

**THE HIGH COURT
JUDICIAL REVIEW**

Record No -----

Between:

Applicant

AND

THE DIRECTOR OF OBERSTOWN DETENTION CENTRE AND ANOTHER

Respondents

AND

IRISH HUMAN RIGHTS AND EQUALITY COMMISSION

Amicus Curiae

**LEGAL SUBMISSIONS ON BEHALF OF THE
IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

Introduction

1. This case and the related cases, --- (record no. -----), ---- (record no. -----) and -- (record no.-----) raise significant human rights issues with regard to the segregation of juvenile prisoners in circumstances where each applicant claims to have been confined to their cell, without respite for a period of weeks, in conditions they allege amount to solitary confinement. These legal submissions apply to all four cases. The Commission, which has been given liberty to appear as *amicus curiae* in all four cases, has undertaken not to entrench on factual matters but will seek to set out the general principles applicable to the practice of solitary confinement.

What is Solitary Confinement?

2. Solitary confinement is now an internationally recognised legal term that refers to extended confinement within four walls in circumstances where there is sensory deprivation and limited access to meaningful human contact. In recent years, with developments in human psychology, there is an increasing recognition that man, as a social animal, craves the company of other humans and is desperate for social interaction

and external stimulation and that a denial of such contact and stimulation is to attack the very fabric of the human personality.

3. In this regard, it appears that the parties are in agreement that the universal definition of solitary confinement is confinement to a cell for more than 22 hours a day, the definition that is set out in “*The Istanbul Statement on the Use and Effects of Solitary Confinement*,” adopted by an international group of experts on 9 December 2007 at the International Psychological Trauma Symposium, Istanbul (and annexed to the 2008 interim report of the United Nations Special Rapporteur on Torture to the General Assembly) (“the Istanbul Statement”). Indeed, it appears the Director of Oberstown has adopted the definition from the Istanbul Statement in Oberstown’s own separation policy (see p. 5 of the Oberstown Campus Policy on Separation adopted January 2016 (“the Policy on Separation”). This same definition has been adopted by Sharon Shalev in her Sourcebook on Solitary Confinement (also referred to in the Policy on Separation) and in the interim report of the Special Rapporteur of the UN Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment (‘the Special Rapporteur’), prepared for the United Nations General Assembly on 5 August 2011.
4. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) also state that solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact, and that prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days (Rule 44). These rules also prohibit the use of solitary confinement on children (Rule 45).
5. The definition makes it clear that it is irrelevant whether the confinement is called “segregation” or “separation” or “isolation”, the key issue is that solitary confinement embraces any *de facto* situation where a person is confined to their cell for more than 22 hours a day with limited social interaction, whether the reason for that confinement is punishment, is disciplinary or is a safety and security measure. Indeed, in its Policy on Separation (at p. 5), the Director of Oberstown has specifically accepted that the words can be used interchangeably. It is stated that “*Separation, therefore, has the potential to amount to solitary confinement. It is well recognised that young people are particularly vulnerable to the negative effects of solitary confinement.*”
6. In the Istanbul Statement the definition of solitary confinement is as follows:

“Solitary confinement is the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the

occasional social contacts are seldom freely chosen, are generally monotonous and are often not empathetic.”

Effects of Solitary Confinement

7. Even where there are occasional contacts with staff, it is emphasised that such contact does not ameliorate the situation unless the contact is meaningful social interaction and not merely routine contact, such as, for instance, where a meal is passed through the hatch of a cell. The Istanbul Statement sets out the negative effects of solitary confinement and covers much of the ground set out by Professor Ian O Donnell in his affidavit filed in the -- case. The Istanbul Statement asserts at p. 2:

“It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90 per cent of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis has been documented. Negative health effects can occur after only a few days in solitary confinement and the health risks rise with each additional day spent in such conditions.

Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being.”

8. These conclusions regarding the effects of solitary confinement are not radical or surprising. In fact, as is set out in submissions filed by the applicants in these cases, both Edwards J (in *Devoy v Governor of Portlaoise*) and Hogan J (in *Kinsella v Governor of Mountjoy Prison*) have remarked that one does not need psychological evidence to appreciate the harmful effects of extended periods of separation or segregation.
9. The Istanbul Statement recommends that the use of solitary confinement should be absolutely prohibited with respect to persons under the age of 18.
10. In his report focusing on children deprived of their liberty from the perspective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment of 5 March 2015, the Special Rapporteur states (at para. 44):

“In accordance with the views of the Committee against Torture, the Subcommittee on Prevention of Torture and the Committee on the Rights of the

Child, the Special Rapporteur is of the view that the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture.”

UN Special Rapporteur Report on Solitary Confinement

11. The growing international awareness of the harmful effects of solitary confinement led to the preparation of the interim report of the Special Rapporteur of the UN Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment of 5 August 2011. This report is worth reading in full for its clear exposition of how the practice of solitary confinement is implemented throughout the world and for the clear explanation as to why the Special Rapporteur (Juan Mendez) has expressed an abhorrence of the practice, and recommended that it should be banned, except in very exceptional circumstances.
12. In his report, the Special Rapporteur draws the attention of the General Assembly to his assessment that solitary confinement can amount to cruel, inhuman or degrading treatment or punishment or even torture.
13. The reports refers to the effects of social isolation on brain activity and human personality (at para. 55):

“Research shows that deprived of a sufficient level of social stimulation, individuals soon become incapable of maintaining an adequate state of alertness and attention to their environment. Indeed, even a few days of solitary confinement will shift an individual's brain activity towards an abnormal pattern characteristic of stupor and delirium..... The European Court of Human Rights has recognised that "complete sensory isolation, coupled with total social isolation, can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason.”

14. The report highlights a number of general principles to help guide States to minimise its use and in certain cases to abolish the practice of solitary confinement. The report states that *“the practice should be used only in very exceptional circumstances, as a last resort, for as short a time as possible”* (para. 89). It also emphasises *“the need for minimum procedural safeguards, internal and external, to ensure that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person.”*

15. At para. 93 the Special Rapporteur recommends as follows:

“All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person’s mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary confinement, and medical assessments of the detained person’s mental and physical health.”

16. The Special Rapporteur also recommends that the justification for, and the duration of, the confinement should be clearly communicated to the detainee together with an explanation of what must be done to be removed from such confinement (para. 94).
17. The Special Rapporteur is of the view that confinement beyond a period of 15 days in respect of adults constitutes torture or cruel and inhuman treatment and calls for an absolute international prohibition on solitary confinement for any period beyond 15 days (para 76).
18. With respect to children, the Special Rapporteur adopts the same view as that adopted in the Istanbul Statement. Given their specific vulnerabilities, his view is that any use of solitary confinement in respect of children constitutes cruel, inhuman and degrading treatment (para. 77):

“With respect to juveniles, the Declaration of the Rights of the Child and the Preamble of the Convention on the Rights of the Child states that, given their physical and mental immaturity, juveniles need special safeguards and care, including appropriate legal protection. Article 19 of the Convention on the Rights of the Child (General Assembly resolution 44/25) requires State Parties to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence...” In its General Comment no. 8, the Committee on the Rights of the Child indicated that “there is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalised violence against children.” Paragraph 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in resolution 45/113 of 14th of December 1990, states that “all disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including... solitary confinement or any other punishment that may compromise

the physical or mental health of the juvenile concerned.". Thus, the Special Rapporteur holds the view that the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture."

Specific Rights of Children

19. The findings of the Special Rapporteur chime with the provisions of Section 201 of the Children Act 2001, where there is a specific prohibition on disciplinary measures that could reasonably be expected to be detrimental to the physical, psychological or emotional well-being of the child. The conclusions also dovetail with Section 221 of the Children Act, 2001, which provides that the Minister may make regulations for the control and management of detention schools, and the maintenance of discipline and good order, *but such rules must not be inconsistent with any relevant international instruments* to which the State is a party, which would clearly include the UN Convention on the Rights of the Child ('the CRC'), the International Covenant on Civil and Political Rights and the Convention against Torture.
20. While it is accepted that the Minister has not made regulations for the control and management of detention schools, it would appear that the clear intent of Section 221 is that any control measures actually adopted must be consistent with international instruments such as the CRC.
21. For completeness, it should be stated that the CRC establishes that children should be afforded heightened measures of protection by the State, in particular when they come into conflict with the law. The Committee on the Rights of the Child, the body tasked with monitoring, enforcing and interpreting the CRC, has stated that the use of solitary confinement violates Article 37 of the CRC which provides that "*no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment*" and that "*every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.*" (see General Comment No. 10, Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007).
22. It is also noted that in its General Comment No.8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, the Committee on the Rights of the Child states that Article 37 of the CRC is complemented and extended by article 19 which requires States to "*take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence injury or abuse, neglect or negligent treatment...while in the care of parent(s), legal guardian(s) or any other person who has care of the child.*" It is noted that under Section 180(8) of the Children Act 2001, the

Director of Oberstown has control over the children at Oberstown as if he were their parent or guardian.

23. It is further submitted that the child's right to education, as provided for in Articles 28 and 29 of the CRC, is particularly relevant in circumstances where a child in a detention school is removed from education, which, under Section 158 of the Children's Act 2001, is stated to be the primary purpose of detention schools.
24. The CRC is also underpinned by four guiding principles that must be considered when assessing how to fully implement the provisions thereof. These guiding principles are: non-discrimination, the best interests of the child, ensuring the child's survival and development, and inclusion and participation of the child. It is submitted that in order to comply with the requirements of the CRC these principles must be addressed when any decision is made that affects children, including, for example, a decision to place a child in detention on a restricted regime.
25. The provisions of these international instruments and standards are relevant to the interpretation of a child's right to bodily integrity under the Constitution. There is a growing recognition in this jurisdiction that children have rights and require heightened measures of protection from the State and this recognition has been enshrined in the Children Act, 2001 and the 31st amendment to the Constitution inserting Article 42A which provides *inter alia* that "*the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*" It is further noteworthy that the European Court of Human Rights has consistently looked to the CRC to assist it in interpreting the rights of children under the European Convention on Human Rights (see *Salduz v Turkey* (Application No. 36391/02), *Tarakhel v Switzerland* (Application No. 29217/12), and *M and M v Croatia* (Application No. 10161/13)). Moreover, there have been a number of cases where the Irish Courts have referred to the CRC in their judgments (see, for example, *Nwole and others v The Minister for Justice, Equality and Law Reform and another* [2004] IEHC 433, and *Dongo v Refugee Applications Commissioner and another* [2004] IEHC 366).

The Relevance of International Instruments and Standards

26. It would appear that the Director of Oberstown has accepted (as set out in the Policy of Separation at page 6) the legitimacy and relevance of the Istanbul Statement, the 24th Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") and the 2008 Council of Europe Rules for Juvenile Offenders ("the 2008 Rules"). The Policy on Separation refers specifically to the 24th report of the CPT and acknowledges its statement that "*separation of juveniles should only be used as a last resort, acknowledging that isolation can compromise a*

young person's physical and/or mental well-being” (at para. 128 of the CPT report).

27. The Policy on Separation also refers to Rule 93 of the 2008 Rules, which states that if, in exceptional cases, a juvenile needs to be separated from others, for safety or security reasons, this shall be decided by a competent authority on the basis of fair procedures laid down in national law, specifying the nature of the separation, its maximum duration and the grounds on which it may be imposed. Rule 93 also provides that isolation, as a calming down mechanism, should only be used for a few hours and should not exceed 24 hours, while separation for disciplinary purposes shall only be imposed in exceptional cases where other sanctions would not be effective. The necessity for a robust review mechanism is highlighted also in the 24th Report of the CPT, echoing the findings of the Special Rapporteur on Torture in that regard. Another important safeguard referred to in the Policy on Separation is the requirement at Rule 91.4 of the 2008 Rules that “*every placement of a juvenile in a calming down room should be immediately brought to the attention of a doctor in order to allow him to look after the health care needs of the juvenile concerned.*”
28. As set out in written submissions furnished by the applicants in these cases, segregation measures taken in the context of a prison or detention centre must meet the test of proportionality as set out in *Heaney v Ireland* and *Holland v Governor of Portlaoise Prison*. In *Killeen and Dundon v Governor of Portlaoise Prison* [2014] IEHC 77, Hedigan J. examined the application of Rule 62 of the Prison Rules to certain prisoners who had been segregated because of the threat they posed to other members of the prison population. The learned Judge took the opportunity to review the domestic and international law in the area and he emphasised the requirement for a robust review process and the fulfilment of the proportionality test. He reviewed the domestic and international law and summarised it as follows:

“6.5 This segregation may be required in certain circumstances and it must be for the prison authorities to determine when. It is something that should only occur in exceptional situations (see Connolly v. Governor of Wheatfield Prison [2013] IEHC 334, Hogan J). When it does, such segregation should be kept under review. Rights are being curtailed and it is clear both from national and international jurisprudence that the principle of proportionality must be applied. See Holland v. Governor of Portlaoise Prison (cited above). See also Ramirez Sanchez v. France Application 59450/00, 4th July, 2006, Grand Chamber, para. 136 where the European Court of Human Rights dealt with the issue of the social isolation of the prisoner.

Thus national and international requirements are broadly the same:-

- (a) There must be good reasons – the segregation must be necessary – the onus is on the authority to justify.*

(b) It should be no more than is necessary to meet the requirements of the occasion i.e. safety and security.

(c) It should be proportionate to the objective sought.

(d) There should be ongoing review.

In the event of prolonged segregation there should be available judicial review of the necessity and proportionality of the measure.’’

General Principles to be Applied

29. The Commission is of the view that any separation policy that amounts to *de facto* solitary confinement should never be imposed on children. If such a policy is to be imposed, then, applying the relevant case law and human rights principles, it is submitted that such separation must, at a bare minimum, comply with the steps set out below. It is further submitted that the onus for justifying the separation of each child for the relevant period of such separation is on the detainer who should be in a position to demonstrate compliance with these rules:

- a. If any child is to be segregated, then the specific decision to separate should be taken at the appropriate level of seniority, and any separation lasting longer than 24 hours should be authorised by the manager of the institution.
- b. Such separation should be a measure of last resort and the detainer should be able to justify why no other measures were appropriate.
- c. The specific reason for that separation should be detailed and should be communicated to the child involved in a transparent and clear manner. Specifically, it should be explained to the child whether the separation involved is a disciplinary matter, or is for the safety and security of that child, or for the safety and security of other children detained at the school.
- d. The intended duration of the separation should be detailed to the child and it should be explained to the child what is required in order to end the period of separation.
- e. The onus is on the detainer to justify why the separation is necessary and that the measures taken are proportionate. The onus is particularly high in situations where a child is removed from education, which is stated to be the primary purpose of detention in a detention school (see Section 158 of the Children's Act 2001, which provides that the primary object of the detention schools is to provide appropriate education and training to promote the effective reintegration into society).
- f. Any child so separated should have immediate access to medical personnel who can assess the effect of such separation on the child.

- g. The child should be allowed continued access to family and to legal representatives and should have access to a complaints procedure. There should at all times be a procedure in place to allow the child to challenge the decision regarding separation.
 - h. A child should have access to reading materials and other appropriate materials to ensure the child has some stimulation during the period of separation.
 - i. A minimum of at least one hour of exercise out of the cell (outdoors if possible) should be afforded for each 24 hours when a child is subject to a separation policy.
 - j. If such separation is to continue for an extended period, then such extension should be justified by reference to the specific reason for such an extended separation.
 - k. If the child is not allowed to go to school, then appropriate educational facilities should be furnished to the child.
30. The Commission reserves the right to supplement these submissions during the course of the oral hearing, subject to the directions of the trial judge.

Eilis Brennan BL
13 January 2017

**Legal Submission on behalf of the
IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**