generally points to a course of conduct. In considering whether the sanitary arrangements had given rise to degrading treatment the arrangements must be looked at in the overall context of the surrounding prison arrangements. In Re Napier the combination of various factors (overcrowding, bad lighting, poor ventilation, lack of privacy during excretion flowing from the fact that cells were occupied by two prisoners) created circumstances giving rise in total to a breach of article 3. However, the sanitation arrangements set in the overall context of the plaintiff's prison conditions in the present instance were not comparable:

(a) the plaintiff occupied his cell on his own and if he had to use a pot he would have been doing so in privacy;

(b) for a significant part of the day he was allowed out of his cell and had access to ordinary toileting and handwashing facilities;

(c) there was an overnight unlock system which while imperfectly administered on some occasions in the main enabled most prisoners most of the time to have access to toilets overnight. The number of occasions when a prisoner would have to defecate in the cell would be limited.

The overall conditions in Magilligan differed from the prison conditions giving rise to findings of degrading treatment in Napier [2001] 35 EHRR 57 Kalashnikov v Russia [2003] EHRR 587 and Krusnetsoff v Ukraine (Application No. 39042-97). Ill treatment must attain a minimum level of severity if it is to fall within article 3. Although proof of intent is not essential, the court must have regard to whether the object was to humiliate and debase the person concerned and whether as far as the consequences were concerned it adversely affected his personality in a manner incompatible with the Convention. The sanitation arrangements at Magilligan were not ideal and open to criticism and having regarding to article 8, fall short of being degrading in the sense that that term is used in article 3.

Conclusions in relation to article 8

[26] Article 8 provides under the heading "Right to respect for private and family life":

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of his right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others.

[27] Mr Maguire on behalf of the respondent in his closing submission stated that there had not apparently been an analysis of the sanitation arrangements in recent times and the issues did not appear to have been considered in the context of the requirements of the Human Rights Act 1998. He accepted that there should be provided as standard in the cell a basin for washing hands, a supply of water, soap and some form of air freshener. It is clear that the provision of basins was not standard. The provision of soap and water was patchy and there was no supply of air fresheners. Slopping out should only take place in the sluice and not in the WC or the Belfast sink and pots should be cleaned only in the sluice. The Prison Service have not applied that policy properly. Disinfectant should always be supplied at the sluice area together with toilet brushes. The Prison Service have not consistently followed that policy. Apart from those shortcomings Mr Maguire contended that operation of the system overall was acceptable and duly recognised the article 8 rights of prisoners.

[28] Mr Murray, Director of Prison Operations at Headquarters, in his evidence accepted that there could be variations in staff attitudes to request to go to the toilet during lock-up. He accepted that clear unambiguous instructions would be helpful. He accepted as abhorrent the adjudication governor's suggestion that the plaintiff could have rinsed his hands under the sluice faucet on the day of the events giving rise to the adjudication. He accepted that it was abhorrent not to have washing facilities after defecation in the cells. He saw that it was important to issue informative statements to prisoners that they have an entitlement to use the toilet. He accepted that no assessment had been carried out on the suitability of the design and nature of the chamberpot. It was not viewed as wrong by the staff to allow excrement and urine to be put down the WC and that practice was unacceptable. It was totally wrong to use the Belfast sink to wash the pots in. The use of black bags to defecate in was absolutely disgusting in his view. He accepted that no Convention analysis had been carried out. Governor Lambert in his evidence indicated that he had now directed the issue of basins as standard equipment in cells with a water supply. Prisoners and staff would be instructed not to allow slopping out in the ablutions area. He now plans to undertake reviews and assessments and review the adequacy of the sluicing

arrangements. He is going to analyse the supply of cleaning materials. He accepted no risk assessment had been carried out on the use of pots in cells. A study of the adequacy of ventilation in cells had not been carried out. He accepted no analysis had been carried out through the prism of the Convention. He had never considered the question of issuing instructions in relation to slopping out procedures. Prison Officer McVeigh accepted that it would be sensible to have a basin to wash hands in the cell but staff had not thought of that previously. He agreed that the prisoners' use of hand wipes might be helpful. He never received or saw any instructions or directions on toileting arrangements. He had read policy statements on the use of mops and cleaning materials (although it did emerge in later evidence that surprising the mops available in the sluice area were mops that were available for general use in the general landing). He never saw anything about the health and safety aspects of the slopping out system.

[29] As Lord Bonomy pointed out in Napier where a public authority has care and control of persons' "private life" under article 8 includes the conditions in which the prisoner is held and the circumstances in which he has to undertake personal regular activities in daily life such as discharging bodily waste and maintaining standards of hygiene. He approached the question of the circumstances of his detention in two stages. Firstly, he posed the question whether the circumstances amounted to a breach of article 8. On the face of it he concluded that they did in that case. Secondly, he posed the question whether the prison was held there in accordance with law (which he was) and whether confining him in such circumstances was a proportionate response to the problem of detaining him. He concluded that he was undeniably held in accordance with the law, his confinement in those particular circumstances could not be considered to be proportionate.

[30] In Re Karen Carson where the female applicant was challenging toileting arrangements at Hydebank I stated at para. 18:

> "For the applicant to succeed in establishing that the Prison Service has breached her article 8 rights it would have to be demonstrated that the overall system in respect of the imprisonment was such that it could be said that the state had in fact in all the circumstances failed to have respect for her private and family life bearing in mind that she was a prisoner lawfully deprived of her liberty. Looking at the circumstances objectively I cannot conclude that overall the circumstances of her imprisonment, including the lack of in-cell sanitation, bearing in mind the toileting and hygiene arrangements which were available to the prisoner pointed, in fact, on the face of it to a lack of respect for her private and family

> life. The prisoner is entitled to expect that there will be in place sufficient and adequate toileting and hygiene facilities to cope with her requirements and if those facilities are not adequate then her private life rights may well have been infringed. I conclude on the totality of the evidence that the facilities were adequate and took account of her article 8 rights."

In relation to the argument that the Prison Service had failed to have explicit regard to article 8 I stated at para. 20:

> "Where objectively the arrangements do not in fact lead to any inference of lack of respect for the applicant's private life the question of the need to justify the arrangements under article 8.2 does not arise. If however I am wrong in that and the decision makers must justify the arrangements as being article 8 compliant I am satisfied the respondent has justified them. Mr Davis, the Governor of Hydebank in his affidavit stated that the Prison Service was acutely aware of the human rights of prisoners in the context of the primary loss of liberty arising from the sentence of the court. Although specific reference was not made to article 8, reading the respondent's evidence as a whole I am satisfied the decision makers' clearly did have in mind the prisoner's right to respect for the privacy and dignity in respect of their toileting arrangements. The arrangements in relation to toileting point clearly to an awareness on the part of the prison authorities at Hydebank of the need to ensure -
>
> (i) adequate numbers of toilets;
>
> (ii) easy access there to during periods when the cells were on lock;
>
> (iii) adequate arrangements to enable prisoners to use the toilets when cells were locked;
>
> (iv) a reduction to the minimum of the need to use a potty and to slop out its contents.
>
> The arrangements of the decision makers relating thereto where thus clearly motivated by an awareness of the need to protect the prisoners' privacy rights.

> While a court could contemplate other or additional arrangements that could be put in place to further improve the situation .. it cannot be said that the arrangements presently in place fall below an acceptable level and represent a disproportionate outcome."

[31] The factual and evidential position in Re Karen Carson (which was a judicial review application without oral evidence) was different from the position in the present case where the court heard much oral evidence and the evidence of prison officers and governors was open to cross-examination and close analysis. In the Re Karen Carson case the conclusion reached by the court was that the Prison Service had taken account of the human rights obligations of the applicant and was acutely aware of the human rights of prisoners. In that case I concluded that the overall system did not disregard her article 8.1 rights.

[32] In approaching its role as the Prison Authority responsible for the proper running of prisons the Prison Service's obligations under article 8 are to recognise and give effect to the prisoners' respect for his private life. This duty arises by virtue of section 6 of the Human Rights Act 1998 which renders it unlawful for the prison authority to act in a way which is incompatible with a Convention right. In Bernard v United Kingdom [2001] 11 BHRC 297 the European Court of Human Rights expressed itself thus:

> "Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect for private life guaranteed by article 8. However the courts' case law does not exclude that treatment which does not reach the severity of article 3 treatment may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effect on physical and moral integrity."

In Abdulaziz v United Kingdom [1985] 7 EHRR 471 the European Court observed:

> "The court recalls that, although the essential object, of article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent here and effective respect for family life. However, especially as far as those positive obligations are concerned the notion of respect is not clear cut: having regard to the diversity of the practice is followed and the situation's obtaining in the

> contracting states, the notion requirements will vary considerably from case to case. Accordingly, this is an area in which the contracting parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."

[33] In approaching the fulfilment of its obligations the Prison Service approach should be informed by the spirit and intent of the Prisons and Young Offender Centre Rules (Northern Ireland) 1995 which in Rule 2 spells out the general principle of the Rules which includes the principle that the treatment of prisoners should be such as to sustain their self respect and health and to encourage them to develop a sense of personal responsibility and the principle that prisoners' living conditions should be compatible with human dignity and acceptable standards in the community. Furthermore, the article 8 duty will also be informed by the spirit and intent of the EPR which clearly appear to have influenced formulation of the 1995 Rules. The EPR require that every effort should be made to ensure that the regimes of the institutions are design managed so as to ensure that the conditions of life of prisoners are compatible with human dignity and acceptable standards in the community and to minimise the detrimental effects of imprisonment and the differences between prison life and life at liberty which tend to diminish the self respect or sense of personal responsibility of prisoners.

[34] After the 1998 Act took effect, in approaching its task in relation to the sanitation systems in prisons which inevitably engaged article 8 the Prison Service is bound to arrive at a decision in relation as to how the system should operate by focusing its mind on its duty under article 8 and section 6 of the Human Rights Act and viewing the matters through the prism of article 8. This necessarily involved considering how the system should operate so as to ensure, as far as possible, that dignity of prisoners, the maintenance of self respect and proper hygiene practices. Due regard must be had to the needs and resources of the prisoners and of the wider community.

[35] The lack of in-cell sanitation does not of itself establish a lack of respect for the prisoners' privacy rights under article 8 as I sought to establish in Re Karen Carson. However the absence of such a facility means that prisoners may have to excrete in circumstances which are in modern conditions somewhat humiliating and distasteful. If not properly managed and handled with care the practice has the potential to be significantly demeaning to a prisoner in an intimate aspect of his private life. Having regard to the general principles emerging from the prison rules and the EPR the Prison Service is bound to put in place and operate a system that minimises so far as possible interference with the prisoner's rights to respect in relation to his private life affected by his bodily functions.

[36] The Prison Service on its own admissions failed to properly direct its mind to the article 8 requirements that came into play in relation to the sanitation system. Formulated against the background of in-cell sanitation such a focused enquiry will require the prison service to properly consider:

(a) how to keep to the minimum the occasions when excretion within the cells has to occur;

(b) how to make as inoffensive and as hygienic as possible the circumstances in which such excretion occurs;

(c) how the disposal of bodily waste material can be effected as discretely and hygienically as possible in a way that keeps to a minimum the indignity and humiliating nature inherent in any process of disposal;

(d) how to set in place mechanisms designed to ensure, so far as possible, the attainment of objectives (a), (b) and (c), such mechanisms to include:

(i) periodic reviews of the system and its operation and any manifest shortcoming in the system; and
(ii) the education of prisoners and the training of prison staff so as to ensure, so far as possible, that the system is operated so as to advance the attainment of objectives (a), (b) and (c).

[37] In the circumstances I am satisfied that on the totality of the evidence the plaintiff is entitled to a declaration that the Prison Service failed to adequately respect his right to respect for his private life in relation to the arrangements made and operated by the Prison Service at Magilligan in respect of toileting and washing facilities during the period of the plaintiff's imprisonment at Magilligan.

[38] The plaintiff in addition sought a declaration that the Prison Service was required to review the adequacy of the toilet and washing facilities for prisoners at that prison so as to ensure the least possible diminution of privacy, health, hygiene and human dignity. The plaintiff is not currently a prisoner at Magilligan and although he may in due course go to that prison in the course of his current sentence he is not currently a victim of any breach of his human rights at Magilligan. He is accordingly not entitled to such a declaration. The effect of the declaration which I have granted will inevitably be to require the Prison Service to carefully review all aspects of the current arrangements which have already been the subject of some modification. The Prison Service will in effect have to carry out a focused article 8 compliant review of the system and its operation.

[39] In relation to the article 14 argument made by the plaintiff for the same reasons which I set out in Re Karen Carson I reject the argument. The difference in treatment between the prisoners at Maghaberry and Magilligan flows from the different facilities historically available in the two different prison institutions. The difference in treatment is not based on any factor which breaches the Convention.

[40] The plaintiff has additionally sought damages for breach of his article 8 rights. The questions of whether damages are appropriate in a breach of article 8 rights and if so how they should be assessed were considered by the Court of Appeal in Anufrijeva v Southwark London BC [2004] 1 All ER 833. Lord Woolf at 853 paras. 55 and 56 set the position out thus:

> "The code (set out in section 6 to 8 of the 1998 Act) recognises the different role played by damages in human rights litigation and has significant features which distinguish it from the approach to the award of damages in a private law contract or tort action. The following points need to be noted:
>
> (a) The award of damages under the 1998 Act is confined to the class of unlawful act of the public authorities defined by section 6(1): see section 8(1) and (6).
>
> (b) The court has a discretion as to whether to make an award (it must be 'just and appropriate' to do so) by contrast to the position in relation to common law claims where there is a right to damages; see section 8(1).
>
> (c) The award must be necessary to achieve just satisfaction: language that is distinct from the approach to common law where a claimant is invariably entitled, so far as money can achieve this, to be restored to the position he would have been in if he had not suffered the injury of which the complaint is made. The concept of damages being 'necessary to afford just satisfaction' provided a link with the approach to compensation of the European Court of Human Rights under article 41.

(d) The court is required to take into account in determining whether damages are payable and the amount of damages payable to different principles applied by the European Court of Human Rights in awarding compensation.

(e) Exemplary damages are not awarded.

In considering whether to award compensation and if so how much there is a balance to be draw between the interests of the victim and those of the public as a whole. The requirement to adopt a balanced approach was recognised in the White Paper (*Rights Brought Home* 3782) (October 1997) where the following comments were made under the heading "Remedies for a Failure to Comply with the Convention".

2.6 A public authority which is found to have acted unlawfully by failing to comply with the Convention will not be exposed to criminal penalties. But the court will be able to grant the injured person any remedy which is within its normal powers to grant in which it considers appropriate and just in the circumstances. "*What remedies appropriate will of course depend both on the facts of the case and on a proper balance between the rights of the individual and the public interest. In some cases, the right course may be for the decision of the public authority in the particular instance to be quashed. In other cases, the only appropriate remedy may be an award of damages*." (My emphasis). "The court has a wide discretion in respect of the award of damages for breach of human rights" Scorey and Eicke in Human Rights Damages: Principles and Practice (2002) do not view this wide discretion as problematic. Instead they considered it derived from the nature of the new approach created by the 1998 Act (para. A4 - 035):

> 'Given that it is anticipated that the majority of cases in which civil claims will be brought under the 1998 Act will be by way of judicial review which has always been discretionary, it is appropriate that section 8(1) of the 1998 Act also has a broad

> discretionary nature… also the language of a just and appropriate remedy is not novel, neither to the United Kingdom nor to other human rights instruments.'
>
> In the analysis of the phrase "just and appropriate" Scorey and Eicke consider the case law in respect of similarly phrased statutes in Canada and South Africa and conclude that it would not be surprising if the English Courts took an approach similar to that of those jurisdictions. In essence this involves determining the appropriate remedy in the light of the particular circumstances of an individual victim whose rights have been violated, having regard to what would be just, not only for that individual victim, but also for the wider public who have an interest in the continued funding of a public service (para. A4 – 036). Damages are not an automatic entitlement but, as Scorey and Eicke also indicate (para. A4 – 040), "a remedy of last resort". As the Law Commission report on assessment of damages under the Human Rights Act stated there is a striking lack of principles as to when damages should be awarded and how they should be measured in the European jurisprudence".

[41] In determining whether damages should be awarded the critical message, according to Lord Woolf, is that the remedy has to be just and appropriate and necessary to afford just satisfaction. The approach is an equitable one. Where particularly grave violations have been found, "the European Court of Human Rights is much more willing to accept that the non-pecuniary damage sustained is also more severe and is also more amenable to accepting the claims for pecuniary loss." (See Scorey and Eicke, Human Rights Damages: Principles and Practice (2002) para. 2.041). The example cited is the case of Aksoy v Turkey [1996] 1 BHRC 625 where the applicant had been detained, tortured and finally released without charge and damages were awarded for pecuniary loss and for non-pecuniary loss (distressed father of the applicant who continued the case after his father died).

[42] Having seen and heard the applicant I am satisfied that while he found the toileting arrangements during the period of incarceration to be demeaning and disgusting, those arrangements did not cause him anxiety or psychiatric or psychological consequences. They caused him annoyance and a sense of frustration. There is no evidence that he suffered from any ill

health as a result of the lack of hygiene involved in the procedures adopted. By the period of his incarceration the toileting facilities had considerably improved because of the installation of the unlock system which had been constructed at considerable cost to the taxpayer. I am satisfied the Prison Service in its approach to the toileting arrangements did not set out to deliberately humiliate or demean prisoners. The failure of the system was a failure to understand and appreciate the obligation to carry out a focused enquiry explicit reference to article 8. Having regard to the wider public who have an interest in the continued funding of a public service one cannot lose sight of the financial consequences of even a modest award of plaintiff when seen in the light of the possible implications in relation to the large number of prisoners going through the prison system at Magilligan. The court must strike a balance between the rights of the individual and the public interest. In the circumstances of this case the granting of declaratory relief represents a just satisfaction and adequate remedy for the plaintiff.