Obstacles to Litigation for Prisoners
Case Study of IPRT, Lennon and Carroll v Governor Mountjoy Prison

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1. Introduction

The focus of my paper today will be the experience of IPRT in pursuing public interest litigation on behalf of mentally ill prisoners in the case of *Lennon, Carroll and Irish Penal Reform Trust (IPRT) v. Governor of Mountjoy Prison*. Over the past few years, there has been considerable interest in the case from a public interest law perspective; indeed former chairperson of IPRT Claire Hamilton presented a paper on this case to a FLAC seminar on public interest litigation as long ago as June 2006.

In fact, the first caveat I must introduce to my account of the case is that many of the events in this convoluted and wandering story took place before I began to work with IPRT in 2007. The second caveat is that I am not a practising lawyer and I have the very vaguest understanding of court procedure; so please ignore any mistreated legal terms in this paper. And a third caveat is that I am restricted in what I can say about the ultimate impact or significance of the case for the obvious reason that it is still before the courts. Therefore while the story I have to tell about the this case does not have a happy or even a clear ending, I hope it will shed some light on the broader themes of public interest litigation and the challenges facing any NGO in embarking on strategic litigation.

2. Background to Litigation – Why IPRT chose the Legal Route

IPRT was founded in 1994 by a group of concerned citizens alarmed by a number of dysfunctional features of the Irish prison system. These included clergy, academics, members of prison visiting committees and service providers working in the prisons. The Whitaker Report had provided a focus in identifying the chronic state of the prison system and the prison population was growing rapidly.

Finding that we were encountering political barriers on the key issues of prison conditions generally, in 1998 we sought a legal opinion from a barrister specialising in the area on the viability of bring a public interest case in this area. That opinion identified several promising areas of prison law and human rights on which to build a challenge to various elements of prison administration, and suggested that judicial review might be the promising avenue to pursue. However, that opinion also identified *locus standi* as the main obstacle to getting a case off the ground.

In 1999 IPRT consulted with sister organisations in the UK (including the Howard League and Greenpeace) about the value of litigation as part of a wider campaigning strategy. We also obtained an opinion from a leading UK based human rights academic and lawyer on the strategic value of bringing a case in this area. From the outset, we saw litigation as one part of a wider strategy and consulted with a PR company about mounting a parallel public relations campaign around any litigation.

In early 2001, IPRT made a request to a number of funders for finances specifically earmarked for a legal campaign. Our core funder at that time, Joseph Rowntree Charitable Trust, made a grant to cover costs of the proposed litigation *if they were not recovered from any other source*. As the case has not yet concluded, a small payment was made to our solicitors in 2002, but otherwise 90% of that grant has not been drawn down.

3. Particular issue of mental health in prison

The rate of mental illness in the Irish prison system and the treatment available to mentally ill prisoners was a priority concern for IPRT since our establishment in 1994. In fact, concern about the inadequate legal and administrative framework for dealing with mentally ill persons in the criminal justice system date back at least as far as the report of the Henchy Commission in 1978.

The Council of Europe Committee for the Prevention of Torture (CPT) made its first visit to Ireland in September 1993 (report not published until 1996), and included among its findings:

> *"The transfer of mentally ill prisoners to an appropriate psychiatric facility should be treated as a matter of the highest priority."*

The CPT found during its visit that detention in strip cells within prisons of mentally prisoners who had been deemed in need of hospitalisation at Dundrum was common place. This practice was necessitated by a shortage of bed spaces at Dundrum and would often involve periods of detention of 2-3 weeks. In 1999 the CPT again recommended that the provision of prison psychiatric services be reorganised as matter of urgency.

IPRT's report **Out of Sight, Out of Mind, April 2001** was based on visits to prisons in 2001 and an analysis of the prison records of the use of strip cells over the period 1999-2001. The main findings of the report were:

- The use of padded cells and the lack of appropriate mental health care exacerbate prisoners' underlying mental disorders, and increase the risk of suicide.
- The use of strip cells is deeply degrading and inexcusable. It is an absolute denial of human rights of the mentally ill. Their use must be abolished.

- A radical overall of the entire health system inside prison is essential and long overdue.
- 3 in-service psychiatric clinics should be opened, throughout the prison system, beds made available in the Hospital of the Criminally Insane, Dundrum, Dublin and a pre-release residential programme needs to be set up.
- Ireland is breaking its international obligations. CAT must be ratified.
- Changes limited to prison mental health programmes *only* will not result in major improvements. Therefore a major diversion programme, using mental health courts and an independent monitoring structure are necessary

4. Preparing the Case

Having decided in 1999 that, on balance, litigation was a speculative tactical approach to penal reform which was worth pursuing, and having identified mental health in prison as an appropriate issue for such litigation, we approached a number of leading international experts with a view to providing expert opinions to support such an action.

In February 2000, IPRT approached a number of mental health and prisoner rehabilitation services in Ireland and in the UK to identify and former Mountjoy prisoners who might be willing to add their names to our legal proceedings. I believe that the general view of IPRT at this time was that joining "real" plaintiffs to our case might strengthen the case and also might help us in overcoming anticipated difficulties on standing. Separately, a number of individuals approached IPRT with their own stories. Two individuals who had come to IPRT with serious grievances were identified (see below), who we met with in autumn 2000.

In June 2000 we notified the Department of Justice of our intention to bring an action and seeking access for our two experts to visit Mountjoy. These visits took place in November 2000 and two reports were prepared. Notice of intention to lodge proceedings was issued to the Minister for Justice in October 2001. Following a number of consultation meetings with counsel, a Statement of Claim was issued in April 2002 to the Governor of Mountjoy and the Minister for Justice, Equality and Law Reform.

5. The Plaintiffs' Stories

The second plaintiff was a retired engineering draughtsman. He had suffered from a history of depression. In 1996 his wife obtained a barring order against him and he was subsequently arrested and charged for breach of that order. He was remanded to Mountjoy and placed naked in a strip cell for his own protection. The cell was unfurnished with a fireproof mattress on the floor. No chamber pot was provided. He protested vigorously by constantly banging the door with his hands and fists. He smeared faeces on the walls of the cell. He was not allowed any outside activities. He remained in the cell for three days and

two nights until admitted to the CMH. He was later deemed unfit to attend court due to his condition and later the charges against him were struck out.

The third plaintiff had a history of opiate use from his teenage years and an associated involvement in serious crime. He had attempted suicide in 1997 and he had been in contact with community mental health services in the UK. He came to the attention of UK police when he was behaving bizarrely and while in detention they received information from the Irish about outstanding charges here in respect of which he had jumped bail. After being initially detained in Garda custody, he was remanded to Mountjoy to await trial. On his committal to Mountjoy, he was on a Valium prescription, but although his family informed the prison about his psychiatric history and he clearly unwell at that time, he received no treatment during the first weeks of his detention. When his conditions deteriorated, he was seen by psychiatrist, who determined that he had experienced a psychotic episode, most probably after ingesting amphetamines at Mountjoy. He was placed in a padded cell for a number of weeks a pot for sanitation, and the only clothing provided was a pair of underpants. He was eventually transferred to the CMH, where he spent some months. When he was returned to Mountjoy, he was placed in a hospital wing and was on several different types of medication. He saw a psychiatrist once or twice a week (instead of daily at the CMH). He was sentenced to 18 months (9 suspended) and his conditions deteriorated further at Mountjoy during his sentence.

6. The Statement of Claim

In our Statement of Claim, we made 17 claims for general declaratory relief relating to the treatment and facilities at Mountjoy, as well as specific claims that each of the plaintiffs had suffered violations of their constitutional rights. We also sought an injunction to remedy the declaratory matters.

The central claims were for a declaration:

(a) that the defendants' failure to provide adequate psychiatric treatment and/or facilities and/or services for the prisoners at Mountjoy Men's Prison and Mountjoy Women's Prison amounts to a breach of the constitutional rights of those prisoners; and

(b) that the defendants' failure to provide adequate psychiatric treatment and/or facilities and/or services for the prisoners at Mountjoy Men's Prison and Mountjoy Women's Prison amounts to a breach of the ECHR, the European Prison Rules and the UN Standard Minimum Rules for the Treatment of Prisoners;

We sought specific declarations about many aspects of the prison psychiatric services, including:

- The need for updated Prison Rules regarding the treatment of mentally ill prisoners
- The inadequate level of medical and pharmacist staff employed at Mountjoy
- The inappropriate use of padded or strip cells
- The practice of detaining in prisons for extended periods, prisoners deemed to need hospitalisation

7. The Defence

After bring a motion for judgment, we eventually received a detailed defence from the Chief State Solicitor in December 2002. Some the main points were:

(a) IPRT does not have legal capacity or *locus standi* to bring proceedings.
(b) The other two plaintiffs can only bring claims with regard to their on treatment
(c) International human rights law is not part of the law of the State
(d) Parts of the claim which are areas of policy are not justiciable before the Courts
(e) No constitutional duty to provide adequate psychiatric treatment
(f) No constitutional right to receive adequate healthcare
(g) In fact psychiatric care in prison is better than in the community
(h) They denied the treatment was unconstitutional
(i) They rejected the allegations of how the two defendants were treated, including that they were detained naked

8. High Court Decision on *Locus Standi*

Discovery was sought in June 2003, and when it came before the Master's Court in October 2003, the State also sought discovery and indicated that they intended to bring a motion challenging our standing, based on their claim that IPRT does not have legal capacity to bring the proceedings (at all), and that the other plaintiffs are confined to bringing claims with regard to their own particular treatment. They brought a motion to that effect to have our claim dismissed in December 2003.

That motion was heard in June 2005 and on 2nd September 2005, Gilligan J gave judgment.

IPRT's Submission

- IPRT was concerned with system deficiencies in prison psychiatric care and believes these to be matters of public concern
- IPRT used litigation as a last resort and does not stand to gain from the proceedings
- Inmates with mental illness face great difficulty in the prison system
- These prisoners are not in a position to assert their constitutional rights

State's Submission

- That the rights argued are personal constitutional rights and therefore IPRT cannot challenge the alleged unconstitutional nature of the action cited.
- To allow IPRT to act in this way would create a whole new class of constitutional actions, ultimately requiring the court to determine constitutional action sin the absence of factual circumstance.

Decision of Gilligan J

The Court relied on the description of the general rules of *locus standi* set out by Henchy J in *Cahill v Sutton*, where the rules of standing are described as being "subject to expansion, exception or qualification when the justice of the case so requires."

Quoting from the judgment

> "that there will be cases where the want of the normal *locus standi* on the part of the person questioning the constitutionality of the statute may be overlooked if in the circumstances of the case there is a transcendent need to assert against the statute the constitutional provision that has been invoked."

In his analysis of the position of the two other plaintiffs, he relied *inter alia* on *Mulcreevy v. Min. for the Environment* [2004] 1 IR 72 to find that the two litigants could not be denied standing on the basis that to do so would mean that no person could challenge the alleged systemic deficiencies in medical care at Mountjoy.

While there was some discussion of the decision in *SPUC v Coogan* [1989] IR 734, which the defendants sought to have narrowly construed to the facts (that the affected persons in that case could not have brought a case in any circumstances). Gilligan J found that he did not need to rely on the *SPUC* line of authority to relax the rules of *locus standi* and instead found:

> **"*The simple fact is that Cahill v. Sutton allows, in plain terms, for the relaxation of the personal standing rules where those prejudiced may not be in a position to adequately assert their constitutional rights. It does not restrict this category of persons to the living, the dead or the unborn nor does it give any indication of what category of person may not be in a position to adequately assert their constitutional rights. If a person is incapable of adequately asserting his constitutional rights for whatever reason, I am of the view that Cahill v. Sutton would support a relaxation of the personal standing rules, provided the relevant person or body is genuine, acting in a bona fide manner, and has a defined interest in the matter in question.*"** (at p12 of judgment)

He further examined the particular position of prisoners with a mental illness:

> ***"It appears a reasonable proposition to this court, for the purpose of deciding this issue, that psychiatrically ill prisoners are persons who are disadvantaged and not in a position to assert adequately their constitutional rights especially as regards systematic deficiencies regarding the treatment of psychiatrically ill prisoners in Mountjoy Prison. I am of the view that while it is arguable that an adult prisoner is fully competent to assert his constitutional rights, this may be an over-simplistic analysis of the facts. It is almost indisputable that prisoners with psychiatric problems are amongst the most vulnerable and disadvantaged members of society. Indeed, many prisoners are ignorant of their rights and might fear retribution if they challenge the prison authorities. Furthermore, prisoners might not be aware of the fact that they have a constitutional right to receive a better standard of treatment. This puts this particular category of persons in an extremely disadvantaged position and their willingness and ability to adequately assert their constitutional rights may suffer as a result."***

And also addressed the particular strengths of IPRT and or capacity to bring such a case:

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

Finally, he distinguished cases where he held that relaxation of the ordinary rules of standing would not be merited citing the position of the Construction Industry Federation in the case of *Construction Industry Federation v Dublin City Council (Unreported Supreme Court, 18th March 2005),* and comparing the position of resourceful individual construction companies with individual prisoners or with individual affected by pollution in the *R v. Inspectorate of Pollution & Anor. Ex Parte Greenpeace (No. 2)* [1994] 4 AER 239.

Our initial reaction was that this was a decisive and comprehensive victory on standing and hopefully one of huge potential significance to NGOs more generally. The clarity of Gilligan's judgment on his interpretation of *Cahill v Sutton* is particularly striking**.** However, this is where the whole story begins to get much more complex and disjointed.

9. Appeal to Supreme Court and Beyond

The State appealed this decision to the Supreme Court and the appeal was heard on April 2nd 2008. The State's appeal was ultimately unsuccessful, but the Supreme Court ruled in September 2008 that the question of our standing to participate in the case will be heard in the substantive High Court hearing. There was no written judgment in the case and very little explanation of the reasoning of the Court. Costs were awarded in favour of IPRT, however. The lack of a written judgment was unsatisfactory in many respects; not least because the position of the Court as to whether standing should be considered as a preliminary or substantive matter remains unclear (particularly in light of the subsequent High Court decision in *Digital Rights).*

In April 2009, the State brought a motion again to

(a) Assign a judge to case manage the case
(b) To strike out again parts of the claim that were alleged to be non-justiciable
(c) To have the proceedings deemed moot given the passage of time (!) and the absence of a claim for damages

Ultimately IPRT consented to (a), and the State dropped (b) and (c).

As of today, no judge has been assigned to case-manage the case, despite a number of hearings for listing before the High Court in 2010 and 2011.

10. Where Stands the Substantive Issue?

There have been some important changes in prison mental health over the intervening decade, including the introduction of new Prison Rules in 200; the establishment of IPS; the construction of a Remand Prison for Dublin at Cloverhill; and significant innovations on the part of the CMH in the delivery of mental health services into prisons.

However, important criticisms of mental health services in prison continue to be raised by bodies such as the Council of Europe Committee for the Prevention of Torture (CPT) and by the Inspector of Prisons, including the continuing detention in prison of mentally ill prisoners who have been assessed as being in need of hospital treatment.

When the case comes before the courts for substantive hearing, it is likely that the earlier expert evidence would need to be fully revised. It is also possible that new issues may have emerged within the prison system that we may now wish to raise. The possibility of identifying new prisoners or former prisoners to be involved in the case may also arise. Of course, it is quite possible that any attempts to amend the original claim in anyway will be resisted by the State.

11. Where Stands IPRT's Role in the Litigation?

The IPRT Board has had to consider our ongoing involvement in the case on a regular basis over the past three years. I cannot provide a details account of those considerations, but I can identify the factors and issues which we have looked at

A. **Ongoing risk of costs being awarded against IPRT, in the context of planning IPRT budgets and the financial responsibilities of the IPRT Board**

B. **IPRT's Loyalty and Ethical Responsibility to Other Plaintiffs**

C. **What progress if any has been made in addressing our central claims**

D. **IPRT's capacity and workload in advancing the case**

E. **The importance of the High Court decision regarding the standing of any NGO engaged in public interest litigation**

12. IPRT and our work in Effecting Change through the Law

What I can say is that, partly as a result of our experience with this case and with regard to the general obstacles to public interest litigation identified by PILA and others, in our Strategic Plan 2011-2015 we have determined not to pursue any further strategic litigation directly. We have instead committed to further developing creative tactical means to advance penal reform and prisoner rights through the law, including:

- We have run a series of Prison Law Seminars with the Irish Criminal Bar Association (ICBA) and the Dublin Solicitors Bar Association (DSBA) over the past three years. This series is aimed at encouraging and supporting lawyers to take actions on behalf of prisoners.
- We will shortly be publishing, in conjunction with ICCL, a prisoners *Know Your Rights* booklet, which is aimed at empowering prisoners to vindicate their legal entitlements within the prison system.
- We have also begun circulating a Prison Law bulletin on a quarterly basis to our network of lawyers.
- In a number of cases, we have provided research support and assistance to legal teams representing prisoners
- We have referred cases to the Voluntary Assistance Scheme
- We work closely with PILA on legal research work and with a view to collaboration on litigation

- We continue to provide support and assistance to prisoners and their families on a wide range of issues, in some cases working directly with their legal representatives
- We have analysed the queries and concerns being raised with us and provided that analysis to the IHRC and the Inspector of Prisons
- We have considered the possibility of intervening in ECtHR cases
- We have provide expert witness reports in Irish and United Kingdom (extradition or European Arrest warrant cases) proceedings.

The area of potential *amicus curia* function for NGOs in Irish litigation is also of great interest to us.

IPRT is also currently working on a study of the obstacles to prisoner litigation with a view to bringing forward recommendations to Government. Some of the issues which we will be looking at are:

- Absence of complaints system within prisons
- Access to lawyers post-conviction
- Delay
- Settlements

We aim to consult with leading practitioners on the practical barriers to prison litigation which they are encountering and to bring recommendations to Government and other stakeholders in this area in the coming months.