

## *Inhuman and degrading treatment and punishment of mentally ill prisoner*

Anne Stanesby\*

### **Keenan v The United Kingdom. TLR 3/4/01**

*European Court of Human Rights. Application no. 27229/95*

*(Judgement 3 April 2001).*

#### **The Facts**

The applicant, Susan Keenan, is the mother of Mark Keenan who, on 15 May 1993, at the age of 28, hung himself whilst serving a sentence of 4 months imprisonment at HM Prison Exeter.

From the age of 21, Mark Keenan had received intermittent treatment in the form of anti-psychotic medication. Diagnoses of borderline personality disorder and paranoid schizophrenia were made and it was noted in his medical records that he had a history of frequent episodes of deliberate self-harm. He was committed to prison on 1st April 1993, following a 4 month sentence for an offence of assault on his girlfriend, and he was placed in the health care centre of the prison. The senior prison medical officer, Dr. Keith, consulted a Dr. Roberts, the consultant who had been treating Mark Keenan prior to his admission, and the latter concurred with the medication which Dr. Keith had prescribed. Attempts to transfer Mark Keenan to the ordinary prison were unsuccessful due to a consequent deterioration in his condition and the exhibition of behaviour suggesting suicidal tendencies.

On 29 April Mark Keenan was assessed by the prison's visiting psychiatrist, a Dr. Rowe who had treated him previously. He prescribed a change in medication. On 30 April Mark Keenan's mental state deteriorated and a Dr Seale, who had no psychiatric training, prescribed a return to the previous medication. At 6 p.m. that day Mark Keenan assaulted two hospital officers, one seriously. He was then placed in an unfurnished cell within the health care centre and put on a 15 minute watch.

On 1 May a Dr Bickerton, who had six months training in psychiatry as a senior house officer, certified him fit for adjudication in respect of the assault and fit for placement in the segregation unit within the prison's punishment block. The same day the prison's deputy governor ordered Mark Keenan to be placed in segregation in the punishment block under Prison Rule 43. (This provides the power to segregate where it appears desirable for the maintenance of good order or discipline or in the prisoner's own interests ). Following a temporary return to the health care centre on a 15 minute watch, Mark Keenan was transferred back to the punishment block on 3 May . The last medical note before his suicide on 15 May was made on 4 May commenting only in respect of medication given. A Dr. Bradley who had no psychiatric training visited him over this time and later did not recall that there had been any cause for concern. However the occurrence

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book for the segregation unit did in fact indicate that some problems had occurred , the last entry being made on 10 May.

On 14 May Dr Bradley, (like Dr. Bickerton on 1 May), assessed Mark Keenan to be fit for adjudication in respect of the assault on the two prison officers on 30 April and for cellular confinement. On the same day Mark Keenan was found guilty of assault and sentenced by the deputy governor to 28 additional days in prison together with 7 days' loss of association and exclusion from work in segregation in the punishment block. At that point Mark Keenan had had only nine days left to serve before his expected release date. At 6.35p.m. on 15 May, Mark Keenan was found by two prison officers hanging from the bars of his cell and he was later pronounced dead.

On 25 August 1993 an Inquest jury recorded a verdict of death by misadventure (and found that the cause of the death was asphyxiation by hanging).

Mark Keenan's mother obtained limited legal aid on 17 November 1993 for a potential action against the Home Office in respect of the treatment of her son and the conditions of his detention. On 14 October 1994 counsel advised that an action in negligence under the Law Reform (Miscellaneous Provisions) Act 1934 would not succeed because as at the time of his death Mark Keenan could not have shown that his mental condition had worsened as a result of his confinement. The mother could not claim bereavement damages under the Fatal Accidents Act 1976 because Mark Keenan was over the age of 18 and he left no dependants who could make a claim under that Act. Legal aid was therefore withdrawn and the applicant could not proceed further in England.

## **Relevant Domestic Law and Practice**

### **A. Prison Regulations.**

The Prison Act 1952 and the Prison Rules 1964 provide for the appointment of prison medical officers and detail the latter's duties. Rule 18 provides inter alia that the medical officer shall inform the governor if he suspects any prisoner of having suicidal intentions, and the prisoner shall be placed under special observation. Pursuant to sections 47 and 48 of the Mental Health Act 1983, any prisoner suffering from a serious mental illness may be transferred to a hospital for detention and treatment.

Rule 43 under which Mark Keenan was segregated provides that the prisoner must be removed from segregation, if so advised, on medical grounds and Rule 53(2) provides that no punishment in cellular confinement is to be imposed unless a medical officer has certified that the prisoner was in a sufficiently fit state of health. Rule 17 provides that medical staff have a discretion to request a psychiatric opinion but there is no legal requirement for the prison to be staffed by a medical officer with psychiatric qualifications.

Remedies available to prisoners at that time consisted of a prison complaint (which would have taken an estimated 6 weeks), an application for Judicial Review (which would not have been available quickly enough to assist in this case) or an action for negligence, assault and misfeasance in public office for damages if the conditions of confinement had caused injury.

### **B. Inquest proceedings.**

Under the Coroners Act 1988 following the death of a prisoner an inquest must be held with a jury. However the primary function of the inquest is to ascertain who the deceased was, and where, when and how he came by his death, not to frame a verdict so as to appear to determine any question of the criminal or civil liability of a named person.

### **C. Proceedings for injury and death caused by negligence**

See above.

## **The Hearing Before the ECtHR**

### **Article 2 of the Convention.**

The applicant complained that the prison authorities through their treatment of her son prior to his suicide failed to protect his right to life contrary to Article 2. Article 2(1) states:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

The Court said in its judgement that the State should take

“appropriate steps to safeguard the lives of those within its jurisdiction...but the scope of this positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”

It was common ground that Mark Keenan was mentally ill. There was a dispute as to whether he was schizophrenic. If he was schizophrenic, the risk of him committing suicide was well known. The Court observed that there was no formal diagnosis of schizophrenia provided by a psychiatric doctor who treated Mark Keenan in the material before it. But the Court was satisfied that the prison authorities knew that Mark Keenan’s mental state was such that he posed a potential risk to his own life. The immediacy of the risk varied. Therefore it could not be concluded that he was at immediate risk throughout his period of detention. The variability of his condition, however, required that he be monitored carefully in case of sudden deterioration. The question arose - did the prison authorities do all that was reasonably expected of them?

The Court found that on the whole the authorities made a reasonable response to Mark Keenan’s conduct, placing him in hospital care and under watch when he evinced suicidal tendencies. He was subject to daily medical supervision by the prison doctors, who on two occasions had consulted external psychiatrists with knowledge of him. The prison doctors, who could have required his removal from segregation at any time, found him fit for segregation. There was no reason to alert the authorities on 15 May that he was in a disturbed state of mind rendering an attempt at suicide likely. In these circumstances it was not apparent that the authorities omitted any step which should have reasonably been taken, such as, for example a 15 minute watch. The Court concluded that there had been no violation of Article 2 of the Convention in this case.

### Article 3.

The applicant complained that her son was subjected to inhuman and/or degrading treatment by the prison authorities in May 1993, contrary to Article 3 of the Convention which provides as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Court said that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim.<sup>1</sup> In considering whether a punishment is “degrading” the Court will consider whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3.<sup>2</sup> This has also been described as involving treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance.<sup>3</sup> It was relevant in this case to recall that the authorities are under an obligation to protect the health of persons deprived of liberty.<sup>4</sup>

The lack of appropriate medical treatment may also amount to treatment contrary to Article 3.<sup>5</sup> The Court pointed out that:

“In particular, the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.”<sup>6</sup>

Although it was not possible to distinguish with any certainty to what extent Mark Keenan’s symptoms during this time, or indeed his death, resulted from the conditions of his detention imposed by the authorities, the Court considered this difficulty was not determinative of the issue as to whether Article 3 had been breached. The Court observed that:

“Treatment of a mentally ill person may be incompatible with the standards imposed by Article 3 in the protection of fundamental human dignity, even though that person may not be able, or capable of, pointing to any specific ill-effects.”

The Court was struck by the lack of medical notes (there being no entries from 5 May to 15 May). There was also no subsequent referral to a psychiatrist after the visit on 29th April by the visiting psychiatrist Dr. Rowe. When Mark Keenan’s condition deteriorated, a prison doctor, unqualified in psychiatry, reverted to previous medication without reference to the psychiatrist who had recommended the change and the assault on two prison officers followed. Though Mark Keenan asked the prison doctor to point out to the governor at the adjudication that the assault occurred

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1 See, for example, the *Tekin v. Turkey* judgment of 9 June 1998, Reports 1998-IV, 52.

2 See e.g. the *Ranine v. Finland* judgment of 16 December 1997, Reports 1997-V111, p. 2821-22, 55

3 *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 66, 167.

4 *Hurtado v. Switzerland*, Comm. Report 8 July 1993, Series A no. 280, p. 16 79.

5 See *Ilhan v. Turkey* (GC) no. 22277/93, ECHR 2000-V11 87

6 See e.g. the *Herczegfalvy v. Austria* judgment of 24 September 1992, Series A no. 244 82; the *Aerts v. Belgium* judgment of 30 July 1998, Reports 1998-V, p. 1966, 66

after a change in his medication, there was no reference to a psychiatrist for advice either as to his future treatment or his fitness for adjudication and punishment. Paragraph 115 of the judgement states:

“The lack of effective monitoring of Mark Keenan’s condition and the lack of informed psychiatric input into his assessment and treatment, disclose significant defects in the medical care provided to a mentally ill person known to be a suicide risk. The belated imposition on him in those circumstances of serious disciplinary punishment- seven days’ segregation in the punishment block and an additional 28 days to his sentence imposed two weeks after the event and only nine days before his expected date of release- which may well have threatened his physical and moral resistance, is not compatible with the standard of treatment required in respect of a mentally ill person. It must be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3 of the Convention.”

Accordingly the Court found a violation of Article 3.

### **Article 13.**

The applicant claimed that there had been no effective remedies in respect of her complaints, invoking Article 13 which reads:

“ Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. “

The Court said that the remedy must be “ effective” - in practice as well as in law. If it were the case, as had been suggested, that Mark Keenan was not in a fit mental state to make use of any available remedy, this would point, not to the absence of any need for recourse but, on the contrary, to the need for the automatic review of an adjudication such as the present one. Mark Keenan had been punished in circumstances disclosing a breach of Article 3, and he had the right under Article 13 to a remedy which would have quashed that punishment before it had either been executed or come to an end. There had therefore been a breach of Article 13 in this respect.

It was common ground that the inquest did not provide a remedy for determining the liability of the authorities for any alleged mistreatment or for providing compensation. The Court considered that, in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies. The Court concluded that the applicant should have been able to apply for compensation both for her non-pecuniary damage and for that suffered by her son before his death.

No effective remedy was available to the applicant in the circumstances of the present case which would have established where responsibility lay for the death of Mark Keenan. In the Court’s view this was an essential element of a remedy under Article 13 for a bereaved parent. Accordingly there had been a breach of Article 13 of the Convention.

**Article 41.**

Article 41 states as follows:

“ If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

The Court found that Mark Keenan must be regarded as having suffered significant stress, anxiety and feelings of insecurity resulting from the disciplinary punishment prior to his death. The applicant, his mother, must also be regarded as having suffered anguish and distress from the circumstances of his detention and her inability to pursue an effective avenue of redress. Making an assessment on an equitable basis and bearing in mind that this was a case of suicide and not deliberate torture, the Court awarded for non-pecuniary damages the sum of £7,000 in respect of Mark Keenan to be held by the applicant for his estate, and £3,000 to the applicant in her personal capacity. £ 21,000 was awarded for costs and expenses.

**Comment.****The Article 2 decision.**

The Court concluded that although the prison authorities did know that there was a risk of suicide, this risk did not exist at all times, that on the whole the Authorities made a reasonable response and that therefore Article 2 had not been violated.

However was the risk of suicide really as “ variable “ as the Court has found? There appears to have been some doubt as to whether Mark Keenan did or did not suffer from schizophrenia. But there are references in the judgment to clear diagnoses of schizophrenia being made on occasions prior to Mark Keenan’s admission to prison. Dr. Maden, a consultant psychiatrist instructed by the applicant, noted in his report of 17 August 1994, that Mark Keenan was also given a diagnosis of personality disorder and substance abuse at various times, however, “none of the psychiatrists who saw him appear to have doubted the additional diagnosis of schizophrenia and all continued his treatment with anti-psychotic medication”. He continued: “ Self harm, suicide and violence are recognised complications of schizophrenia”. He was of the opinion that Mark Keenan did indeed suffer from paranoid schizophrenia.

Dr. Reveley, a second consultant psychiatrist instructed by the applicant, supported this view and added: “ In my opinion he was recognisably in one of the very highest risk groups”.

It appears to the writer that in fact there was strong evidence that Mark Keenan did suffer from schizophrenia and that the risk of serious self-harm was surely constantly present, especially after the adjudication. That being so, surely his treatment or the lack of it must be held responsible for the eventual tragic outcome? Was the punishment block the right environment for someone in his condition? As Dr. Reveley pointed out: “An acceptable level of care in the management of Mark Keenan’s condition during this period would have included a close monitoring of the medication as regards dose and side effects; a close monitoring of his mental state as regards symptomatology, and as regards any increased risk of self-harm or suicide. There is no evidence that adequate monitoring of this type was performed during the last thirteen days of his life.”

Did the prison authorities do all that could have been reasonably expected of them to prevent the risk of a suicide occurring? Surely the answer to this question must be 'no', since they could have monitored Mark Keenan's condition more closely, they could have transferred him back to the hospital block and they could have considered a transfer to a hospital pursuant to the relevant provisions in the Mental Health Act 1983.

### **The Article 3 decision.**

This is most welcome and highlights a fact that has been known for some time, i.e. that the treatment of mentally ill prisoners in our country is seriously inadequate.<sup>7</sup> Surely there should be a legal requirement that someone on the prison medical staff should have a reasonable length of experience in psychiatry or, if this is not possible, then it should be mandatory that frequent referrals to outside experts should take place. The criticisms regarding poor record keeping and the question marks that must hang over the assessments that Mark Keenan was fit for adjudication and placement in the segregation unit, serve further to illustrate this point.

The imposition of additional punishment is also rightly criticised. Was it fair to punish someone who might only have struck out because his medication was wrong? Did anyone represent him at the adjudication hearing? There is no mention in the judgement to suggest that anyone did. Did anyone think about the issue of Mark Keenan's mental state and vulnerability and of his undoubted need for assistance by someone at the hearing? What about litigation friends or advocates for prisoners?

### **Articles 13 and 41**

The limitations in our inquest procedure are well known. A fundamental review into the inquest system is currently being conducted.<sup>8</sup> The writer hopes that the lessons of this case will not be lost on those conducting that review. In some cases it is now possible to obtain publicly funded representation at inquests more easily than it was,<sup>9</sup> and the rules regarding disclosure of documents have been improved to some extent.<sup>10</sup> However these reforms do not really go far enough and the basic problem with such hearings remains. The bereaved do need to know not just how a person died but if possible who, if anyone, can be held legally responsible for causing that death.

As well as it not being possible for an inquest to award compensation in our country, if a person over the age of 18 dies prematurely, even in clear circumstances indicating negligence, that person's parents have little redress under our current legislation, the Fatal Accidents Act 1976. In this case only funeral expenses could have been claimed by the applicant-mother, and as this

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7 See (1) *Care or Custody? Mentally Disordered Offenders in the Criminal Justice System*, Judith M. Laing, Oxford University Press 1999; (2) *Mentally Disordered Offenders*, edited by David Webb and Robert Harris, Routledge 1999; (3) HM Prison healthcare needs assessment, Harty et al, *Journal of Forensic Psychiatry*, Vol. 12, December 2001, pp 639-645.

8 See *Annual Report 2001 of the organisation Inquest, and details of the terms of reference reported in LAG Bulletin May 2001*, p 5.

9 See *Law Society Gazette 9th November 2001*, report on page 63.

10 See article by Danny Friedman "The Human Rights Act and the inquest process - Part 2". Page 16 *LAG Bulletin December 2001*

deceased left no dependants there was no one who could pursue a claim for loss of dependency. To dismiss the pain of a bereaved parent in such a way leaves our laws open to criticism. The award of damages to Mark Keenan's mother is to be welcomed as is the award made in respect of the mental suffering which Mark Keenan himself underwent.