Source:
http://blogs.ft.com/david-allen-green/2016/04/27/theresa-may-hillsborough-human-rights-law-and-the-politics-of-superficiality/

Theresa May, Hillsborough, human rights law and the politics of superficiality

David Allen Green | Apr 27 11:49 | Comments | Share

On Monday, Theresa May gave a speech where, contrary to the policy of the UK government, she called for the country to leave the European Convention on Human Rights.

It was a curious speech for the Home Secretary to make — indeed for any UK Home Secretary to make. This is for many reasons, not least that the Good Friday agreement explicitly requires that the ECHR have ongoing legal effect in Northern Ireland. For this requirement to change would require the UK to try to rewrite and renegotiate the peace settlement, and even then the amendment would have to be approved by referendums in both Northern Ireland and the Republic of Ireland. And, as the ECHR requirement was included so to give comfort to nationalists concerned about the Police Service of Northern Ireland, Ms May's demand would risk causing upset and alienation.

Perhaps the Home Secretary did not realise this; perhaps she did not care. It would seem that the political imperative was for her to send a signal to Conservative politicians and the media — she is opposed to Britain leaving the EU so no doubt wanted to placate her pro-Brexit supporters. Whatever the explanation, it showed a certain superficiality in her approach to human rights: the assertion of a populist view without regard to the relevant facts or to its practicality. And this is not the first time: in 2011 she told her party conference that an illegal immigrant could not be deported because they had a pet cat. "I am not making this up," she assured her audience.

She was, of course, making it up. The case in question was not dependent on a pet cat. But Theresa May did not care. She had a political point to make, and being accurate would not have been helpful.

This time round, the Home Secretary went too far for even her political colleagues. The next day, the Justice Secretary Michael Gove, whose department is responsible for human rights policy, firmly told the House of Commons that he believed the UK should remain within the ECHR. But Ms May's superficial approach to human rights law in general and the ECHR in particular also now has other problems. The beneficial results of the Human Rights Act, which took effect in 2000, are now becoming plain in the law generally. And on Tuesday there was a significant example of this.

The jury in the new Hillsborough inquest returned a verdict of "unlawful killing" in respect of the 96 people who died as result of the events on April 15 1989. The verdict was a triumph for the families of the dead who have campaigned for 27 years for justice. The scope of the new inquest, however, was only possible because of the Human Rights Act 1998, which gives the articles of the ECHR effect in domestic law.

Source:
http://blogs.ft.com/david-allen-green/2016/04/27/theresa-may-hillsborough-human-rights-law-and-the-politics-of-superficiality/

The first inquest had in 1991 returned a verdict of "accidental death". But this was on a markedly narrow investigation of what had happened. When that verdict was quashed in 2012 and a new inquest ordered, the High Court made it a condition that the new coroner would have to consider whether Article 2 of the ECHR applied and, if so, how. Article 2 provides the "right to life" and part of that right is a duty on the State to ensure suspicious deaths are properly investigated.

In 2004 the House of Lords, then the UK's highest court, held in the Middleton case, which involved a death in custody, that the effect of Article 2 being part of domestic law meant that it was no longer enough for an inquest just to decide the means by which a person died; an inquest now also had to determine "in what circumstances" the death occurred. This meant, at a stroke, coroner's inquests could become more wide-ranging, especially where those acting on behalf of the State, such as the police, were involved.

As Mark George QC, who acted for 22 of the families at the new inquest, explained to me:

"This inquest would not have been possible without the ECHR and the Human Rights Act. The right to life enshrined in Article 2 of the Convention was the basis on which a jury was able to decide this important case. This inquest prove how crucial such legislation is to righting wrongs and enforcing people's rights."

Put simply: without the Human Rights Act and ECHR there would not have been this new Hillsborough inquest. Examples like this of how the ECHR in practice is improving domestic law will make it more difficult over time for the Home Secretary and her allies to use human rights as a token in the game of politics. Even superficial politics can lose their shine.

David Allen Green, a lawyer and journalist, writes the Jack of Kent blog. David was recently shortlisted as digital journalist of the year at the London Press Awards.

Law and policy round-up: Theresa May’s call for the UK to leave the ECHR

26th April 2016

Human Rights and ECHR

Theresa May, the Home Secretary, gave a speech yesterday which included a call for the United Kingdom to leave the European Convention on Human Rights.

The speech is set out in full at ConservativeHome, and (as it appears to be a statement on behalf of her department) it is also now on the Home Office site.

The statement is, of course, more about the politics of Brexit and succession to the Tory leadership than anything serious about law and policy. It is a sort of counter-balance to her position on the UK remaining in the European Union.

For a number of reasons, not least that the Good Friday agreement requires the ECHR to have continual legal effect in Northern Ireland, this demand will go nowhere.

(I set out the seven hurdles for repeal of the Human Rights Act and for UK leaving the ECHR – including the problems presented by Northern Ireland and Scottish devolution – in a post here last May.)

Given the office Theresa May holds, it is worth taking a moment to look at the Northern Ireland point, for the UK to leave the ECHR would require the UK to reopen and renegotiate the Good Friday agreement.

> *This is the provision of the Good Friday agreement of which UK will be in breach if*

> *Theresa May got her way on ECHR. pic.twitter.com/1NnI3dM9sT*
>
> *— David Allen Green (@DavidAllenGreen) April 25, 2016*

Any change to the agreement would, in turn, require fresh referendums in Northern Ireland and the Republic of Ireland.

It would also risk alienating the nationalists who accepted the Police Service of Northern Ireland only as long as it was subject to the ECHR.

It is, in all, a remarkable demand for a serving Home Secretary to make, and it is also extraordinary for the Home Office to post the statement on their own site as if it is government policy – and here it should be noted that policy on the Human Rights Act is (supposedly) under the Ministry of Justice, and not the Home Office.

This does not seem thought through. One suspects the Home Secretary does not realise (or does not care) about the implications of the UK leaving the ECHR – perhaps her desire to send a political signal to Tory back-benchers and the popular media is too great.

26th April 2016 David Allen Green Brexit, British Bill of Rights, Bullshit, EU law and policy, Home Office, Human Rights and Civil Liberties, International, Law, Law and Policy Round-up, Media, Ministry of Justice, Policy, Politics, Theresa May Good Friday Agreement, Northern Ireland, Scotland

5 thoughts on "Law and policy round-up: Theresa May's call for the UK to leave the ECHR"

Patrick

26th April 2016 at 07:37

Hasn't Gove been sidelined where Europe is concerned? I seem to recall he was complaining he was being denied access to certain documents.

Is it possible perhaps that May is getting ideas above her station and thinking that she now speaks for the government on the matter of human rights as well as home affairs?

REPLY

Pingback: Theresa May sells Tory members an empty promise: are they as gullible as she thinks they are? | Coffee House

Andrew

27th April 2016 at 11:23

The "British Bill of Rights" malarkey is political dog-whistle poppycock of the worst kind, but is either the Good Friday Agreement, or the devolution settlement with Scotland (or Wales?), really an insurmountable

point?

At the risk of inserting the thin end of a wedge into a can of worms, surely there is a difference between "incorporation into Northern Ireland law" and "incorporation into UK law".

If the Northern Ireland Assembly can be prevailed upon to legislate the ECHR into domestic law there (and perhaps the legislatures in Scotland or Wales could do something similar), then presumably the way would be clear to repealing the Human Rights Act for the rest of the UK.

And yes, the Sewel convention, s.2 of the Scotland Act 2016, and s.57 and s.100 of the Scotland Act 1998, etc, but the "United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not … [but] would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature". *Normally*.

This is a very abnormal situation, and it would be messy. But is there anything to stop the devolved legislatures reincorporating the ECHR in their domains if they so wished (just leaving the poor English without the right to life, the right not to be tortured, the right to a fair trial, the right to privacy, freedom of conscience, expression, and association, etc.).

REPLY

Andrew

27th April 2016 at 14:35

Just returning to this, a larger issue, it seems to me, is that the European Convention is an essential part of the EU's acquis communautaire.

No doubt the UK Parliament could exercise its untrammelled sovereignty and repeal the Human Rights Act, and so return us to the rather unsatisfactory pre-2000 position of being a signatory to the Convention with no way to enforce it under domestic law. Even with the Human Rights Act still in place, Parliament remains sovereign: prisoners still do not have the vote, nor do they have any compensation for that denial of their human rights. Perhaps the Government thinks warm words – like Magna Carta – are better than enforceable rights?

But leaving the Convention entirely: is that even compatible with remaining a member of the EU?

REPLY

Pingback: Theresa May, please note: without the Human Rights Act and ECHR there would not have been this new Hillsborough inquest | Political Concern

Leave a Reply

Your email address will not be published. Required fields are marked *

COMMENT

NAME *

EMAIL *

WEBSITE

Post Comment

Notify me of follow-up comments by email.

Notify me of new posts by email.

PREVIOUS
Law and policy round-up: media law, Brevik and human rights, legal aid and access to justice

NEXT
FT post on Theresa May, Hillsborough, human rights law and the politics of superficiality

Published: April 25, 2016

97 comments

Theresa May’s speech on Brexit: full text

Thank you. Today I want to talk about the United Kingdom, our place in the world and our membership of the European Union.

But before I start, I want to make clear that – as you can see – this is not a rally. It will not be an attack or even a criticism of people who take a different view to me. It will simply be my analysis of the rights and wrongs, the opportunities and risks, of our membership of the EU.

Sovereignty and membership of multilateral institutions

In essence, the question the country has to answer on 23rd June – whether to Leave or Remain – is about how we maximise Britain’s security, prosperity and influence in the world, and how we maximise our sovereignty: that is, the control we have over our own affairs in future.

I use the word “maximise” advisedly, because no country or empire in world history has ever been totally sovereign, completely in control of its destiny. Even at the height of their power, the Roman Empire, Imperial China, the Ottomans, the British Empire, the Soviet Union, modern-day America, were never able to have everything their own way. At different points, military rivals, economic crises, diplomatic manoeuvring, competing philosophies and emerging technologies all played their part in inflicting defeats and hardships, and necessitated compromises even for states as powerful as these.

Today, those factors continue to have their effect on the sovereignty of nations large and small, rich and poor. But there is now an additional complication. International, multilateral institutions exist to try to systematise negotiations between nations, promote trade, ensure cooperation on matters like cross-border crime, and create rules and norms

Related Articles

Anna Firth: Five reasons why women should vote Leave

WATCH: Redwood on the IFS Brexit claims – “There is good news for Vote Leave in this report”

Who is to blame for tensions in the Party? Cameron? Boris? Both? Neither? Take our monthly survey

Christopher Howarth: Cameron’s Hollow Deal 3) The claim that immigration will fall is false – and the Prime Minister knows it

Peter Marshall: Uncertainty, inconsistency, irresponsibility. Why

that reduce the risk of conflict.

[the case for Brexit is fundamentally flawed]

These institutions invite nation states to make a trade-off: to pool and therefore cede some sovereignty in a controlled way, to prevent a greater loss of sovereignty in an uncontrolled way, through for example military conflict or economic decline.

Article 5 of NATO's Washington Treaty is a good example of how this principle works: NATO member countries, Britain included, have agreed to be bound by the principle of collective defence. An attack on any single member will, according to the Treaty, be interpreted as an attack on all members, and collective defence measures – including full military action – can be triggered. Britain could find itself bound to go to war because of a dispute involving a different country – a clear and dramatic loss of control of our foreign policy – but on the other hand, NATO membership means we are far more secure from attack by hostile states – which increases our control of our destiny. This is an institutionalised trade-off that the vast majority of the public – and most political leaders, apart from Jeremy Corbyn – think is worthwhile.

Looking back at history – and not very distant history at that – we know what a world without international, multilateral institutions looks like. Any student of the way in which Europe stumbled its way to war in 1914 knows that the confused lines of communications between states, the ambiguity of nations' commitments to one another, and the absence of any system to de-escalate tension and conflict were key factors in the origins of the First World War. The United Nations may be a flawed organisation that has failed to prevent conflict on many occasions, but nobody should want an end to a rules-based international system and – so long as they have the right remits – institutions that try to promote peace and trade.

How we reconcile these institutions and their rules with democratic government – and the need for politicians to be accountable to the public – remains one of the great challenges of this century. And the organisations of which the United Kingdom should become – and remain – a member will be a matter of constant judgement for our leaders and the public for many years to come.

Principles for Britain's membership of international institutions

We need, therefore, to establish clear principles for Britain's membership of these institutions. Does it make us more influential beyond our own shores? Does it make us more secure? Does it make us more prosperous? Can we control or influence the direction of the organisation in question? To what extent does membership bind the hands of Parliament?

If membership of an international institution can pass these tests, then I believe it will be in our national interest to join or remain a member of it. And on this basis, the case for Britain remaining a member of organisations such as NATO, the World Trade Organisation and the United Nations, for example, is clear.

But as I have said before, the case for remaining a signatory of the European Convention on Human Rights – which means Britain is subject to the jurisdiction of the European Court of Human Rights – is not clear. Because, despite what people sometimes think, it wasn't the European Union that delayed for years the extradition of Abu Hamza, almost stopped the deportation of Abu Qatada, and tried to tell Parliament that – however we voted – we could not deprive prisoners of the vote. It was the European Convention on Human Rights.

The ECHR can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights. So regardless of the EU referendum, my view is this. If we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its Court.

I can already hear certain people saying this means I'm against human rights. But human rights were not invented in 1950, when the Convention was drafted, or in 1998, when it was incorporated into our law through the Human Rights Act. This is Great Britain – the country of Magna Carta, Parliamentary democracy and the fairest courts in the world – and we can protect human rights ourselves in a way that doesn't jeopardise national security or bind the hands of Parliament. A true British Bill of Rights – decided by Parliament and amended by Parliament – would protect not only the rights set out in the Convention but could include traditional British rights not protected by the ECHR, such as the right to trial by jury.

I also know that others will say there is little point in leaving the ECHR if we remain members of the EU, with its Charter of Fundamental Rights and its Court of Justice. And I am no fan of the Charter or of many of the rulings made by the Court. But there are several problems that do apply to the Court of Human Rights in Strasbourg, yet do not apply to the Court of Justice in Luxembourg. Strasbourg is in effect a final appeals court; Luxembourg has no such role. Strasbourg can issue orders preventing the deportation of foreign nationals; Luxembourg has no such power. Unlike the European Convention on Human Rights, the European Treaties are clear: "national security," they say, "remains the sole responsibility of each Member State."

And unlike the ECHR, which is a relatively narrow human rights convention, our membership of the EU involves cooperation – and, yes, rules and obligations – on a much wider range of issues. The country's decision in the referendum is therefore a much more complex undertaking. So I want to spend some time to go through the most important issues we need to consider.

Arguments that do not count

But before I do that, I want to deal with several arguments that should not count. The first is that, in the twenty-first century, Britain is too small a country to cope outside the European Union. That is nonsense. We are the fifth biggest economy in the world, we are growing faster than any economy in the G7, and we attract nearly a fifth of all foreign investment in the EU. We have a military capable of projecting its power around the world, intelligence services that are second to none, and friendships and alliances that go far beyond Europe. We have the greatest soft power in the world, we sit in exactly the right time zone for global trade, and our language is theworld's language. Of course Britain could cope outside the European Union. But the question is not whether we could survive without the EU, but whether we are better off, in or out.

Neither is it true that the EU is the only reason the continent has been largely peaceful since the end of the Second World War. Nor is it about "the kind of country we want to be", as the cliche is usually put. Nor is the decision we face anything to do with our shared cultural heritage with Europe. Of course we are a European country, but that in itself is not a reason to be an EU member state.

And nor is this debate about the past. Really, I cannot emphasise this enough. We are not in 1940, when Europe's liberty was in peril and Britain stood alone. We are not in 1957, when the Treaty of Rome was agreed, Europe was a Group of Six and the Cold War was a generation away from its conclusion. We are not in 1973, when Britain was the "sick man of Europe" and saw the European Economic Community as its way out of trouble. We are not even in 1992, when Maastricht was signed and the reunification of Germany had only just taken place.

We are in 2016, and when we make this important decision, we need to look ahead to the challenges we will face – and the rest of Europe will face – over the next ten, twenty, thirty years and more. Those challenges – about security, trade and the economy – are serious, complex and deserve a mature debate. We need our decision to be the result of a hard-headed analysis of what is in our national interest. There are certainly problems that are caused by EU membership, but of course there are advantages too. Our decision must come down to whether, after serious thought about the pros and the cons, we believe there is more in the credit column than in the debit column for remaining on the inside.

Security

So I want to talk now about those three big, future challenges – security, trade and the economy.

A lot has been said already during this referendum campaign about security. But I want to set out the arguments as I see them. If we were not members of the European Union, of course we would still have our relationship with America. We would still be part of the Five Eyes, the closest international intelligence-sharing arrangement in the world. We would still have our first-rate security and intelligence agencies. We would still share intelligence about terrorism and crime with our European allies, and they would do the same with us.

But that does not mean we would be as safe as if we remain. Outside the EU, for example, we would have no access to the European Arrest Warrant, which has allowed us to extradite more than 5,000 people from Britain to Europe in the last five years, and bring 675 suspected or convicted wanted individuals to Britain to face justice. It has been used to get terror suspects out of the country and bring terrorists back here to face justice. In 2005, Hussain Osman – who tried to blow up the London Underground on 21/7 – was extradited from Italy using the Arrest Warrant in just 56 days. Before the Arrest Warrant existed, it took ten long years to extradite Rachid Ramda, another terrorist, from Britain to France.

There are other advantages too. Take the Passenger Name Records Directive. This will give law enforcement agencies access to information about the movements of terrorists, organised criminals and victims of trafficking on flights between European countries and from all other countries to the EU. When I first became Home Secretary, I was told there wasn't a chance of Britain ever getting this deal. But I won agreement in the Council of Ministers in 2012 and – thanks to Timothy Kirkhope MEP and the hard work of my Home Office team – the final Directive has now been agreed by the European Parliament and Council.

Most importantly, this agreement will make us all safer. But it also shows two advantages of remaining inside the EU. First, without the kind of institutional framework offered by the European Union, a complex agreement like this could not have been struck across the whole continent, because bilateral deals between every single member state would have been impossible to reach. And second, without British leadership and influence, a Directive would never have been on the table, let alone agreed.

These measures – the Arrest Warrant and PNR – are worthwhile because they are not about grandiose state-building and integration but because they enable practical cooperation and information sharing. Britain will never take part in a European police force, we will never sign up to a European Public Prosecutor, and two years ago we took Britain out of around a hundred unhelpful EU justice and home affairs measures. But when we took that decision, we also made sure that Britain remained signed up to the measures that make a positive difference in fighting crime and preventing terrorism.

The European Criminal Records Information System, Financial Intelligence Units, the Prisoner Transfer Framework, SIS II, Joint Investigation Teams, Prüm. These are all agreements that enable law enforcement agencies to cooperate and share information with one another in the fight against cross-border crime and terrorism. They help us to turn foreign criminals away at the border, prevent money laundering by terrorists and criminals, get foreign criminals out of our prisons and back to their home countries, investigate cases that cross borders, and share forensic data like DNA and fingerprinting much more quickly.

In the last year, we have been able to check the criminal records of foreign nationals more than 100,000 times. Checks such as these mean we have been able to deport more than 3,000 European nationals who posed a threat to the public. The police will soon be able to check DNA records for EU nationals in just fifteen minutes. Under the old system it took 143 days. Last year, the French used information exchanged through the Prüm agreement to locate one of the suspected perpetrators of the November attacks in Paris.

These are practical measures that promote effective cooperation between different European law enforcement organisations, and if we were not part of them Britain would be less safe.

Now I know some people say the EU does not make us more secure because it does not allow us to control our border. But that is not true. Free movement rules mean it is harder to control the volume of Europeanimmigration - and as I said yesterday that is clearly no good thing – but they do not mean we cannot control the border. The fact that we are not part of Schengen – the group of countries without border checks – means we have avoided the worst of the migration crisis that has hit continental Europe over the last year. It means we can conduct checks on people travelling to Britain from elsewhere in Europe. And, subject to certain rules and the availability of information, it means we can block entry for serious criminals and terrorists.

I have heard some people say – especially after the terrorist attacks in Brussels last month – that the very existence of extremists and terrorists in Belgium, France and other EU member states is reason enough to leave. But our response to Paris and Brussels cannot be to say that we should have less cooperation with countries that are not only our allies but our nearest neighbours. And anyway leaving the EU would not mean we could just close ourselves off to the world: the 9/11 attacks on New York were planned in Afghanistan. The 7/7 attackers trained in Pakistan. And most of the international terrorism casework that crosses my desk involves countries beyond Europe's borders.

So my judgement, as Home Secretary, is that remaining a member of the European Union means we will be more secure from crime and terrorism.

But now I want to turn to the other challenges we face in the coming decades: trade and the economy.

Trade and the economy

The headline facts of Britain's trade with Europe are clear. The EU is a single market of more than 500 million people, representing an economy of almost £11 trillion and a quarter of the world's GDP. 44 per cent of our goods and services exports go to the EU, compared to five per cent to India and China. We have a trade surplus in services with the rest of the EU of £17 billion. And the trading relationship is more inter-related than even these figures suggest. Our exporters rely on inputs from EU companies more than firms from anywhere else: nine per cent of the 'value added' of UK exports comes from inputs from within the EU, compared to 2.7 per cent from the United States and 1.3 per cent from China.

So the single market accounts for a huge volume of our trade, but if it is completed – so there are genuinely open markets for all services, the digital economy, energy and finance – we would see a dramatic increase in economic growth, for Britain and the rest of Europe. The Capital Markets Union – initiated and led by Britain – will allow finance to flow freely between member states: the first proposal alone could lead to £110 billion in extra lending to businesses. A completed energy single market could save up to £50 billion per year across the EU by 2030. And a digital single market is estimated to be worth up to £330 billion a year to the European economy overall. As Britain is the leading country in Europe when it comes to the digital economy, that is an enormous opportunity for us all.

These changes will mean greater economic growth in Britain, higher wages in Britain and lower prices for consumers – in Britain. But they will not happen spontaneously and they require British leadership. And that is a crucial point in this referendum: if we leave the EU it is not just that we might not have access to these parts of the single market – these parts of the single market might never be created at all.

The economic case for remaining inside the European Union isn't therefore just about risk, but about opportunity. And it isn't just about fear, but about optimism – optimism that Britain can take a lead and deliver more trade and economic growth inside Europe and beyond.

There are risks we need to weigh, of course. And there are risks in staying as well as leaving. There is a big question mark, for example, about whether Britain, as a member state that has not adopted the euro, risks being discriminated against as the countries inside the Eurozone integrate further. When the European Central Bank said clearing houses dealing in large volumes of

euros had to be located in the Eurozone, it could have forced LCH.Clearnet to move its euro business out of London, probably to Paris. That was struck down by the EU's General Court, but the threat was clear. And that is why it was so important that the Prime Minister's negotiation guaranteed a principle of non-discrimination against businesses from countries outside the Eurozone.

If we were not in the European Union, however, no such deal could have been agreed. There would be little we could do to stop discriminatory policies being introduced, and London's position as the world's leading financial centre would be in danger. The banks may be unpopular, but this is no small risk: financial services account for more than seven per cent of our economic output, thirteen per cent of our exports, a trade surplus of almost £60 billion – and more than one million British jobs.

But this is all about trade with Europe. What about trade with the rest of the world? It is tempting to look at developing countries' economies, with their high growth rates, and see them as an alternative to trade with Europe. But just look at the reality of our trading relationship with China – with its dumping policies, protective tariffs and industrial-scale industrial espionage. And look at the figures. We export more to Ireland than we do to China, almost twice as much to Belgium as we do to India, and nearly three times as much to Sweden as we do to Brazil. It is not realistic to think we could just replace European trade with these new markets.

And anyway, this apparent choice is a false dichotomy. We should be aiming to increase our trade with these markets in addition to the business we win in Europe. Given that British exports in goods and services to countries outside the EU are rising, one can hardly argue that the EU prevents this from happening. Leaving the EU, on the other hand, might make it considerably harder. First, we would have to replace 36 existing trade agreements we have with non-EU countries that cover 53 markets. The EU trade deals Britain has been driving – with the US, worth £10 billion per year to the UK, with Japan, worth £5 billion a year to the UK, with Canada, worth £1.3 billion a year to the UK – would be in danger of collapse. And while we could certainly negotiate our own trade agreements, there would be no guarantee that they would be on terms as good as those we enjoy now. There would also be a considerable opportunity cost given the need to replace the existing agreements – not least with the EU itself – that we would have torn up as a consequence of our departure.

Inside the EU, without Britain, the balance of power in the Council of Ministers and European Parliament would change for the worse. The liberal, free-trading countries would find themselves far below the 35 per cent blocking threshold needed in the Council, while the countries that tend towards protectionism would have an even greater percentage of votes. There would be a very real danger that the EU heads in a protectionist direction, which would damage wider international trade and affect for the worse Britain's future trade with the EU.

So, if we do vote to leave the European Union, we risk bringing the development of the single market to a halt, we risk a loss of investors and businesses to remaining EU member states driven by discriminatory EU policies, and we risk going backwards when it comes to international trade. But the big question is whether, in the event of Brexit, we would be able to negotiate a new free trade agreement with the EU and on what terms.

Some say we would strike deals that are the same as the EU's agreements with Norway, Switzerland or even Canada. But with all due respect to those countries, we are a bigger and more powerful nation than all three. Perhaps that means we could strike a better deal than they have. After all, Germany will still want to sell us their cars and the French will still want to sell us their wine. But in a stand-off between Britain and the EU, 44 per cent of our exports is more important to us than eight per cent of the EU's exports is to them.

With no agreement, we know that WTO rules would oblige the EU to charge ten per cent tariffs on UK car exports, in line with the tariffs they impose on Japan and the United States. They would be required to do the same for all other goods upon which they impose tariffs. Not all of these tariffs are as high as ten per cent, but some are considerably higher.

The reality is that we do not know on what terms we would win access to the single market. We do know that in a negotiation we would need to make concessions in order to access it, and those concessions could well be about accepting EU regulations, over which we would have no say, making financial contributions, just as we do now, accepting free movement rules, just as we do now, or quite possibly all three combined. It is not clear why other EU member states would give Britain a better deal than they themselves enjoy.

All of this would be negotiable, of course. For the reasons I listed earlier, Britain is big enough and strong enough to be a success story in or out of the EU. But the question is not whether we can survive Brexit: it is whether Brexit would make us better off. And that calculation has to include not only the medium to long-term effects but the immediate risks as well.

The Union with Scotland and the other risks of Brexit

Now it is sometimes suggested that Brexit could lead to other countries seeking to leave the European Union. Some even believe that Brexit might be a fatal blow to the whole EU project. And some, I know, think that this would be a good thing. But I'm afraid I disagree. The disintegration of the EU would cause massive instability among our nearest neighbours and biggest trading

partners. With the world economy in the fragile state it is, that would have real consequences for Britain.

But if Brexit isn't fatal to the European Union, we might find that it is fatal to the Union with Scotland. The SNP have already said that in the event that Britain votes to leave but Scotland votes to remain in the EU, they will press for another Scottish independence referendum. And the opinion polls show consistently that the Scottish people are more likely to be in favour of EU membership than the people of England and Wales.

If the people of Scotland are forced to choose between the United Kingdom and the European Union we do not know what the result would be. But only a little more than eighteen months after the referendum that kept the United Kingdom together, I do not want to see the country I love at risk of dismemberment once more. I do not want the people of Scotland to think that English Eurosceptics put their dislike of Brussels ahead of our bond with Edinburgh and Glasgow. I do not want the European Union to cause the destruction of an older and much more precious Union, the Union between England and Scotland.

Brexit also risks changing our friendships and alliances from further afield. In particular, as President Obama has said, it risks changing our alliance with the United States. Now I know as well as anybody the strength and importance of that partnership – our security and intelligence agencies have the closest working relationship of any two countries in the world – and I know that it would certainly survive Britain leaving the EU. But the Americans would respond to Brexit by finding a new strategic partner inside the European Union, a partner on matters of trade, diplomacy, security and defence, and our relationship with the United States would inevitably change as a result. That would not, I believe, be in our national interest.

We should remain in the EU

So I want to return to the principles I set out to help us judge whether Britain should join or remain a member of international institutions. Remaining inside the European Union does make us more secure, it does make us more prosperous and it does make us more influential beyond our shores.

Of course, we don't get anything like everything we want, and we have to put up with a lot that we do not want. And when that happens, we should be honest about it. The Common Agricultural Policy, the Common Fisheries Policy, the free movement of people: none of these things work the way we would like them to work, and we need to be smarter about how we try to change these things in future. But that does not mean we have no control over the EU. Britain can and often does lead in Europe: the creation of the single market was driven by Mrs Thatcher, the competitiveness and trade agendas now pursued by the Commission were begun at the behest of Britain and Germany, and I can tell you that on matters of counter-terrorism and security, the rest of Europe instinctively looks towards us. But it shouldn't be a notable exception when Britain leads in Europe: it must become the norm.

And turning to the final test: to what extent does EU membership bind the hands of Parliament? Of course, every directive, regulation, treaty and court ruling limits our freedom to act. Yet Parliament remains sovereign: if it voted to leave the EU, we would do so. But unless and until the European Communities Act is repealed, Parliament has accepted that it can only act within the limits set by the European treaties and the judgments of the Court of Justice. The freedom to decide whether to remain a member of the EU or to leave will therefore always be in the hands of Parliament and the British people.

I do not want to stand here and insult people's intelligence by claiming that everything about the EU is perfect, that membership of the EU is wholly good, nor do I believe those that say the sky will fall in if we vote to leave. The reality is that there are costs and benefits of our membership and, looking to the years and decades ahead, there are risks and opportunities too. The issues the country has to weigh up before this referendum are complex. But on balance, and given the tests I set earlier in my speech, I believe the case to remain a member of the European Union is strong.

A different European policy

For each of the principles I set out earlier, however, I cannot help but think there would be more still in the credit rather than debit column if Britain adopted a different approach to our engagement with the EU. Because we should be in no doubt that, if we vote to remain, our relationship with the European Union will go on changing. And that change – with new treaties on the horizon – might be for the better or worse.

We all know the game that has been played in the past. Prime Ministers like Tony Blair and Gordon Brown went into the Council of Ministers without a positive agenda for what Britain wanted, their advisers briefed about the five red lines they were not prepared to cross, they gave way on three, and returned triumphant claiming to have stopped the Europeans in their tracks. If we go back to the same way of doing business, Britain will not get what it needs from the EU and the public will grow more cynical and more dissatisfied.

We have become so used to being in this permanently defensive crouch that when it comes to the EU, Britain has forgotten how to stand up and lead. And to those who say Britain cannot achieve what it needs in Europe, I say have more belief in what Britain can do. I say think about how Britain built the single market, and let's be that ambitious – in the British national interest – once

again.

Let us set clear objectives to complete the single market, to pursue new free trade deals with other countries, to reform the European economy and make it more competitive. Let's work to ensure the countries of Europe can protect their borders from illegal immigrants, criminals and terrorists. Let's try to make sure that more of our European allies play their part in protecting western interests abroad.

We need to have a clear strategy of engagement through the Council of Ministers, seek a bigger role for Britain inside the Commission, try to stem the growth in power of the European Parliament, and work to limit the role of the Court of Justice. We need to work not only through the EU's institutions and summits, but by also pursuing more bilateral diplomacy with other European governments.

And it is time to question some of the traditional British assumptions about our engagement with the EU. Do we stop the EU going in the wrong direction by shouting on the sidelines, or by leading and making the case for taking Europe in a better direction? And do we really still think it is in our interests to support automatically and unconditionally the EU's further expansion? The states now negotiating to join the EU include Albania, Serbia and Turkey – countries with poor populations and serious problems with organised crime, corruption, and sometimes even terrorism. We have to ask ourselves, is it really right that the EU should just continue to expand, conferring upon all new member states all the rights of membership? Do we really think now is the time to contemplate a land border between the EU and countries like Iran, Iraq and Syria? Having agreed the end of the European principle of "ever closer union", it is time to question the principle of ever wider expansion.

Stand tall and lead

So this is my analysis of the rights and wrongs, the opportunities and risks, of our membership of the EU – and the reasons I believe it is clearly in our national interest to remain a member of the European Union.

And I want to emphasise that I think we should stay inside the EU not because I think we're too small to prosper in the world, not because I am pessimistic about Britain's ability to get things done on the international stage. I think it's right for us to remain precisely because I believe in Britain's strength, in our economic, diplomatic and military clout, because I am optimistic about our future, because I believe in our ability to lead and not just follow.

But I know what a difficult decision this is going to be for a lot of people. I know, because of the conversations I have with my constituents every Saturday. Because of the discussions I've had with members of the public – and members of the Conservative Party – up and down the country. And because I myself have already gone through the process of carefully weighing up what is in Britain's interests, now and in the future, before making my decision. Ultimately, this is a judgement for us all, and it's right that people should take their time and listen to all the arguments.

So as we approach polling day, and as the country starts to weigh up its decision, let us focus on the future. Instead of debating the peripheral, the ephemeral and the trivial, let both sides of the argument debate what matters. And let us do so in a serious and mature way. Let us concentrate on Britain's national interest. Britain's future. Our influence around the world. Our security. And our prosperity. Let us make our decision with the great challenges of the future in mind. Let us have more confidence in our ability to get things done in Europe. This is about our future. Let us, Great Britain, stand tall and lead.

ECONOMIC POLICY | EU | EU REFERENDUM | EUROPEAN CONVENTION ON HUMAN RIGHTS | HUMAN RIGHTS | SECURITY | THERESA MAY MP | TRADE

Recent articles

Steve Hilton – moderniser for Brexit

Published: May 23, 2016

The full list of Bills in the Queen's Speech

Published: May 18, 2016

97 comments for: Theresa May’s speech on Brexit: full text

Comments (103)

Login

Sort by: **Date** Rating Last Activity

Login or signup now to comment.

JohnJCMoss · *4 weeks ago*

Unfortunately for Ms May, accepting the jurisdiction of the ECHR is written into the Good Friday Agreement so it would require a renegotiation of that Agreement for this to happen.

It is also the case that the reach of the Charter of Fundamental Rights is now being extended by the ECJ, so remaining under its jurisdiction will increasingly harm the UK's position should we remain members of the EU.

Sorry, but the central theme of this is that there is some sort of special "British solution" which can be fabricated to keep us in the EU. Just as with Dave's Dodgy Deal, I'm afraid there isn't. Whatever concessions we think we have won will be obliterated by the steamroller of European integration in a few short years.

Reply ▶ **3 replies** · *active 4 weeks ago* Report

fordprefect100 83p · *4 weeks ago*

I did a quick search for the word "migration" in this speech.
It appears twice.

Given:
- the content of Ms May's recent conference speech on immigration
- the fact that as members of the EU, we cannot limit immigration from EU member states
- the fact that immigration is the number 1 topic of concern amongst voters
- and the fact that immigration is one of her primary responsibilites as Home Secretary

her failure to discuss this topic at all means she has lost all credibility and should be ignored for the remainder of the EU debate.

Reply Report

MalcolmDunn 128p · *4 weeks ago*

I notice Theresa does not apologise for her failure to hit the immigration target she agreed to and proposes absolutely no solutions to address that. In most other walks of life a senior executive who did that would probably be sacked.
She also does not say why she thinks that all security cooperation will end when we leave the EU . It is in other countries as much as ours interest for it to continue.
All in all I think a rather lightweight speech that adds nothing to the debate.

Reply ▶ **2 replies** · *active 4 weeks ago* Report

Keith_N 116p · *4 weeks ago*

I understand there are about 30 Conservative MPs, such as David Davis and Dominic Grieve, who support human rights and our membership of the ECHR - so even with the UKIP MP, the government do not have a majority to repeal the HRA.

Unless it can bully or bribe most of those 30, the Conservatives will simply have to try to get a bigger majority in 2020.

Reply ▶ **2 replies** · *active 4 weeks ago* Report

Connaught 83p · *4 weeks ago*

Immigration-A crash on Marr yesterday and now this! So what was this once hopeful Leadership contender talking about last October? Birmingham in October is going to be interesting!

Reply Report

RalphBaldwin 101p · *4 weeks ago*

Boris Johnsons article in today's Telegraph is excellent, one of his best so far in this campaign
Our party is owning the debate, is playing the most fundamental part of the campaign whether you are a remainer or an outer.

Reply ▶ **7 replies** · *active 4 weeks ago* Report

Nige122 67p · *4 weeks ago*

"Do we stop the EU going in the wrong direction by shouting on the sidelines, or by leading and making the case for taking Europe in a better direction? "

I agree with Mrs May. Better to be in the tent.

Reply ▶ **7 replies** · *active 4 weeks ago* Report

AngryofSE1 80p · *4 weeks ago*

As Guido pints out - she rubbishes the "Remain" economic argument. I expect that's going to go down like a pint of cold sick with Dave and his friends.

Reply Report

Connaught 83p · *4 weeks ago*

We've been inside the tent for over forty years and the train is moving ever faster in the wrong direction. Influence?-pull the other one!

Reply Report

EMTurner 137p · *4 weeks ago*

I do apologise for asking this, but what is she referring to in the phrase 'exporters rely on inputs from EU companies more than firms from anywhere else: nine per cent of the ‘value added’ of UK exports comes from inputs from within the EU'?

Reply ▶ **2 replies** · *active 4 weeks ago* Report

FanofAl 80p · *4 weeks ago*

She was very poor on Marr yesterday. This is little better. Another potential Leader falls way by the wayside.

Reply Report

EMTurner 137p · *4 weeks ago*

Isn't there going to be a fairly big problem with Remaining and getting out of the ECHR (and indeed ECJ, neither of whom have been kind to us)?

Reply ▶ **1 reply** · *active 4 weeks ago* Report

Treforion 42p · *4 weeks ago*

Theresa May, and indeed other Conservatives, need to remind themselves, that it was Winston Churchill who in 1948 advocated a European 'Charter of Human Rights' in direct response to the horrors of the Nazi regime and the Second World War. It was British lawyers, the Tory Sir David Maxwell Fyfe, MP, in particular, who primarily drafted what was later to become the European Convention. The Convention established the European Court of Human Rights and the UK was the first country to sign up to the Convention.

This great European institution was therefore the creation of some of the greatest Conservative Party political thinkers of the modern era.

Why modern Conservatives would wish to dismantle and indeed destroy the work of Churchill and other great Tory political thinkers is beyond me !

Reply ▶ **7 replies** · *active 4 weeks ago* Report

PeterBuss 102p · *4 weeks ago*

Way off beam this morning Mrs May. Utterly disagree with leaving the ECHR.

Reply Report

PeterBuss 102p · *4 weeks ago*

Seemed to me that Theresa was genuflecting toward the Remain camp in order not to damage her Leadership prospects. If so I guess she has done them no favours at all as she will also have upset Remainers like yours truly!

Reply ▶ **5 replies** · *active 4 weeks ago* Report

surepaywill 64p · *4 weeks ago*

With Remain now certain to win, interesting how Number 10
are putting more definite references to the UK joining the Euro zone
as in May's speech.

Brussels wil regard a strong Remain vote as the starting bell for the next
stage of EU integration as outlined in the 5 President Report.

Key to this is ending the 2 tier nature of the EU and requiring the UK
as the strongest economy outside the Euro to join. This has always been
regarded as essential to the Euro's survival by the Commission - so we can
expect rapid action on this by Brussels after June 23rd. for ensuring the
Eurozone survives.

All the major Banks see the UK's adoption of the Euro as a natural conclusion
of the Remain vote - and very profitable for them -hence their major contributions

to the Remain campaign.

Reply ▶ **7 replies** · *active 4 weeks ago* Report

Kitty ! 108p · *4 weeks ago*

I offer no apologies when I say politicians with their own boas agendas (on both sides) should just be quiet.
No one listens to them, trusts them or respects them.
We should have the opinions of business leaders and economists but even they have their own political leanings.
At the end of the day I wont be about bleatings from a n echo chamber or mawkish tales of patriotism
its about jobs, growth and individuals with their own lives who are not all looking under the bed for ' immigrants'.

Reply Report

Lindsay_Jenkins 97p · *4 weeks ago*

Every one of Mrs May’s sentences is specious. I give up. Is she really Home Secretary?

Reply Report

AlexanderTheHog 61p · *4 weeks ago*

I respect Theresa May immensely, and have found her charming in person. It is a good speech in which she analysis better than any other Remainian has the arguments to stay with the EU system. These are pretty thin gruel though to justify the costs and the burdens.

Reply Report

David_Cooper 88p · *4 weeks ago*

"So as we approach polling day, and as the country starts to weigh up its decision, let us focus on the future. Instead of debating the peripheral, the ephemeral and the trivial, let both sides of the argument debate what matters. And let us do so in a serious and mature way. Let us concentrate on Britain’s national interest. Britain’s future. Our influence around the world. Our security. And our prosperity. Let us make our decision with the great challenges of the future in mind. Let us have more confidence in our ability to get things done in Europe. This is about our future. Let us, Great Britain, stand tall and lead."

Ironic, perhaps, that if we took the last paragraph of her speech in complete isolation from what preceded it, we might feel that it had been delivered by one of the intellectual members of the Brexit campaign.

Could she be hedging her bets, just in case "events, dear boy, events" might give her the chance to change her mind, even at this late stage?

Reply Report

cf2012 100p · *4 weeks ago*

"Do we stop the EU going in the wrong direction by shouting on the sidelines, or by leading and making the case for taking Europe in a better direction?"

The European Union is focussed on expanding and deepening integration in the Eurozone. Currently that is not all countries, but every country except the UK and Denmark is legally obliged to join it. The EU has been willing to damage several economies and is destroying one to maintain the integration of the eurozone. It has shown clearly that the EZ matters more than the wealth and health of even larger member nations (eg, Italy and Spain). We can't draw (current) non-Euro countries into our orbit because they are bound by treaty to join the Euro. The EZ is planning common treasury and fiscal management. The UK hasn't even got a vote on Euro measures, and in Cameron's Agreement, undertakes an obligation not to frustrate any measures taken

by the Euro group (which legally is all but the UK and Denmark). How do we "lead" when we are completely outside the scope of the only thing that matters to the EU institutions? We are also outside Schengen (the other thing that matters).

Does the Government plan at some time after Remain to join the Euro so the UK can "lead"?
If so, we should be told. If not, what does "leading" mean in that situation?

"And do we really still think it is in our interests to support automatically and unconditionally the EU’s further expansion?"

That was originally a British plan! The aim was to expand the EC/EU membership with the intention of binding the old Eastern Bloc in to free trading relationships, and also to reduce the supranational direction of EC/EU policy. It was confounded by the linking of expansion with the conversion of the EC to the EU and the introduction of monetary union.

Reply ▶ **7 replies** · *active 4 weeks ago* Report

ALEXANDRA_1 109p · *4 weeks ago*

Complete and utter rubbish from one of many that have no shame selling our Country down the river.

Reply Report

ProudTory 46p · *4 weeks ago*

She is talking balderdash !

"Laws which govern citizens in this country are decided by politicians from other nations who we never elected and can't throw out."

Mrs May.....TAKE CONTROL>>>>>>>>>>>>>>>>>>>>VOTE EXIT.

Reply Report

deleted4262146 35p · *4 weeks ago*

All Cabinet Members who support 'Remain' must, as a matter of principle, resign, if Brexit wins the day. That goes for you too Theresa May. We must campaign for this to happen. Brexit will mean a new direction for our country and will need new people to lead it.

Reply ▶ **8 replies** · *active 4 weeks ago* Report

AmpfieldAndy 110p · *4 weeks ago*

If we were still on a Shakespearean theme, I would describe the speech as "much ado about nothing". We are not going to stand tall and lead in Europe. We have tried that for 40 years and the only PM to achieve anything worthwhile was Mrs Thatcher. The failed re-renegotiation that preceded the referendum campaign achieved nothing and now plays no part in the Remain campaign it was such a failure. The economy is a no win debate for Remain with the EU having no Single Market for services upon which the UK economy is dependant and the UK having a £ 60bn trade deficit with the EU but a trade surplus with the RoW, including the USA. You can't make a credible case for sovereignty with so much law being determined in Brussels and imposed on the UK and UK common law being completely disregarded. A British Bill of Rights would be totally meaningless with the UK still subject to EU directives and the ECHR was an ill thought out throw away to try and appease Leavers that can't be enacted without renegotiating the Good Friday Agreement. It's a nonsense to talk about increased security with no effective control over own borders and immigration and with the EU states that border non-EU countries having such porous borders themselves. Co-operation with the EU would still continue post Brexit just as it did prior to the UK joining the old EEC. As my old schoolmasters used to write regularly in my school reports "must try harder".

Reply ▶ **2 replies** · *active 4 weeks ago* Report

1 2 Next »

- Highlights
- Latest
- Comments

It's good news that the British shale gas industry is another step closer to reality
May 25, 2016

Who is to blame for tensions in the Party? Cameron? Boris? Both? Neither? Take our monthly survey
May 25, 2016

Christopher Howarth: Cameron's Hollow Deal 3) The claim that immigration will fall is false – and the Prime Minister knows it
May 25, 2016

Peter Marshall: Uncertainty, inconsistency, irresponsibility. Why the case for Brexit is fundamentally flawed
May 25, 2016

Reggie to Dessie: My pitch for leader – my great-uncle was a bus driver. He drove one to help break the General Strike in 1926.
May 25, 2016

Anna Firth: Five reasons why women should vote Leave
May 25, 2016

Andrew Gimson's PMQs sketch: Eagle soars above Osborne
May 25, 2016

Jonathan Russell: Banning Orders for extremists would be illiberal and counter-productive
May 25, 2016

WATCH: Redwood on the IFS Brexit claims – "There is good news for Vote Leave in this report"
May 25, 2016

Calling Conservatives: New public appointments announced. Chairs of the Migration Advisory Committee – and more
May 25, 2016

It's good news that the British shale gas industry is another step closer to reality

milesking10 46p forgive me but I think I'll listen to what the climate scientists have to say on this one, rather...

» 9 minutes ago Jump to ➡

How you can still be Prime Minister, George - a letter from Mandelson to Osborne

lankester2 65p GO's failings were clear even before the referendum. A politician-especially a Chancellor, who makes...

» 11 minutes ago Jump to ➡

Newslinks for Thursday 26th May 2016

DavidBelchamber 102p Such has been the force of the third party in the referendum campaign (i.e. the government) that I have...

» 11 minutes ago Jump to

It's good news that the British shale gas industry is another step closer to reality

milesking10 46p just another straw man argument

» 11 minutes ago Jump to

Lord Ashcroft: Control versus risk - my new poll explores which message might win out in the referen

fordprefect100 83p The recent polling evidence doesn't support your reckoning, ETA.

Discounting Lynton Crosb...

» 18 minutes ago Jump to

Peter Marshall: Uncertainty, inconsistency, irresponsibility. Why the case for Brexit is fundamental

DavidChesham 31p So what part of his CV disqualifies him?

» 18 minutes ago Jump to

Tweets from @PaulGoodmanCH/news-tweets

Editors Blog List

Select blog link

Latest Tweets

A selection of must-read blogs and news stories, chosen by the @ConHome team

Follow @MustBeRead

Open up the Supreme Court, urges @Dannythefink https://t.co/zEFGXhCT3V
5 hours ago

Five reasons why women should #VoteLeave, by @anna_firth https://t.co/CII5TGRyBX
5 hours ago

The EU will do anything to hold off its various crises until after the referendum, writes @Freedland https://t.co/22dTlA0wIa
9 hours ago

Cringe-makin, patronisin, flailin and failin - @thequentinletts reviews the pro-EU campaign's "votin" campaign https://t.co/EwjgjTd8sK
9 hours ago

Any Tory who challenges Cameron after the referendum is a fool, writes @MrTCHarris https://t.co/3emjsdtukN
9 hours ago

Join the conversation

Browse by Tag

CONSERVATIVEHOME MEMBERS' PANEL | COUNCIL FINANCES | ENVIRONMENT | LOCAL ELECTIONS (GENERAL) | SCOTLAND | ED MILIBAND MP | OPINION POLLS | EU REFERENDUM | LIBERAL DEMOCRATS | UKIP | GENERAL ELECTION 2015 | HOUSING | TAX AND SPENDING | EU | GEORGE OSBORNE MP | CONSERVATIVES | EDUCATION | LABOUR | EUROPE | DAVID CAMERON MP

Show all tags

conservativehome

Britain’s leading Conservative blog for news, comment, analysis and campaigns, edited by Paul Goodman. We are independent of the Conservative Party but supportive of it.

Site Information

- About ConservativeHome
- Advertise
- Contact Us
- Comments Policy
- ConservativeHome’s Daily Email
- News feeds from ConservativeHome

What’s happening inside the Conservative Party?

ConservativeIntelligence has the answers. A weekly ‘Intelligence Letter‘, email alerts, high quality events, extended briefings and an online, searchable databank.

Website by Tjugo Tjugo

Speech

Home Secretary’s speech on the UK, EU and our place in the world

From: Home Office and The Rt Hon Theresa May MP
Delivered on: 25 April 2016 (Original script, may differ from delivered version)
Location: London
First published: 25 April 2016
Part of: EU referendum

Theresa May addresses audience at the Institute of Mechanical Engineers in central London.

The United Kingdom, the European Union, and our place in the world

Thank you. Today I want to talk about the United Kingdom, our place in the world and our membership of the European Union.

But before I start, I want to make clear that - as you can see - this is not a rally. It will not be an attack or even a criticism of people who take a different view to me. It will simply be my analysis of the rights and wrongs, the opportunities and risks, of our membership of the EU.

Sovereignty and membership of multilateral institutions

In essence, the question the country has to answer on 23 June - whether to leave or remain - is about how we maximise Britain’s security, prosperity and influence in the world, and how we maximise our sovereignty: that is, the control we have over our own affairs in future.

I use the word ‘maximise’ advisedly, because no country or empire in world history has ever been totally sovereign, completely in control of its destiny. Even at the height of their power, the Roman Empire, Imperial China, the Ottomans, the British Empire, the Soviet Union, modern-day America, were never able to have everything their own way. At different points, military rivals, economic crises, diplomatic manoeuvring, competing philosophies and emerging technologies all played their part in inflicting defeats and hardships, and necessitated compromises even for states as powerful as these.

Today, those factors continue to have their effect on the sovereignty of nations large and small, rich and

poor. But there is now an additional complication. International, multilateral institutions exist to try to systematise negotiations between nations, promote trade, ensure co-operation on matters like cross-border crime, and create rules and norms that reduce the risk of conflict.

These institutions invite member states to make a trade-off: to pool and therefore cede some sovereignty in a controlled way, to prevent a greater loss of sovereignty in an uncontrolled way, through for example military conflict or economic decline.

Article 5 of NATO’s Washington Treaty is a good example of how this principle works: NATO member countries, Britain included, have agreed to be bound by the principle of collective defence. An attack on any single member will, according to the treaty, be interpreted as an attack on all members, and collective defence measures - including full military action - can be triggered. Britain could find itself bound to go to war because of a dispute involving a different country - a clear and dramatic loss of control of our foreign policy - but on the other hand, NATO membership means we are far more secure from attack by hostile states - which increases our control of our destiny. This is an institutionalised trade-off that the vast majority of the public - and most political leaders - think is worthwhile.

Looking back at history - and not very distant history at that - we know what a world without international, multilateral institutions looks like. Any student of the way in which Europe stumbled its way to war in 1914 knows that the confused lines of communications between states, the ambiguity of nations’ commitments to one another, and the absence of any system to de-escalate tension and conflict were key factors in the origins of the First World War. The United Nations may be a flawed organisation that has failed to prevent conflict on many occasions, but nobody should want an end to a rules-based international system and - so long as they have the right remits - institutions that try to promote peace and trade.

How we reconcile those institutions and their rules with democratic government - and the need for politicians to be accountable to the public - remains one of the great challenges of this century. And the organisations of which the United Kingdom should become - and remain - a member will be a matter of constant judgement for our leaders and the public for many years to come.

Principles for Britain’s membership of international institutions

We need, therefore, to establish clear principles for Britain’s membership of these institutions. Does it make us more influential beyond our own shores? Does it make us more secure? Does it make us more prosperous? Can we control or influence the direction of the organisation in question? To what extent does membership bind the hands of Parliament?

If membership of an international institution can pass these tests, then I believe it will be in our national interest to join or remain a member of it. And on this basis, the case for Britain remaining a member of organisations such as NATO, the World Trade Organisation and the United Nations, for example, is clear.

But as I have said before, the case for remaining a signatory of the European Convention on Human Rights - which means Britain is subject to the jurisdiction of the European Court of Human Rights - is not clear. Because, despite what people sometimes think, it wasn’t the European Union that delayed for years the extradition of Abu Hamza, almost stopped the deportation of Abu Qatada, and tried to tell Parliament that - however we voted - we could not deprive prisoners of the vote. It was the European Convention on Human Rights (ECHR).

The ECHR can bind the hands of Parliament, adds nothing to our prosperity, makes us less secure by

preventing the deportation of dangerous foreign nationals - and does nothing to change the attitudes of governments like Russia’s when it comes to human rights. So regardless of the EU referendum, my view is this. If we want to reform human rights laws in this country, it isn’t the EU we should leave but the ECHR and the jurisdiction of its court.

I can already hear certain people saying this means I’m against human rights. But human rights were not invented in 1950, when the convention was drafted, or in 1998, when it was incorporated into our law through the Human Rights Act. This is Great Britain - the country of Magna Carta, Parliamentary democracy and the fairest courts in the world - and we can protect human rights ourselves in a way that doesn’t jeopardise national security or bind the hands of Parliament. A true British Bill of Rights - decided by Parliament and amended by Parliament - would protect not only the rights set out in the convention but could include traditional British rights not protected by the ECHR, such as the right to trial by jury.

I also know that others will say there is little point in leaving the ECHR if we remain members of the EU, with its Charter of Fundamental Rights and its Court of Justice. And I am no fan of the charter or of many of the rulings of the court. But there are several problems that do apply to the Court of Human Rights in Strasbourg, yet do not apply to the Court of Justice in Luxembourg. Strasbourg is in effect a final appeals court; Luxembourg doesn’t have that role. Strasbourg can issue orders preventing the deportation of foreign nationals; Luxembourg has no such power. Unlike the European Convention on Human Rights, the European Treaties are clear: ‘national security,’ they say, ‘remains the sole responsibility of each member state’.

And unlike the ECHR, which is a relatively narrow human rights convention, our membership of the EU involves co-operation - and, yes, rules and obligations - on a much wider range of issues. The country’s decision in the referendum is therefore a much more complex undertaking. So I want to spend some time to go through the most important issues we need to consider.

Arguments that do not count

But before I do that, I want to deal with several arguments that should not count. The first is that, in the 21st century, Britain is too small a country to cope outside the European Union. That is nonsense. We are the fifth biggest economy in the world, we are growing faster than any economy in the G7, and we attract nearly a fifth of all foreign investment in the EU. We have a military capable of projecting its power around the world, intelligence services that are second to none, and friendships and alliances that go far beyond Europe. We have the greatest soft power in the world, we sit in exactly the right time zone for global trade, and our language is the world’s language. Of course Britain could cope outside the European Union. But the question is not whether we could survive without the EU, but whether we are better off, in or out.

Neither is it true that the EU is the only reason the continent has been largely peaceful since the end of the Second World War. Nor is it about ‘the kind of country we want to be’, as the cliche is usually put. Nor is the decision we face anything to do with our shared cultural heritage with Europe. Of course we are a European country, but that in itself is not a reason to be an EU member state.

And nor is this debate about the past. Really, I cannot emphasise this enough. We are not in 1940, when Europe’s liberty was in peril and Britain stood alone. We are not in 1957, when the Treaty of Rome was agreed, Europe was a Group of Six and the Cold War was a generation away from its conclusion. We are not in 1973, when Britain was the ‘sick man of Europe’ and saw the European Economic Community as its way out of trouble. We are not even in 1992, when Maastricht was signed and the reunification of Germany had only just taken place.

We are in 2016, and when we make this important decision, we need to look ahead to the challenges we will face - and the rest of Europe will face - over the next ten, twenty, thirty years and more. Those challenges - about security, trade and the economy - are serious, complex and deserve a mature debate. We need our decision to be the result of a hard-headed analysis of what is in our national interest. There are certainly problems that are caused by EU membership, but of course there are advantages too. Our decision must come down to whether, after serious thought about the pros and the cons, we believe there is more in the credit column than in the debit column for remaining on the inside.

Security

So I want to talk now about those 3 big, future challenges - security, trade and the economy.

A lot has been said already during this referendum campaign about security. But I want to set out the arguments as I see them. If we were not members of the European Union, of course we would still have our relationship with America. We would still be part of the Five Eyes, the closest international intelligence-sharing arrangement in the world. We would still have our first-rate security and intelligence agencies. We would still share intelligence about terrorism and crime with our European allies, and they would do the same with us.

But that does not mean we would be as safe as if we remain. Outside the EU, for example, we would have no access to the European Arrest Warrant, which has allowed us to extradite more than 5,000 people from Britain to Europe in the last 5 years, and bring 675 suspected or convicted wanted individuals to Britain to face justice. It has been used to get terror suspects out of the country and bring terrorists back here to face justice. In 2005, Hussain Osman - who tried to blow up the London Underground on 21/7 - was extradited from Italy using the Arrest Warrant in just 56 days. Before the Arrest Warrant existed, it took 10 long years to extradite Rachid Ramda, another terrorist, from Britain to France.

There are other advantages too. Take the passenger name records directive. This will give law enforcement agencies access to information about the movements of terrorists, organised criminals and victims of trafficking on flights between European countries and from all other countries to the EU. When I first became Home Secretary, I was told there wasn’t a chance of Britain ever getting this deal. But I won agreement in the Council of Ministers in 2012 and - thanks to Timothy Kirkhope MEP and the hard work of my Home Office team - the final directive has now been agreed by the European Parliament and Council.

Most importantly, this agreement will make us all safer. But it also shows 2 advantages of remaining inside the EU. First, without the kind of institutional framework offered by the European Union, a complex agreement like this could not have been struck across the whole continent, because bilateral deals between every single member state would have been impossible to reach. And second, without British leadership and influence, a directive would never have been on the table, let alone agreed.

These measures - the Arrest Warrant and PNR - are worthwhile because they are not about grandiose state-building and integration but because they enable practical co-operation and information sharing. Britain will never take part in a European police force, we will never sign up to a European Public Prosecutor, and 2 years ago we took Britain out of around a hundred unhelpful EU justice and home affairs measures. But when we took that decision, we also made sure that Britain remained signed up to the measures that make a positive difference in fighting crime and preventing terrorism.

The European Criminal Records Information System, financial intelligence units, the prisoner transfer

framework, SIS II, joint investigation teams, Prüm. These are all agreements that enable law enforcement agencies to co-operate and share information with one another in the fight against cross-border crime and terrorism. They help us to turn foreign criminals away at the border, prevent money laundering by terrorists and criminals, get foreign criminals out of our prisons and back to their home countries, investigate cases that cross borders, and share forensic data like DNA and fingerprinting much more quickly.

In the last year, we have been able to check the criminal records of foreign nationals more than 100,000 times. Checks such as these mean we have been able to deport more than 3,000 European nationals who posed a threat to the public. The police will soon be able to check DNA records for EU nationals in just 15 minutes. Under the old system it took 143 days. Last year, the French used information exchanged through the Prüm agreement to locate one of the suspected perpetrators of the November attacks in Paris.

These are practical measures that promote effective cooperation between different European law enforcement organisations, and if we were not part of them Britain would be less safe.

Now I know some people say the EU does not make us more secure because it does not allow us to control our border. But that is not true. Free movement rules mean it is harder to control the volume of European immigration - and as I said yesterday that is clearly no good thing - but they do not mean we cannot control the border. The fact that we are not part of Schengen - the group of countries without border checks - means we have avoided the worst of the migration crisis that has hit continental Europe over the last year. It means we can conduct checks on people travelling to Britain from elsewhere in Europe. And, subject to certain rules and the availability of information, it means we can block entry for serious criminals and terrorists.

I have heard some people say - especially after the terrorist attacks in Brussels last month - that the very existence of extremists and terrorists in Belgium, France and other EU member states is reason enough to leave. But our response to Paris and Brussels cannot be to say that we should have less co-operation with countries that are not only our allies but our nearest neighbours. And anyway leaving the EU would not mean we could just close ourselves off to the world: the 9/11 attacks on New York were planned in Afghanistan. The 7/7 attackers trained in Pakistan. And most of the international terrorism casework that crosses my desk involves countries beyond Europe’s borders.

So my judgement, as Home Secretary, is that remaining a member of the European Union means we will be more secure from crime and terrorism.

But now I want to turn to the other challenges we face in the coming decades: trade and the economy.

Trade and the economy

The headline facts of Britain’s trade with Europe are clear. The EU is a single market of more than 500 million people, representing an economy of almost £11 trillion and a quarter of the world’s GDP. 44% of our goods and services exports go to the EU, compared to 5% to India and China. We have a trade surplus in services with the rest of the EU of £17 billion. And the trading relationship is more inter-related than even these figures suggest. Our exporters rely on inputs from EU companies more than firms from anywhere else: 9% of the ‘value added’ of UK exports comes from inputs from within the EU, compared to 2.7% from the United States and 1.3% from China.

So the single market accounts for a huge volume of our trade, but if it is completed - so there are genuinely open markets for all services, the digital economy, energy and finance - we would see a dramatic increase

in economic growth, for Britain and the rest of Europe. The Capital Markets Union - initiated and led by Britain - will allow finance to flow freely between member states: the first proposal alone could lead to £110 billion in extra lending to businesses. A completed energy single market could save up to £50 billion per year across the EU by 2030. And a digital single market is estimated to be worth up to £330 billion a year to the European economy overall. As Britain is the leading country in Europe when it comes to the digital economy, that is an enormous opportunity for us all.

These changes will mean greater economic growth in Britain, higher wages in Britain and lower prices for consumers - in Britain. But they will not happen spontaneously and they require British leadership. And that is a crucial point in this referendum: if we leave the EU it is not just that we might not have access to these parts of the single market - these parts of the single market might never be created at all.

The economic case for remaining inside the European Union isn’t therefore just about risk, but about opportunity. And it isn’t just about fear, but about optimism - optimism that Britain can take a lead and deliver more trade and economic growth inside Europe and beyond.

There are risks we need to weigh, of course. And there are risks in staying as well as leaving. There is a big question mark, for example, about whether Britain, as a member state that has not adopted the euro, risks being discriminated against as the countries inside the Eurozone integrate further. When the European Central Bank said clearing houses dealing in large volumes of euros had to be located in the Eurozone, it could have forced LCH.Clearnet to move its euro business out of London, probably to Paris. That was struck down by the EU’s General Court, but the threat was clear. And that is why it was so important that the Prime Minister’s negotiation guaranteed a principle of non-discrimination against businesses from countries outside the Eurozone.

If we were not in the European Union, however, no such deal could have been agreed. There would be little we could do to stop discriminatory policies being introduced, and London’s position as the world’s leading financial centre would be in danger. The banks may be unpopular, but this is no small risk: financial services account for more than 7% of our economic output, 13% of our exports, a trade surplus of almost £60 billion - and more than one million British jobs.

But this is all about trade with Europe. What about trade with the rest of the world? It is tempting to look at developing countries’ economies, with their high growth rates, and see them as an alternative to trade with Europe. But just look at the reality of our trading relationship with China - with its dumping policies, protective tariffs and industrial-scale industrial espionage. And look at the figures. We export more to Ireland than we do to China, almost twice as much to Belgium as we do to India, and nearly 3 times as much to Sweden as we do to Brazil. It is not realistic to think we could just replace European trade with these new markets.

And anyway, this apparent choice is a false dichotomy. We should be aiming to increase our trade with these markets in addition to the business we win in Europe. Given that British exports in goods and services to countries outside the EU are rising, one can hardly argue that the EU prevents this from happening. Leaving the EU, on the other hand, might make it considerably harder. First, we would have to replace 36 existing trade agreements we have with non-EU countries that cover 53 markets. The EU trade deals Britain has been driving - with the US, worth £10 billion per year to the UK, with Japan, worth £5 billion a year to the UK, with Canada, worth £1.3 billion a year to the UK - would be in danger of collapse. And while we could certainly negotiate our own trade agreements, there would be no guarantee that they would be on terms as good as those we enjoy now. There would also be a considerable opportunity cost given the need to replace the existing agreements - not least with the EU itself - that we would have torn up as a consequence of our departure.

Inside the EU, without Britain, the balance of power in the Council of Ministers and European Parliament would change for the worse. The liberal, free-trading countries would find themselves far below the 35% blocking threshold needed in the council, while the countries that tend towards protectionism would have an even greater percentage of votes. There would be a very real danger that the EU heads in a protectionist direction, which would damage wider international trade and affect for the worse Britain’s future trade with the EU.

So, if we do vote to leave the European Union, we risk bringing the development of the single market to a halt, we risk a loss of investors and businesses to remaining EU member states driven by discriminatory EU policies, and we risk going backwards when it comes to international trade. But the big question is whether, in the event of Brexit, we would be able to negotiate a new free trade agreement with the EU and on what terms.

Some say we would strike deals that are the same as the EU’s agreements with Norway, Switzerland or even Canada. But with all due respect to those countries, we are a bigger and more powerful nation than all 3. Perhaps that means we could strike a better deal than they have. After all, Germany will still want to sell us their cars and the French will still want to sell us their wine. But in a stand-off between Britain and the EU, 44% of our exports is more important to us than 8% of the EU’s exports is to them.

With no agreement, we know that WTO rules would oblige the EU to charge 10% tariffs on UK car exports, in line with the tariffs they impose on Japan and the United States. They would be required to do the same for all other goods upon which they impose tariffs. Not all of these tariffs are as high as 10%, but some are considerably higher.

The reality is that we do not know on what terms we would have access to the single market. We do know that in a negotiation we would need to make concessions in order to access it, and those concessions could well be about accepting EU regulations, over which we would have no say, making financial contributions, just as we do now, accepting free movement rules, just as we do now, or quite possibly all 3 combined. It is not clear why other EU member states would give Britain a better deal than they themselves enjoy.

All of this would be negotiable, of course. For the reasons I listed earlier, Britain is big enough and strong enough to be a success story in or out of the EU. But the question is not whether we can survive Brexit: it is whether Brexit would make us better off. And that calculation has to include not only the medium to long-term effects but the immediate risks as well.

The union with Scotland and the other risks of Brexit

Now it is sometimes suggested that Brexit could lead to other countries seeking to leave the European Union. Some even believe that Brexit might be a fatal blow to the whole EU project. And some, I know, think that this would be a good thing. But I’m afraid I disagree. The disintegration of the EU would cause massive instability among our nearest neighbours and biggest trading partners. With the world economy in the fragile state it is, that would have real consequences for Britain.

But if Brexit isn’t fatal to the European Union, we might find that it is fatal to the union with Scotland. The SNP have already said that in the event that Britain votes to leave but Scotland votes to remain in the EU, they will press for another Scottish independence referendum. And the opinion polls show consistently that the Scottish people are more likely to be in favour of EU membership than the people of England and

Wales.

If the people of Scotland are forced to choose between the United Kingdom and the European Union we do not know what the result would be. But only a little more than 18 months after the referendum that kept the United Kingdom together, I do not want to see the country I love at risk of dismemberment once more. I do not want the people of Scotland to think that English Eurosceptics put their dislike of Brussels ahead of our bond with Edinburgh and Glasgow. I do not want the European Union to cause the destruction of an older and much more precious union, the union between England and Scotland.

Brexit also risks changing our friendships and alliances from further afield. In particular, as President Obama has said, it risks changing our alliance with the United States. Now I know as well as anybody the strength and importance of that partnership - our security and intelligence agencies have the closest working relationship of any 2 countries in the world - and I know that it would certainly survive Britain leaving the EU. But the Americans would respond to Brexit by finding a new strategic partner inside the European Union, a partner on matters of trade, diplomacy, security and defence, and our relationship with the United States would inevitably change as a result. That would not, I believe, be in our national interest.

We should remain in the EU

So I want to return to the principles I set out to help us judge whether Britain should join or remain a member of international institutions. Remaining inside the European Union does make us more secure, it does make us more prosperous and it does make us more influential beyond our shores.

Of course, we don’t get anything like everything we want, and we have to put up with a lot that we do not want. And when that happens, we should be honest about it. The Common Agricultural Policy, the Common Fisheries Policy, the free movement of people: none of these things work the way we would like them to work, and we need to be smarter about how we try to change these things in future. But that does not mean we have no control over the EU. Britain can and often does lead in Europe: the creation of the single market was driven by Mrs Thatcher, the competitiveness and trade agendas now pursued by the commission were begun at the behest of Britain and Germany, and I can tell you that on matters of counter-terrorism and security, the rest of Europe instinctively looks towards us. But it shouldn’t be a notable exception when Britain leads in Europe: it should become the norm.

And turning to the final test: to what extent does EU membership bind the hands of Parliament? Of course, every directive, regulation, treaty and court ruling limits our freedom to act. Yet Parliament remains sovereign: if it voted to leave the EU, we would do so. But unless and until the European Communities Act is repealed, Parliament has accepted that it can only act within the limits set by the European treaties and the judgments of the Court of Justice. The freedom to decide whether to remain a member of the EU or to leave will therefore always be in the hands of Parliament and the British people.

I do not want to stand here and insult people’s intelligence by claiming that everything about the EU is perfect, that membership of the EU is wholly good, nor do I believe those that say the sky will fall in if we vote to leave. The reality is that there are costs and benefits of our membership and, looking to the years and decades ahead, there are risks and opportunities too. The issues the country has to weigh up before this referendum are complex. But on balance, and given the tests I set earlier in my speech, I believe the case to remain a member of the European Union is strong.

A different European policy

For each of the principles I set out earlier, however, I cannot help but think there would be more still in the credit rather than debit column if Britain adopted a different approach to our engagement with the EU. Because we should be in no doubt that, if we vote to remain, our relationship with the European Union will go on changing. And that change - with new treaties on the horizon - might be for the better or worse.

And to those who say Britain cannot achieve what it needs in Europe, I say have more belief in what Britain can do. I say think about how Britain built the single market, and let’s be that ambitious - in the British national interest - once again.

Let us set clear objectives to complete the single market, to pursue new free trade deals with other countries, to reform the European economy and make it more competitive. Let’s work to ensure the countries of Europe can protect their borders from illegal immigrants, criminals and terrorists. Let’s try to make sure that more of our European allies play their part in protecting western interests abroad.

We need to have a clear strategy of engagement through the Council of Ministers, seek a bigger role for Britain inside the commission, try to stem the growth in power of the European Parliament, and work to limit the role of the Court of Justice. We need to work not only through the EU’s institutions and summits, but by also pursuing more bilateral diplomacy with other European governments.

And it is time to question some of the traditional British assumptions about our engagement with the EU. Do we stop the EU going in the wrong direction by shouting on the sidelines, or by leading and making the case for taking Europe in a better direction? And do we really still think it is in our interests to support automatically and unconditionally the EU’s further expansion? The states now negotiating to join the EU include Albania, Serbia and Turkey - countries with poor populations and serious problems with organised crime, corruption, and sometimes even terrorism. We have to ask ourselves, is it really right that the EU should just continue to expand, conferring upon all new member states all the rights of membership? Do we really think now is the time to contemplate a land border between the EU and countries like Iran, Iraq and Syria? Having agreed the end of the European principle of ‘ever closer union’, it is time to question the principle of ever wider expansion.

Stand tall and lead

So this is my analysis of the rights and wrongs, the opportunities and risks, of our membership of the EU - and the reasons I believe it is clearly in our national interest to remain a member of the European Union.

And I want to emphasise that I think we should stay inside the EU not because I think we’re too small to prosper in the world, not because I am pessimistic about Britain’s ability to get things done on the international stage. I think it’s right for us to remain precisely because I believe in Britain’s strength, in our economic, diplomatic and military clout, because I am optimistic about our future, because I believe in our ability to lead and not just follow.

But I know what a difficult decision this is going to be for a lot of people. I know, because of the conversations I have with my constituents every Saturday. Because of the discussions I’ve had with members of the public - and members of the Conservative Party - up and down the country. And because I myself have already gone through the process of carefully weighing up what is in Britain’s interests, now and in the future, before making my decision. Ultimately, this is a judgement for us all, and it’s right that people should take their time and listen to all the arguments.

So as we approach polling day, and as the country starts to weigh up its decision, let us focus on the future. Instead of debating the peripheral, the ephemeral and the trivial, let both sides of the argument debate what matters. And let us do so in a serious and mature way. Let us concentrate on Britain’s national interest. Britain’s future. Our influence around the world. Our security. And our prosperity. Let us make our decision with the great challenges of the future in mind. Let us have more confidence in our ability to get things done in Europe. This is about our future. Let us, Great Britain, stand tall and lead.

Published:

25 April 2016

From:

Home Office

The Rt Hon Theresa May MP

Part of:

EU referendum

Environment and countryside

Housing and local services

Money and tax

Passports, travel and living abroad

Visas and immigration

Working, jobs and pensions

Departments and policy

How government works

Departments

Worldwide

Policies

Publications

Announcements

Help Cookies Contact Terms and conditions Rhestr o Wasanaethau Cymraeg
Built by the Government Digital Service

Policy paper

The Belfast Agreement

From: Northern Ireland Office
First published: 10 April 1998
Part of: Northern Ireland political stability

This publication was published under the 1997 to 2001 Labour government

The Belfast Agreement, also known as the Good Friday Agreement, was reached in multi-party negotiations and signed on 10 April 1998.

Document

The Belfast Agreement

PDF, 204KB, 35 pages

This file may not be suitable for users of assistive technology. Request an accessible format.

Detail

The Belfast Agreement covers 3 areas:

- the creation of a democratically elected Assembly
- the creation of a North/South Ministerial Council
- the creation of a British-Irish Council and the British-Irish Governmental Conference

Published:

10 April 1998

From:

Northern Ireland Office

Part of:

Northern Ireland political stability

Departments

Worldwide

Policies

Publications

Announcements

Help Cookies Contact Terms and conditions Rhestr o Wasanaethau Cymraeg
Built by the Government Digital Service

The Agreement

Agreement reached in the multi-party negotiations

TABLE OF CONTENTS

- -

ANNEX: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland.

Tablecontents.htm

DECLARATION OF SUPPORT

1. We, the participants in the multi-party negotiations, believe that the agreement we have negotiated offers a truly historic opportunity for a new beginning.

2. The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all.

3. We are committed to partnership, equality and mutual respect as the basis of relationships within Northern Ireland, between North and South, and between these islands.

4. We reaffirm our total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, and our opposition to any use or threat of force by others for any political purpose, whether in regard to this agreement or otherwise.

5. We acknowledge the substantial differences between our continuing,

and equally legitimate, political aspirations. However, we will endeavour to strive in every practical way towards reconciliation and rapprochement within the framework of democratic and agreed arrangements. We pledge that we will, in good faith, work to ensure the success of each and every one of the arrangements to be established under this agreement. It is accepted that all of the institutional and constitutional arrangements - an Assembly in Northern Ireland, a North/South Ministerial Council, implementation bodies, a British-Irish Council and a British-Irish Intergovernmental Conference and any amendments to British Acts of Parliament and the Constitution of Ireland - are interlocking and interdependent and that in particular the functioning of the Assembly and the North/South Council are so closely inter-related that the success of each depends on that of the other.

6. Accordingly, in a spirit of concord, we strongly commend this agreement to the people, North and South, for their approval.

CONSTITUTIONAL ISSUES

1. The participants endorse the commitment made by the British and Irish Governments that, in a new British-Irish Agreement replacing the Anglo-Irish Agreement, they will:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and, accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

2. The participants also note that the two Governments have accordingly undertaken in the context of this comprehensive political agreement, to propose and support changes in, respectively, the Constitution of Ireland and in British legislation relating to the constitutional status of Northern Ireland.

ANNEX A

DRAFT CLAUSES/SCHEDULES FOR INCORPORATION IN BRITISH LEGISLATION

1. (1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

2. The Government of Ireland Act 1920 is repealed; and this Act shall have effect notwithstanding any other previous enactment.

SCHEDULE 1

POLLS FOR THE PURPOSE OF SECTION 1

1. The Secretary of State may by order direct the holding of a poll for the purposes of section 1 on a date specified in the order.

2. Subject to paragraph 3, the Secretary of State shall exercise the power under paragraph 1 if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.

3. The Secretary of State shall not make an order under paragraph 1 earlier than seven years after the holding of a previous poll under this Schedule.

4. (Remaining paragraphs along the lines of paragraphs 2 and 3 of existing Schedule 1 to 1973 Act.)

ANNEX B

IRISH GOVERNMENT DRAFT LEGISLATION TO AMEND THE CONSTITUTION

Add to Article 29 the following sections:

7.

1. The State may consent to be bound by the British-Irish Agreement done at Belfast on the day of 1998, hereinafter called the Agreement.

1. Any institution established by or under the Agreement may exercise the powers and functions thereby conferred on it in respect of all or any part of the island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution. Any power or function conferred on such an institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person or organ of State as aforesaid.

1. If the Government declare that the State has become obliged, pursuant to the Agreement, to give effect to the amendment of this Constitution referred to therein, then, notwithstanding Article 46 hereof, this Constitution shall be amended as follows:

i. the following Articles shall be substituted for Articles 2 and 3 of the Irish text:

"2. [Irish text to be inserted here]

3. [Irish text to be inserted here]"

ii. the following Articles shall be substituted for Articles 2 and 3 of the English text:

"Article 2

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3

1. It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.

2. Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the island."

iii. the following section shall be added to the Irish text of this Article:

"8. [Irish text to be inserted here]"

and

iv. the following section shall be added to the English text of this Article:

"8. The State may exercise extra-territorial jurisdiction in accordance with the generally recognised principles of international law."

4. If a declaration under this section is made, this subsection and subsection 3, other than the amendment of this Constitution effected thereby, and subsection 5 of this section shall be omitted from every official text of this Constitution published thereafter, but notwithstanding such omission this section shall continue to have the force of law.

5. If such a declaration is not made within twelve months of this section being added to this Constitution or such longer period as may be provided for by law, this section shall cease to have effect and shall be omitted from every official text of this Constitution published thereafter.

STRAND ONE

DEMOCRATIC INSTITUTIONS IN NORTHERN IRELAND

1. This agreement provides for a democratically elected Assembly in Northern Ireland which is inclusive in its membership, capable of exercising executive and legislative authority, and subject to safeguards to protect the rights and interests of all sides of the community.

The Assembly

2. A 108-member Assembly will be elected by PR(STV) from existing Westminster constituencies.

3. The Assembly will exercise full legislative and executive authority in respect of those matters currently within the responsibility of the six Northern Ireland Government Departments, with the possibility of taking on responsibility for other matters as detailed elsewhere in this agreement.

4. The Assembly - operating where appropriate on a cross-community basis - will be the prime source of authority in respect of all devolved responsibilities.

Safeguards

5. There will be safeguards to ensure that all sections of the community can participate and work together successfully in the operation of these institutions and that all sections of the community are protected, including:

(a) allocations of Committee Chairs, Ministers and Committee membership in proportion to party strengths;

(b) the European Convention on Human Rights (ECHR) and any Bill of Rights for Northern Ireland supplementing it, which neither the Assembly nor public bodies can infringe, together with a Human Rights Commission;

(c) arrangements to provide that key decisions and legislation are proofed to ensure that they do not infringe the ECHR and any Bill of Rights for Northern Ireland;

(d) arrangements to ensure key decisions are taken on a cross-community basis;

(i) either parallel consent, i.e. a majority of those members present and voting, including a majority of the unionist and nationalist designations present and voting;

(ii) or a weighted majority (60%) of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.

Key decisions requiring cross-community support will be designated in advance, including election of the Chair of the Assembly, the First Minister and Deputy First Minister, standing orders and budget allocations. In other cases such decisions could be triggered by a petition of concern brought by a significant minority of Assembly members (30/108).

(e) an Equality Commission to monitor a statutory obligation to promote equality of opportunity in specified areas and parity of esteem between the two main communities, and to investigate individual complaints against public bodies.

Operation of the Assembly

6. At their first meeting, members of the Assembly will register a designation of identity - nationalist, unionist or other - for the purposes of measuring cross-community support in Assembly votes under the relevant provisions above.

7. The Chair and Deputy Chair of the Assembly will be elected on a cross-community basis, as set out in paragraph 5(d) above.

8. There will be a Committee for each of the main executive functions of the Northern Ireland Administration. The Chairs and Deputy Chairs of the Assembly Committees will be allocated proportionally, using the d'Hondt system. Membership of the Committees will be in broad proportion to party strengths in the Assembly to ensure that the opportunity of Committee places is available to all members.

9. The Committees will have a scrutiny, policy development and consultation role with respect to the Department with which each is associated, and will have a role in initiation of legislation. They will have the power to:

- consider and advise on Departmental budgets and Annual Plans in the context of the overall budget allocation;
- approve relevant secondary legislation and take the Committee stage of relevant primary legislation;
- call for persons and papers;
- initiate enquiries and make reports;
- consider and advise on matters brought to the Committee by its Minister.

10. Standing Committees other than Departmental Committees may be established as may be required from time to time.

11. The Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights. The Committee shall have the power to call people and papers to assist in its consideration of the matter. The Assembly shall then consider the report of the Committee and can determine the matter in accordance with the cross-community consent procedure.

12. The above special procedure shall be followed when requested by the Executive Committee, or by the relevant Departmental Committee, voting on a cross-community basis.

13. When there is a petition of concern as in 5(d) above, the Assembly shall vote to determine whether the measure may proceed without reference to this special procedure. If this fails to achieve support on a cross-community basis, as in 5(d)(i) above, the special procedure shall be followed.

Executive Authority

14. Executive authority to be discharged on behalf of the Assembly by a First Minister

and Deputy First Minister and up to ten Ministers with Departmental responsibilities.

15. The First Minister and Deputy First Minister shall be jointly elected into office by the Assembly voting on a cross-community basis, according to 5(d)(i) above.

16. Following the election of the First Minister and Deputy First Minister, the posts of Ministers will be allocated to parties on the basis of the d'Hondt system by reference to the number of seats each party has in the Assembly.

17. The Ministers will constitute an Executive Committee, which will be convened, and presided over, by the First Minister and Deputy First Minister.

18. The duties of the First Minister and Deputy First Minister will include, inter alia, dealing with and co-ordinating the work of the Executive Committee and the response of the Northern Ireland administration to external relationships.

19. The Executive Committee will provide a forum for the discussion of, and agreement on, issues which cut across the responsibilities of two or more Ministers, for prioritising executive and legislative proposals and for recommending a common position where necessary (e.g. in dealing with external relationships).

20. The Executive Committee will seek to agree each year, and review as necessary, a programme incorporating an agreed budget linked to policies and programmes, subject to approval by the Assembly, after scrutiny in Assembly Committees, on a cross-community basis.

21. A party may decline the opportunity to nominate a person to serve as a Minister or may subsequently change its nominee.

22. All the Northern Ireland Departments will be headed by a Minister. All Ministers will liaise regularly with their respective Committee.

23. As a condition of appointment, Ministers, including the First Minister and Deputy First Minister, will affirm the terms of a Pledge of Office (Annex A) undertaking to discharge effectively and in good faith all the responsibilities attaching to their office.

24. Ministers will have full executive authority in their respective areas of responsibility, within any broad programme agreed by the Executive Committee and endorsed by the Assembly as a whole.

25. An individual may be removed from office following a decision of the Assembly taken on a cross-community basis, if (s)he loses the confidence of the Assembly, voting on a cross-community basis, for failure to meet his or her responsibilities including, inter alia, those set out in the Pledge of Office. Those who hold office should use only democratic, non-violent means, and those who do not should be excluded or removed from office under these provisions.

Legislation

26. The Assembly will have authority to pass primary legislation for Northern Ireland in devolved areas, subject to:

(a) the ECHR and any Bill of Rights for Northern Ireland supplementing it which, if the courts found to be breached, would render the relevant legislation null and void;

(b) decisions by simple majority of members voting, except when decision on a cross-community basis is required;

(c) detailed scrutiny and approval in the relevant Departmental Committee;

(d) mechanisms, based on arrangements proposed for the Scottish Parliament, to ensure suitable co-ordination, and avoid disputes, between the Assembly and the Westminster Parliament;

(e) option of the Assembly seeking to include Northern Ireland provisions in United Kingdom-wide legislation in the Westminster Parliament,

especially on devolved issues where parity is normally maintained (e.g. social security, company law).

27. The Assembly will have authority to legislate in reserved areas with the approval of the Secretary of State and subject to Parliamentary control.

28. Disputes over legislative competence will be decided by the Courts.

29. Legislation could be initiated by an individual, a Committee or a Minister.

Relations with other institutions

30. Arrangements to represent the Assembly as a whole, at Summit level and in dealings with other institutions, will be in accordance with paragraph 18, and will be such as to ensure cross-community involvement.

31. Terms will be agreed between appropriate Assembly representatives and the Government of the United Kingdom to ensure effective co-ordination and input by Ministers to national policy-making, including on EU issues.

32. Role of Secretary of State:

(a) to remain responsible for NIO matters not devolved to the Assembly, subject to regular consultation with the Assembly and Ministers;

(b) to approve and lay before the Westminster Parliament any Assembly legislation on reserved matters;

(c) to represent Northern Ireland interests in the United Kingdom Cabinet;

(d) to have the right to attend the Assembly at their invitation.

33. The Westminster Parliament (whose power to make legislation for Northern Ireland would remain unaffected) will:

(a) legislate for non-devolved issues, other than where the Assembly legislates with the approval of the Secretary of State and subject to the control of Parliament;

(b) to legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland;

(c) scrutinise, including through the Northern Ireland Grand and Select Committees, the responsibilities of the Secretary of State.

34. A consultative Civic Forum will be established. It will comprise representatives of the business, trade union and voluntary sectors, and such other sectors as agreed by the First Minister and the Deputy First Minister. It will act as a consultative mechanism on social, economic and cultural issues. The First Minister and the Deputy First Minister will by agreement provide administrative support for the Civic Forum and establish guidelines for the selection of representatives to the Civic Forum.

Transitional Arrangements

35. The Assembly will meet first for the purpose of organisation, without legislative or executive powers, to resolve its standing orders and working practices and make preparations for the effective functioning of the Assembly, the British-Irish Council and the North/South Ministerial Council and associated implementation bodies. In this transitional period, those members of the Assembly serving as shadow Ministers shall affirm their commitment to non-violence and exclusively peaceful and democratic means and their opposition to any use or threat of force by others for any political purpose; to work in good faith to bring the new arrangements into being; and to observe the spirit of the Pledge of Office applying to appointed Ministers.

Review

36. After a specified period there will be a review of these arrangements, including the details of electoral arrangements and of the Assembly's procedures, with a view to agreeing any adjustments necessary in the interests of efficiency and fairness.

Annex A

Pledge of Office

To pledge:

(a) to discharge in good faith all the duties of office;

(b) commitment to non-violence and exclusively peaceful and democratic means;

(c) to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination;

(d) to participate with colleagues in the preparation of a programme for government;

(e) to operate within the framework of that programme when agreed within the Executive Committee and endorsed by the Assembly;

(f) to support, and to act in accordance with, all decisions of the Executive Committee and Assembly;

(g) to comply with the Ministerial Code of Conduct.

CODE OF CONDUCT

Ministers must at all times:

- observe the highest standards of propriety and regularity involving impartiality, integrity and objectivity in relationship to the stewardship of public funds;
- be accountable to users of services, the community and, through the Assembly, for the activities within their responsibilities, their stewardship of public funds and the extent to which key performance targets and objectives have been met;
- ensure all reasonable requests for information from the Assembly, users of services and individual citizens are complied with; and that Departments and their staff conduct their dealings with the public in an open and responsible way;
- follow the seven principles of public life set out by the Committee on Standards in Public Life;
- comply with this code and with rules relating to the use of public funds;
- operate in a way conducive to promoting good community relations and equality of treatment;
- not use information gained in the course of their service for personal gain; nor seek to use the opportunity of public service to promote their private interests;
- ensure they comply with any rules on the acceptance of gifts and hospitality that might be offered;
- declare any personal or business interests which may conflict with their responsibilities. The Assembly will retain a Register of Interests. Individuals must ensure that any direct or indirect pecuniary interests which members of the public might reasonably think could influence their judgement are listed in the Register of Interests;

STRAND TWO

NORTH/SOUTH MINISTERIAL COUNCIL

1. Under a new British/Irish Agreement dealing with the totality of relationships, and related legislation at Westminster and in the Oireachtas, a North/South Ministerial Council to be established to bring together

those with executive responsibilities in Northern Ireland and the Irish Government, to develop consultation, co-operation and action within the island of Ireland - including through implementation on an all-island and cross-border basis - on matters of mutual interest within the competence of the Administrations, North and South.

2. All Council decisions to be by agreement between the two sides. Northern Ireland to be represented by the First Minister, Deputy First Minister and any relevant Ministers, the Irish Government by the Taoiseach and relevant Ministers, all operating in accordance with the rules for democratic authority and accountability in force in the Northern Ireland Assembly and the Oireachtas respectively. Participation in the Council to be one of the essential responsibilities attaching to relevant posts in the two Administrations. If a holder of a relevant post will not participate normally in the Council, the Taoiseach in the case of the Irish Government and the First and Deputy First Minister in the case of the Northern Ireland Administration to be able to make alternative arrangements.

3. The Council to meet in different formats:

(i) in plenary format twice a year, with Northern Ireland representation led by the First Minister and Deputy First Minister and the Irish Government led by the Taoiseach;

(ii) in specific sectoral formats on a regular and frequent basis with each side represented by the appropriate Minister;

(iii) in an appropriate format to consider institutional or cross-sectoral matters (including in relation to the EU) and to resolve disagreement.

4. Agendas for all meetings to be settled by prior agreement between the two sides, but it will be open to either to propose any matter for consideration or action.

5. The Council:

(i) to exchange information, discuss and consult with a view to co-operating on matters of mutual interest within the competence of both Administrations, North and South;

(ii) to use best endeavours to reach agreement on the adoption of common policies, in areas where there is a mutual cross-border and all-island benefit, and which are within the competence of both Administrations, North and South, making determined efforts to overcome any disagreements;

(iii) to take decisions by agreement on policies for implementation separately in each jurisdiction, in relevant meaningful areas within the competence of both Administrations, North and South;

(iv) to take decisions by agreement on policies and action at an all-island and cross-border level to be implemented by the bodies to be established as set out in paragraphs 8 and 9 below.

6. Each side to be in a position to take decisions in the Council within the defined authority of those attending, through the arrangements in place for co-ordination of executive functions within each jurisdiction. Each side to remain accountable to the Assembly and Oireachtas respectively, whose approval, through the arrangements in place on either side, would be required for decisions beyond the defined authority of those attending.

7. As soon as practically possible after elections to the Northern Ireland Assembly, inaugural meetings will take place of the Assembly, the British/Irish Council and the North/South Ministerial Council in their transitional forms. All three institutions will meet regularly and frequently on this basis during the period between the elections to the Assembly, and the transfer of powers to the Assembly, in order to establish their modus operandi.

8. During the transitional period between the elections to the Northern Ireland Assembly and the transfer of power to it, representatives of the Northern Ireland transitional Administration and the Irish Government operating in the North/South Ministerial Council will undertake a work programme, in consultation with the British Government, covering at least 12 subject areas, with a view to identifying and agreeing by 31 October 1998 areas where co-operation and implementation for mutual benefit will take place. Such areas may include matters in the list set out in the Annex.

9. As part of the work programme, the Council will identify and agree at least 6 matters for co-operation and implementation in each of the following categories:

(I) Matters where existing bodies will be the appropriate mechanisms for co-operation in each separate jurisdiction;

(ii) Matters where the co-operation will take place through agreed implementation bodies on a cross-border or all-island level.

10. The two Governments will make necessary legislative and other enabling preparations to ensure, as an absolute commitment, that these bodies, which have been agreed as a result of the work programme, function at the time of the inception of the British-Irish Agreement and the transfer of powers, with legislative authority for these bodies transferred to the Assembly as soon as possible thereafter. Other arrangements for the agreed co-operation will also commence contemporaneously with the transfer of powers to the Assembly.

11. The implementation bodies will have a clear operational remit. They will implement on an all-island and cross-border basis policies agreed in

the Council.

12. Any further development of these arrangements to be by agreement in the Council and with the specific endorsement of the Northern Ireland Assembly and Oireachtas, subject to the extent of the competences and responsibility of the two Administrations.

13. It is understood that the North/South Ministerial Council and the Northern Ireland Assembly are mutually inter-dependent, and that one cannot successfully function without the other.

14. Disagreements within the Council to be addressed in the format described at paragraph 3(iii) above or in the plenary format. By agreement between the two sides, experts could be appointed to consider a particular matter and report.

15. Funding to be provided by the two Administrations on the basis that the Council and the implementation bodies constitute a necessary public function.

16. The Council to be supported by a standing joint Secretariat, staffed by members of the Northern Ireland Civil Service and the Irish Civil Service.

17. The Council to consider the European Union dimension of relevant matters, including the implementation of EU policies and programmes and proposals under consideration in the EU framework. Arrangements to be made to ensure that the views of the Council are taken into account and represented appropriately at relevant EU meetings.

18. The Northern Ireland Assembly and the Oireachtas to consider developing a joint parliamentary forum, bringing together equal numbers from both institutions for discussion of matters of mutual interest and concern.

19. Consideration to be given to the establishment of an independent consultative forum appointed by the two Administrations, representative of civil society, comprising the social partners and other members with expertise in social, cultural, economic and other issues.

ANNEX

Areas for North-South co-operation and implementation may include the following:

1. Agriculture - animal and plant health.

2. Education - teacher qualifications and exchanges.

3. Transport - strategic transport planning.

4. Environment - environmental protection, pollution, water quality, and waste management.

5. Waterways - inland waterways.

6. Social Security/Social Welfare - entitlements of cross-border workers and fraud control.

7. Tourism - promotion, marketing, research, and product development.

8. Relevant EU Programmes such as SPPR, INTERREG, Leader II and their successors.

9. Inland Fisheries.

10. Aquaculture and marine matters

11. Health: accident and emergency services and other related cross-border issues.

12. Urban and rural development.

Others to be considered by the shadow North/ South Council.

STRAND THREE

BRITISH-IRISH COUNCIL

1. A British-Irish Council (BIC) will be established under a new British-Irish Agreement to promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands.

2. Membership of the BIC will comprise representatives of the British and Irish Governments, devolved institutions in Northern Ireland, Scotland and Wales, when established, and, if appropriate, elsewhere in the United Kingdom, together with representatives of the Isle of Man and the Channel Islands.

3. The BIC will meet in different formats: at summit level, twice per year; in specific sectoral formats on a regular basis, with each side represented by the appropriate Minister; in an appropriate format to consider cross-sectoral matters.

4. Representatives of members will operate in accordance with whatever procedures for democratic authority and accountability are in force in their respective elected institutions.

5. The BIC will exchange information, discuss, consult and use best endeavours to reach agreement on co-operation on matters of mutual interest within the competence of the relevant Administrations. Suitable issues for early discussion in the BIC could include transport links, agricultural issues, environmental issues, cultural issues, health issues, education issues and approaches to EU issues. Suitable arrangements to be made for practical co-operation on agreed policies.

6. It will be open to the BIC to agree common policies or common actions. Individual members may opt not to participate in such common policies and common action.

7. The BIC normally will operate by consensus. In relation to decisions on common policies or common actions, including their means of implementation, it will operate by agreement of all members participating in such policies or actions.

8. The members of the BIC, on a basis to be agreed between them, will provide such financial support as it may require.

9. A secretariat for the BIC will be provided by the British and Irish Governments in co-ordination with officials of each of the other members.

10. In addition to the structures provided for under this agreement, it will be open to two or more members to develop bilateral or multilateral arrangements between them. Such arrangements could include, subject to the agreement of the members concerned, mechanisms to enable consultation, co-operation and joint decision-making on matters of mutual interest; and mechanisms to implement any joint decisions they may reach. These arrangements will not require the prior approval of the BIC as a whole and will operate independently of it.

11. The elected institutions of the members will be encouraged to develop interparliamentary links, perhaps building on the British-Irish Interparliamentary Body.

12. The full membership of the BIC will keep under review the workings of the Council, including a formal published review at an appropriate time after the Agreement comes into effect, and will contribute as appropriate to any review of the overall political agreement arising from the multi-party negotiations.

BRITISH-IRISH INTERGOVERNMENTAL CONFERENCE

1. There will be a new British-Irish Agreement dealing with the totality of relationships. It will establish a standing British-Irish Intergovernmental Conference, which will subsume both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Agreement.

2. The Conference will bring together the British and Irish Governments to promote bilateral co-operation at all levels on all matters of mutual interest within the competence of both Governments.

3. The Conference will meet as required at Summit level (Prime Minister and Taoiseach). Otherwise, Governments will be represented by appropriate Ministers. Advisers, including police and security advisers, will attend as appropriate.

4. All decisions will be by agreement between both Governments. The Governments will make determined efforts to resolve disagreements between them. There will be no derogation from the sovereignty of either Government.

5. In recognition of the Irish Government's special interest in Northern Ireland and of the extent to which issues of mutual concern arise in relation to Northern Ireland, there will be regular and frequent meetings of the Conference concerned with non-devolved Northern Ireland matters, on which the Irish Government may put forward views and proposals. These meetings, to be co-chaired by the Minister for Foreign Affairs and the Secretary of State for Northern Ireland, would also deal with all-island and cross-border co-operation on non-devolved issues.

6. Co-operation within the framework of the Conference will include facilitation of co-operation in security matters. The Conference also will address, in particular, the areas of rights, justice, prisons and policing in Northern Ireland (unless and until responsibility is devolved to a Northern Ireland administration) and will intensify co-operation between the two Governments on the all-island or cross-border aspects of these matters.

7. Relevant executive members of the Northern Ireland Administration will be involved in meetings of the Conference, and in the reviews referred to in paragraph 9 below to discuss non-devolved Northern Ireland matters.

8. The Conference will be supported by officials of the British and Irish Governments, including by a standing joint Secretariat of officials dealing with non-devolved Northern Ireland matters.

9. The Conference will keep under review the workings of the new British-Irish Agreement and the machinery and institutions established under it, including a formal published review three years after the Agreement comes into effect. Representatives of the Northern Ireland Administration will be invited to express views to the Conference in this context. The Conference will contribute as appropriate to any review of the overall political agreement arising from the multi-party negotiations but will have no power to override the democratic arrangements set up by this Agreement.

RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY

Human Rights

1. The parties affirm their commitment to the mutual respect, the civil rights and the religious liberties of everyone in the community. Against the background of the recent history of communal conflict, the parties affirm in particular:

- the right of free political thought;
- the right to freedom and expression of religion;
- the right to pursue democratically national and political aspirations;
- the right to seek constitutional change by peaceful and legitimate means;
- the right to freely choose one's place of residence;
- the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity;
- the right to freedom from sectarian harassment; and
- the right of women to full and equal political participation.

United Kingdom Legislation

2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.

3. Subject to the outcome of public consultation underway, the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables.

4. The new Northern Ireland Human Rights Commission (see paragraph 5

below) will be invited to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and

- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

New Institutions in Northern Ireland

5. A new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so.

6. Subject to the outcome of public consultation currently underway, the British Government intends a new statutory Equality Commission to replace the Fair Employment Commission, the Equal Opportunities Commission (NI), the Commission for Racial Equality (NI) and the Disability Council. Such a unified Commission will advise on, validate and monitor the statutory obligation and will investigate complaints of default.

7. It would be open to a new Northern Ireland Assembly to consider bringing together its responsibilities for these matters into a dedicated Department of Equality.

8. These improvements will build on existing protections in Westminster legislation in respect of the judiciary, the system of justice and policing.

Comparable Steps by the Irish Government

9. The Irish Government will also take steps to further strengthen the protection of human rights in its jurisdiction. The Government will, taking

account of the work of the All-Party Oireachtas Committee on the Constitution and the Report of the Constitution Review Group, bring forward measures to strengthen and underpin the constitutional protection of human rights. These proposals will draw on the European Convention on Human Rights and other international legal instruments in the field of human rights and the question of the incorporation of the ECHR will be further examined in this context. The measures brought forward would ensure at least an equivalent level of protection of human rights as will pertain in Northern Ireland. In addition, the Irish Government will:

- establish a Human Rights Commission with a mandate and remit equivalent to that within Northern Ireland;

- proceed with arrangements as quickly as possible to ratify the Council of Europe Framework Convention on National Minorities (already ratified by the UK);

- implement enhanced employment equality legislation;

- introduce equal status legislation; and

- continue to take further active steps to demonstrate its respect for the different traditions in the island of Ireland.

A Joint Committee

10. It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland.

Reconciliation and Victims of Violence

11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.

12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the troubles face particular difficulties and will support the development of special community-based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and

community-based voluntary organisations facilitating locally-based self-help and support networks. This will require the allocation of sufficient resources, including statutory funding as necessary, to meet the needs of victims and to provide for community-based support programmes.

13. The participants recognise and value the work being done by many organisations to develop reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South, and they see such work as having a vital role in consolidating peace and political agreement. Accordingly, they pledge their continuing support to such organisations and will positively examine the case for enhanced financial assistance for the work of reconciliation. An essential aspect of the reconciliation process is the promotion of a culture of tolerance at every level of society, including initiatives to facilitate and encourage integrated education and mixed housing.

RIGHTS, SAFEGUARDS AND EQUALITY OF OPPORTUNITY

Economic, Social and Cultural Issues

1. Pending the devolution of powers to a new Northern Ireland Assembly, the British Government will pursue broad policies for sustained economic growth and stability in Northern Ireland and for promoting social inclusion, including in particular community development and the advancement of women in public life.

2. Subject to the public consultation currently under way, the British Government will make rapid progress with:

(i) a new regional development strategy for Northern Ireland, for consideration in due course by a the Assembly, tackling the problems of a divided society and social cohesion in urban, rural and border areas, protecting and enhancing the environment, producing new approaches to transport issues, strengthening the physical infrastructure of the region, developing the advantages and resources of rural areas and rejuvenating major urban centres;

(ii) a new economic development strategy for Northern Ireland, for consideration in due course by a the Assembly, which would provide for short and medium term economic planning linked as appropriate to the regional development strategy; and

(iii) measures on employment equality included in the recent White Paper ("Partnership for Equality") and covering the extension and strengthening of anti-discrimination legislation, a review of the national security aspects of the present fair employment legislation at the earliest possible time, a new more focused Targeting Social Need initiative and a range of

measures aimed at combating unemployment and progressively eliminating the differential in unemployment rates between the two communities by targeting objective need.

3. All participants recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic communities, all of which are part of the cultural wealth of the island of Ireland.

4. In the context of active consideration currently being given to the UK signing the Council of Europe Charter for Regional or Minority Languages, the British Government will in particular in relation to the Irish language, where appropriate and where people so desire it:

• take resolute action to promote the language;

• facilitate and encourage the use of the language in speech and writing in public and private life where there is appropriate demand;

• seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of the language;

• make provision for liaising with the Irish language community, representing their views to public authorities and investigating complaints;

• place a statutory duty on the Department of Education to encourage and facilitate Irish medium education in line with current provision for integrated education;

• explore urgently with the relevant British authorities, and in co-operation with the Irish broadcasting authorities, the scope for achieving more widespread availability of Teilifis na Gaeilige in Northern Ireland;

• seek more effective ways to encourage and provide financial support for Irish language film and television production in Northern Ireland; and

• encourage the parties to secure agreement that this commitment will be sustained by a new Assembly in a way which takes account of the desires and sensitivities of the community.

5. All participants acknowledge the sensitivity of the use of symbols and emblems for public purposes, and the need in particular in creating the new institutions to ensure that such symbols and emblems are used in a manner which promotes mutual respect rather than division. Arrangements will be made to monitor this issue and consider what action might be required.

DECOMMISSIONING

1. Participants recall their agreement in the Procedural Motion adopted on 24 September 1997 "that the resolution of the decommissioning issue is an indispensable part of the process of negotiation", and also recall the provisions of paragraph 25 of Strand 1 above.

2. They note the progress made by the Independent International Commission on Decommissioning and the Governments in developing schemes which can represent a workable basis for achieving the decommissioning of illegally-held arms in the possession of paramilitary groups.

3. All participants accordingly reaffirm their commitment to the total disarmament of all paramilitary organisations. They also confirm their intention to continue to work constructively and in good faith with the Independent Commission, and to use any influence they may have, to achieve the decommissioning of all paramilitary arms within two years following endorsement in referendums North and South of the agreement and in the context of the implementation of the overall settlement.

4. The Independent Commission will monitor, review and verify progress on decommissioning of illegal arms, and will report to both Governments at regular intervals.

6. Both Governments will take all necessary steps to facilitate the decommissioning process to include bringing the relevant schemes into force by the end of June.

SECURITY

1. The participants note that the development of a peaceful environment on the basis of this agreement can and should mean a normalisation of security arrangements and practices.

2. The British Government will make progress towards the objective of as early a return as possible to normal security arrangements in Northern Ireland, consistent with the level of threat and with a published overall strategy, dealing with:

(i) the reduction of the numbers and role of the Armed Forces deployed in Northern Ireland to levels compatible with a normal peaceful society;

(ii) the removal of security installations;

(iii) the removal of emergency powers in Northern Ireland; and

(iv) other measures appropriate to and compatible with a normal peaceful society.

3. The Secretary of State will consult regularly on progress, and the

response to any continuing paramilitary activity, with the Irish Government and the political parties, as appropriate.

4. The British Government will continue its consultation on firearms regulation and control on the basis of the document published on 2 April 1998.

5. The Irish Government will initiate a wide-ranging review of the Offences Against the State Acts 1939-85 with a view to both reform and dispensing with those elements no longer required as circumstances permit.

POLICING AND JUSTICE

1. The participants recognise that policing is a central issue in any society. They equally recognise that Northern Ireland's history of deep divisions has made it highly emotive, with great hurt suffered and sacrifices made by many individuals and their families, including those in the RUC and other public servants. They believe that the agreement provides the opportunity for a new beginning to policing in Northern Ireland with a police service capable of attracting and sustaining support from the community as a whole. They also believe that this agreement offers a unique opportunity to bring about a new political dispensation which will recognise the full and equal legitimacy and worth of the identities, senses of allegiance and ethos of all sections of the community in Northern Ireland. They consider that this opportunity should inform and underpin the development of a police service representative in terms of the make-up of the community as a whole and which, in a peaceful environment, should be routinely unarmed.

2. The participants believe it essential that policing structures and arrangements are such that the police service is professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms. The participants also believe that those structures and arrangements must be capable of maintaining law and order including responding effectively to crime and to any terrorist threat and to public order problems. A police service which cannot do so will fail to win public confidence and acceptance. They believe that any such structures and arrangements should be capable of delivering a policing service, in constructive and inclusive partnerships with the community at all levels, and with the maximum delegation of authority and responsibility, consistent with the foregoing principles. These arrangements should be based on principles of protection of human rights and professional integrity and should be unambiguously accepted and actively supported by the entire community.

3. An independent Commission will be established to make

recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread community support for these arrangements within the agreed framework of principles reflected in the paragraphs above and in accordance with the terms of reference at Annex A. The Commission will be broadly representative with expert and international representation among its membership and will be asked to consult widely and to report no later than Summer 1999.

4. The participants believe that the aims of the criminal justice system are to:

• deliver a fair and impartial system of justice to the community;

• be responsive to the community's concerns, and encouraging community involvement where appropriate;

• have the confidence of all parts of the community; and

• deliver justice efficiently and effectively.

5. There will be a parallel wide-ranging review of criminal justice (other than policing and those aspects of the system relating to the emergency legislation) to be carried out by the British Government through a mechanism with an independent element, in consultation with the political parties and others. The review will commence as soon as possible, will include wide consultation, and a report will be made to the Secretary of State no later than Autumn 1999. Terms of Reference are attached at Annex B.

6. Implementation of the recommendations arising from both reviews will be discussed with the political parties and with the Irish Government.

7. The participants also note that the British Government remains ready in principle, with the broad support of the political parties, and after consultation, as appropriate, with the Irish Government, in the context of ongoing implementation of the relevant recommendations, to devolve responsibility for policing and justice issues.

ANNEX A

COMMISSION ON POLICING FOR NORTHERN IRELAND

Terms of Reference

Taking account of the principles on policing as set out in the agreement, the Commission will inquire into policing in Northern Ireland and, on the basis of its findings, bring forward proposals for future policing structures

and arrangements, including means of encouraging widespread community support for those arrangements.

Its proposals on policing should be designed to ensure that policing arrangements, including composition, recruitment, training, culture, ethos and symbols, are such that in a new approach Northern Ireland has a police service that can enjoy widespread support from, and is seen as an integral part of, the community as a whole.

Its proposals should include recommendations covering any issues such as re-training, job placement and educational and professional development required in the transition to policing in a peaceful society.

Its proposals should also be designed to ensure that:

- the police service is structured, managed and resourced so that it can be effective in discharging its full range of functions (including proposals on any necessary arrangements for the transition to policing in a normal peaceful society);
- the police service is delivered in constructive and inclusive partnerships with the community at all levels with the maximum delegation of authority and responsibility;
- the legislative and constitutional framework requires the impartial discharge of policing functions and conforms with internationally accepted norms in relation to policing standards;
- the police operate within a clear framework of accountability to the law and the community they serve, so:
• they are constrained by, accountable to and act only within the law;

• their powers and procedures, like the law they enforce, are clearly established and publicly available;

• there are open, accessible and independent means of investigating and adjudicating upon complaints against the police;

• there are clearly established arrangements enabling local people, and their political representatives, to articulate their views and concerns about policing and to establish publicly policing priorities and influence policing policies, subject to safeguards to ensure police impartiality and freedom from partisan political control;

• there are arrangements for accountability and for the effective, efficient and economic use of resources in achieving policing objectives;

• there are means to ensure independent professional scrutiny and inspection of the police service to ensure that proper professional standards are maintained;

- the scope for structured co-operation with the Garda Siochana and other police forces is addressed; and
- the management of public order events which can impose exceptional demands on policing resources is also addressed.

The Commission should focus on policing issues, but if it identifies other aspects of the criminal justice system relevant to its work on policing, including the role of the police in prosecution, then it should draw the attention of the Government to those matters.

The Commission should consult widely, including with non-governmental expert organisations, and through such focus groups as they consider it appropriate to establish.

The Government proposes to establish the Commission as soon as possible, with the aim of it starting work as soon as possible and publishing its final report by Summer 1999.

ANNEX B

REVIEW OF THE CRIMINAL JUSTICE SYSTEM

Terms of Reference

Taking account of the aims of the criminal justice system as set out in the Agreement, the review will address the structure, management and resourcing of publicly funded elements of the criminal justice system and will bring forward proposals for future criminal justice arrangements (other than policing and those aspects of the system relating to emergency legislation, which the Government is considering separately) covering such issues as:

- the arrangements for making appointments to the judiciary and magistracy, and safeguards for protecting their independence;
- the arrangements for the organisation and supervision of the prosecution process, and for safeguarding its independence;
- measures to improve the responsiveness and accountability of, and any lay participation in the criminal justice system;
- mechanisms for addressing law reform;
- the scope for structured co-operation between the criminal justice agencies on both parts of the island; and
- the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area.
- The Government proposes to commence the review as soon as possible, consulting with the political parties and others, including non-

governmental expert organisations. The review will be completed by Autumn 1999.

PRISONERS

1. Both Governments will put in place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners). Any such arrangements will protect the rights of individual prisoners under national and international law.

2. Prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire will not benefit from the arrangements. The situation in this regard will be kept under review.

3. Both Governments will complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community. In addition, the intention would be that should the circumstances allow it, any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point.

4. The Governments will seek to enact the appropriate legislation to give effect to these arrangements by the end of June 1998.

5. The Governments continue to recognise the importance of measures to facilitate the reintegration of prisoners into the community by providing support both prior to and after release, including assistance directed towards availing of employment opportunities, re-training and/or re-skilling, and further education.

VALIDATION, IMPLEMENTATION AND REVIEW

Validation and Implementation

1. The two Governments will as soon as possible sign a new British-Irish Agreement replacing the 1985 Anglo-Irish Agreement, embodying understandings on constitutional issues and affirming their solemn commitment to support and, where appropriate, implement the agreement reached by the participants in the negotiations which shall be annexed to the British-Irish Agreement.

2. Each Government will organise a referendum on 22 May 1998. Subject

to Parliamentary approval, a consultative referendum in Northern Ireland, organised under the terms of the Northern Ireland (Entry to Negotiations, etc.) Act 1996, will address the question: "Do you support the agreement reached in the multi-party talks on Northern Ireland and set out in Command Paper 3883?". The Irish Government will introduce and support in the Oireachtas a Bill to amend the Constitution as described in paragraph 2 of the section "Constitutional Issues" and in Annex B, as follows: (a) to amend Articles 2 and 3 as described in paragraph 8.1 in Annex B above and (b) to amend Article 29 to permit the Government to ratify the new British-Irish Agreement. On passage by the Oireachtas, the Bill will be put to referendum.

3. If majorities of those voting in each of the referendums support this agreement, the Governments will then introduce and support, in their respective Parliaments, such legislation as may be necessary to give effect to all aspects of this agreement, and will take whatever ancillary steps as may be required including the holding of elections on 25 June, subject to parliamentary approval, to the Assembly, which would meet initially in a "shadow" mode. The establishment of the North-South Ministerial Council, implementation bodies, the British-Irish Council and the British-Irish Intergovernmental Conference and the assumption by the Assembly of its legislative and executive powers will take place at the same time on the entry into force of the British-Irish Agreement.

4. In the interim, aspects of the implementation of the multi-party agreement will be reviewed at meetings of those parties relevant in the particular case (taking into account, once Assembly elections have been held, the results of those elections), under the chairmanship of the British Government or the two Governments, as may be appropriate; and representatives of the two Governments and all relevant parties may meet under independent chairmanship to review implementation of the agreement as a whole.

Review procedures following implementation

5. Each institution may, at any time, review any problems that may arise in its operation and, where no other institution is affected, take remedial action in consultation as necessary with the relevant Government or Governments. It will be for each institution to determine its own procedures for review.

6. If there are difficulties in the operation of a particular institution, which have implications for another institution, they may review their operations separately and jointly and agree on remedial action to be taken under their respective authorities.

7. If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each

Government will be responsible for action in its own jurisdiction.

8. Notwithstanding the above, each institution will publish an annual report on its operations. In addition, the two Governments and the parties in the Assembly will convene a conference 4 years after the agreement comes into effect, to review and report on its operation.

AGREEMENT

BETWEEN THE GOVERNMENT OF

THE UNITED KINGDOM OF

GREAT BRITAIN AND NORTHERN IRELAND

AND

THE GOVERNMENT

OF IRELAND

The British and Irish Governments:

Welcoming the strong commitment to the Agreement reached on 10th April 1998 by themselves and other participants in the multi-party talks and set out in Annex 1 to this Agreement (hereinafter "the Multi-Party Agreement");

Considering that the Multi-Party Agreement offers an opportunity for a new beginning in relationships within Northern Ireland, within the island of Ireland and between the peoples of these islands;

Wishing to develop still further the unique relationship between their peoples and the close co-operation between their countries as friendly neighbours and as partners in the European Union;

Reaffirming their total commitment to the principles of democracy and non-violence which have been fundamental to the multi-party talks;

Reaffirming their commitment to the principles of partnership, equality and mutual respect and to the protection of civil, political, social, economic and cultural rights in their respective jurisdictions;

Have agreed as follows:

ARTICLE 1

The two Governments:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that, if in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

ARTICLE 2

The two Governments affirm their solemn commitment to support, and where appropriate implement, the provisions of the Multi-Party Agreement. In particular there shall be established in accordance with the

provisions of the Multi-Party Agreement immediately on the entry into force of this Agreement, the following institutions:

(i) a North/South Ministerial Council;

(ii) the implementation bodies referred to in paragraph 9 (ii) of the section entitled "Strand Two" of the Multi-Party Agreement;

(iii) a British-Irish Council;

(iv) a British-Irish Intergovernmental Conference.

ARTICLE 3

(1) This Agreement shall replace the Agreement between the British and Irish Governments done at Hillsborough on 15th November 1985 which shall cease to have effect on entry into force of this Agreement.

(2) The Intergovernmental Conference established by Article 2 of the aforementioned Agreement done on 15th November 1985 shall cease to exist on entry into force of this Agreement.

ARTICLE 4

(1) It shall be a requirement for entry into force of this Agreement that:

(a) British legislation shall have been enacted for the purpose of implementing the provisions of Annex A to the section entitled "Constitutional Issues" of the Multi-Party Agreement;

(b) the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement shall have been approved by Referendum;

(c) such legislation shall have been enacted as may be required to establish the institutions referred to in Article 2 of this Agreement.

(2) Each Government shall notify the other in writing of the completion, so far as it is concerned, of the requirements for entry into force of this Agreement. This Agreement shall enter into force on the date of the receipt of the later of the two notifications.

(3) Immediately on entry into force of this Agreement, the Irish Government shall ensure that the amendments to the Constitution of Ireland set out in Annex B to the section entitled "Constitutional Issues" of the Multi-Party Agreement take effect.

In witness thereof the undersigned, being duly authorised thereto by the respective Governments, have signed this Agreement.

Done in two originals at Belfast on the 10th day of April 1998.

For the Government of the United Kingdom of Great Britain and Northern Ireland	For the Government of Ireland

ANNEX 1

The Agreement Reached in the Multi-Party Talks

ANNEX 2

Declaration on the Provisions of Paragraph (vi) of Article 1 In Relationship to Citizenship

The British and Irish Governments declare that it is their joint understanding that the term "the people of Northern Ireland" in paragraph (vi) of Article 1 of this Agreement means, for the purposes of giving effect to this provision, all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British citizen, an Irish citizen or is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence.

The Seven Hurdles for Repeal of the Human Rights Act

15th May 2015

Additions since 15th May 2015 marked as "[Add…]"

The new Conservative government wants to repeal the Human Right Act 1998 (the "Act") and replace with a "British Bill of Rights".

The intention appears to be to do this in "one hundred days".

This post sets out as seven distinct "hurdles" the various legal and political difficulties which the new Conservative government will have to address in doing this. Each "hurdle" has the appropriate links to relevant materials and news reports.

In essence, the "hurdles" are: (1) addressing the issue of Scottish Devolution; (2) addressing the issue of repeal impacting on the Good Friday Agreement; (3) dealing with Conservative supporters of the Act and the European Convention of Human Rights (ECHR); (4) getting repeal and a replacement "British Bill of Rights" through the House of Lords; (5) working out which rights are to be protected; (6) working out how those rights will be enforced and the legal form of the "British Bill of Rights"; and (7) explaining why any of this exercise is necessary in the first place.

Background – the Human Rights Act 1998

The Human Rights Act – it is worth taking a few minutes to read it. (Many of those who criticise it, and some who support it, seem to not know what it says.)

It is brief as statutes go, and is actually shorter than much of the commentary which is linked to below.

Schedule 1 to the Act contains the relevant Articles of the ECHR. These rights are called the "convention rights". As the convention rights are in a schedule, they only have legal effect via the substantive sections of the Act: the convention rights are not free-standing.

The key substantive sections of the Act, which allow the convention rights to be enforced in UK courts, are Section 3 (statutory interpretation), Section 6 (duties of public authorities – including courts), and Section 2 (which provides court "must take into account" – though not necessarily follow – the case law of the European Court of Human Rights).

Background – the Conservative Manifesto

The commitment to repeal the Act and to replace it with a "British Bill of Rights" is in 2015 Conservative Manifesto.

The manifesto contains the following statements:

> *We will…scrap the Human Rights Act and curtail the role of the European Court of Human Rights, so that foreign criminals can be more easily deported from Britain. […]*
>
> *The next Conservative Government will scrap the Human Rights Act, and introduce a British Bill of Rights. […]*
>
> *We will scrap Labour's Human Rights Act and introduce a British Bill of Rights which will restore common sense to the application of human rights in the UK.*

The desire to repeal the Act in "one hundred days" is not in the manifesto. It appears to come from an article on 26 April 2015 by David Cameron for the Telegraph. On 10 May 2015, after the election result,

this ambition was repeated in a number of news outlets. The Guardian said:

> *The scrapping of the human rights act, a pledge included in the Tory manifesto, is one of the measures to be included in the prime minister's plans for the first 100 days, when the Queen's speech is delivered on 27 May.*
>
> *The plans, which would see the human rights act replaced by a British bill of rights, say that the European court of human rights would be "no longer binding over the UK's supreme court". The ECHR would also be "no longer able to order a change to UK law" although British citizens would still be entitled to appeal to the Strasbourg-based court.*

It is not clear whether the "one hundred days" is from the general election or the Queen's Speech (expected on 27 May 2015); and it is not clear whether the "one hundred days" is for complete repeal and enactment of a replacement, or for the draft legislation to be published and presented.

But it seems something dramatic is supposed to take place which will affect the Act.

Hurdle One: Scotland

The first "hurdle" is that provided by Scottish devolution. Here there is both a constitutional and a political dimension.

The "constitutional" question is whether repeal (and the replacement "British Bill of Rights") can be imposed "constitutionally" on a post-devolution Scotland. By "constitutional" it is meant whether the process will be in accordance with the (non-legal) conventions which apply to the relationships between state entities – things can be "unconstitutional" without it being illegal.

The second question is whether, regardless of the strict constitutional position, as a matter of practical politics the Scottish Government (and the SNP in the house of commons) will seek to block repeal anyway, at least to the extent it may affect Scotland.

Constitutional materials

The Sewel Convention is the convention (ie, not binding law) limiting what the Westminster Parliament can impose on Scotland without the consent of the Scottish Parliament.

Also relevant is the Memorandum of Understanding between the UK and the devolved administrations, paragraph 14 of which provides:

> *The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.*

[Add, 16 May 2015: I have been asked to emphasise that the paragraph above and indeed the Memorandum of Understanding applies also to the devolved assemblies in Wales and Northern Ireland – and in the latter, this is in addition to the points made in Hurdle Two below.]

The Scottish Government has issued a statement (October 2014) that it would oppose repeal. This statement includes the following text:

> *The Scottish Government is strongly opposed to any attempt by a future UK Government to repeal the Human Rights Act or to withdraw from the European Convention on Human Rights. To do so would require the consent of the Scottish Parliament and, given our longstanding opposition, we would invite the Scottish Parliament to refuse this.*

Constitutional commentary

These articles, by constitutional and legal experts, set out the relevant issues.

(Pre-election)

Will devolution scupper Conservative plans for a "British" Bill of Rights? by Professor Aileen McHarg

Devolution: Grayling's human rights petard by "Lallands Peat Worrier" (a highly regarded Scots law blogger

Human Rights, Devolution and the Constrained Authority of the Westminster Parliament by Colm O'Cinneide

(Post-election)

Echo Chamber: the 2015 General Election at Holyrood – a word on Sewel by Chris McCorkindale

Scotland and Human Rights Act abolition… by "Lallands Peat Worrier"

Could the devolved nations block repeal of the Human Rights Act and the enactment of a new Bill of Rights? by Dr Mark Elliott

[Add, 16 May 2015: *Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland*, by Professor Christine Bell]

Political developments

The following seem to be the key political developments so far in respect of Hurdle One.

The Scottish justice minister on Twitter:

> *The Scottish Government will robustly oppose any attempt by the UK Government to repeal the Human Rights Act or to withdraw from the ECHR.*
>
> *— Michael Matheson MSP (@MathesonMichael) May 12, 2015*

YouTube video (12 May 2015) of the Scottish First Minister saying she will oppose repeal.

The Leader of the Scottish Conservatives on the need for the Scottish Parliament to consent to repeal:

> *I wonder if any of this eve's avid tweeters bothered to read @ScotTories manifesto. P.65 states Holyrood has final say on any rights change.*
>
> *— Ruth Davidson MSP (@RuthDavidsonMSP) May 12, 2015*

Guardian (12 May 2015): *Scotland 'will not consent' to Tory plans to scrap Human Rights Act*

SNP statement (14 May 2015) that it will oppose repeal.

Hurdle Two: Northern Ireland

The primary issue in respect of Northern Ireland is whether repeal of the Act would need re-visiting the Good Friday Agreement (GFA), which explicitly requires that the ECHR be given legal effect in the jurisdiction.

The GFA states:

> *The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.*

The Act was the means by which the UK government performed this obligation under the GFA. If the Act is repealed then something just as effective in respect of breaches of the ECHR will need to be immediately put in its place.

And whist the DUP are no great fans of the ECHR, the nationalists certainly are. (The UK government knows this: for example, search for "human rights" in this 2000 pamphlet by Michael Gove, who as the new Justice Secretary is responsible for the proposed repeal.) It is also hard to see how nationalists will accept any replacement called a "British Bill of Rights".

[Add, 16 May 2015: *Human Rights Act Repeal and Devolution: Quick Points and Further Resources on Scotland and Northern Ireland*, by Professor Christine Bell]

Political developments

The following seem to be the key political developments so far in respect of Hurdle Two.

Committee for the Administration of Justice (11 May 2015): *Tory plan to repeal Human Rights Act in NI would constitute flagrant breach of GFA*

Guardian (12 May 2015): *Scrapping Human Rights Act 'would breach Good Friday agreement'*

Irish Times (14 May 2015): *Government concern about UK plan to scrap Human Rights Act*

Hurdle Three: the Conservative supporters of the Act and the ECHR

There are Conservatives, including many MPs and peers, in favour of the ECHR and the Act.

After all, the ECHR was co-written by Conservative lawyers following the Second World War (and it is a pity that Conservatives are not as proud of this as, say, the Labour Party is of creating the NHS).

As Winston Churchill himself said in his Hague Speech of 1948:

> *In the centre of our movement stands the idea of a Charter of Human Rights, guarded by freedom and sustained by law.*

To repeal the Act and replace it with a "British Bill of Rights" the government will need to either win-over

or defeat its own back-benchers who are in favour of the Act.

Two of the best things to read by Tories in favour of the Act are:

The Conservative Case for the Human Rights Act by Jesse Norman MP and Peter Oborne

Human Rights Act: Why the Conservatives are wrong by former Attorney-General Dominic Grieve QC MP

And it does not look as if the government has yet won-over its backbenchers.

Independent (14 May 2015): *Cameron faces Tory backbench rebellion over plans to scrap the Human Rights Act*

[Add, 16 May 2015: David Davis shaping up to oppose government.]

Hurdle Four: the House of Lords

Even if the government addresses the issues presented by Scottish devolution and the GFA, and survives any backbench rebellion in the house of commons, it has to get repeal and its replacement through the house of lords. (And since the end of the coalition, the Conservatives do not have a majority in the house of lords.)

In forcing through repeal, the government will seek to rely on the Salisbury Convention that manifesto commitments are not blocked or unduly delayed by the house of lords.

This post by a leading public law experts sets out the relevant issues and queries whether the Salisbury Convention will apply: *Replacing the Human Rights Act: the House of Lords, the Parliament Acts and the Salisbury Convention* by Dr Mark Elliott.

Even if the Salisbury Convention does apply, there is certainly no way the house of lords (which has many former judges and legal experts) can be rushed into passing a repeal and its replacement in "one hundred days": that ambitious timetable was not a manifesto commitment.

Hurdle Five: Which substantive rights?

And if all the procedural hurdles are somehow negotiated safely, there remains the question of what rights will be protected.

On the background to the convention rights, the best thing to read is the late Lord Bingham's classic 2009 lecture on the ECHR – as he pointedly asks, which of these rights would you want to discard?

The UK government is (currently) not proposing for the UK to withdraw from the ECHR (a move which would place the UK alongside Belarus). So it would appear the government is going to all this trouble to just place convention rights on a different footing.

Hurdle Six: what would a replacement "British Bill of Rights" actually say?

This is a genuinely knotty problem for the government, especially if the substantive (convention) rights remain unchanged. It is difficult to see in practice how the current provisions of the Act can be significantly improved upon.

In 2012, a "Bill of Rights Commission" was appointed by the then coalition government to try to solve the problem of what a replacement would look like. Eventually it was disbanded having achieved no consensus. As one member of the commission, Phillipe Sands QC, said of the government's current "one hundred days" target, "*eight of us couldn't find a way in 700 days*".

Equally a failure was the Tory announcement last October that a replacement Bill would be provided "shortly". This failure to produce a draft Bill has been deftly analysed by Joshua Rozenberg.

It is one thing to announce there will be a replacement "British Bill of Rights" and it is another to provide an actual draft of it. It is difficult to see how one can be produced and placed into law in just "one hundred days".

[Add, 16 May 2015: according to the Guardian there has been seven drafts to date of the Bill, and it still is not in final form.]

Hurdle Seven: the test of necessity

And then there is the ultimate question: what is the point of the repeal and replacement? What will the exercise actually achieve, which cannot be achieved by other means?

Here it is important to note that the human rights rulings which have upset many Conservatives and tabloids have been addressed by other means – in particular on "life meaning life" and the rights of prisoners to vote. On this see Carl Gardner's detailed account of how the former Attorney-General Dominic Grieve's policy of

constructive engagement ensured that these problems were resolved. This is how nuts are smashed without sledgehammers.

More generally, many of the "but what about?" examples of supposed human rights abuses turn out to be myths or to be caused by the application of domestic or EU law.

It is difficult, if not impossible, to posit a case where the only legislative response is repeal of the Act and its replacement by a (unspecified) "British Bill of Rights".

This is not to say that the Act cannot be amended and improved; but that is not repeal.

So the current situation is: if the UK government can address the immense problems presented by Scottish devolution and the Good Friday Agreement, win-over or defeat Conservative supporters of the Act, shove the legislation through the house of lords, work out which rights are to be protected, somehow come up with a draft Bill of British Rights, and also explain why any of this is really necessary, and can do all this (or to do something dramatic) in "one hundred days" then…the Conservatives can meet their manifesto commitment in accordance with their ambitious timetable.

But it seems unlikely.

Further reading

On problems of repeal generally:

Matthew Scott in the Telegraph: *Michael Gove's attempt to repeal the Human Rights Act faces almost insurmountable odds*

Economist: *There may be trouble ahead: Getting rid of the Human Rights Act will be tough—and almost pointless*

Phillipe Sands QC in the Guardian: *This British bill of rights could end the UK*

Comments moderation

Comments are pre-moderated. Please use a name if you can when posting a comment. Suggestions for additional links welcome.

15th May 2015 David Allen Green Human Rights and Civil Liberties, Law, Policy, Politics, Uncategorized

29 thoughts on "The Seven Hurdles for Repeal of the Human Rights Act"

Pingback: British bill of all kinds of wrong | Alex's Archives

Simon Myerson

15th May 2015 at 08:47

Am I the only person to whom this feels like an out of control train? The original commitment appears to have been given to fuel the wrong-headed notion that the HRA was what prevented the deportation of Abu Qatada (who wasn't – at that point – a criminal as I recollect it). In reality it seems to have been returning him to a place which was planning to obtain his account by taking his toenails off with pliers.

That, in itself, suggests a view – so ably articulated by Martin Howe QC – that foreigners shouldn't have the same rights as us, as it's difficult to imagine that argument not gaining some traction if the person were British. Compare, for example, all the people we don't want to send to America. I don't mind having that debate, but the Government doesn't appear quite so keen.

But, that issue aside, the only other benefit to the abandonment of the Act – whatever it's replaced by – that I can perceive is that it will be drafted so as to ensure that politics are unnecessary. Dominic Grieve devoted considerable time to negotiating political solutions to the political problems caused by a small number of judgments. That appears to be out of kilter with the current approach, which is that such resolutions are a

waste of time and probably a bit boring really.

Whether it's authoritarianism, laziness, or simply a belief that we're all children so that "because I say so" becomes the default mode of ensuring society does what you want, it does seem to be part of an accelerating trend. As the left contorts itself to make topics out of bounds for discussion, the right signals that discussion is unnecessary. Sigh.

This discussion being brought to you by freedom of expression, the right to which is currently being defended.

REPLY

Editor Shield

15th May 2015 at 08:52

Thank you for writing this. I'm not a lawyer but recently read through as much detail as I could about the proposed Conservative plans and wrote a 'layman's guide' to it (from a left perspective):

https://theroseandshield.wordpress.com/2015/05/11/how-the-conservatives-want-to-change-human-rights-in-the-uk/

I'll be linking to this article from that post as I think it'll help improve people's understanding even further!

REPLY

Mark

15th May 2015 at 08:53

How about this?

The British Rights Bill 2015

1. The Human Rights Act 1998 ("the Act We Don't Like") shall be renamed the British Bill of Rights ("the

Bill").

2. All references to the Act We Don't Like in legislation (other than in this Act) and in regulations shall be replaced by references to the Bill.

3. This Act shall come into force on the passing of this Act.

REPLY

Rupert Baines

15th May 2015 at 09:13

Excellent analysis.

Thanks

One comment and one question

Hurdle Seven – Is it necessary

The government is saying they want to change the relationship with Strasbourg.
The Conservatives want to give UK courts and parliament the "final say" on human rights issues rather than Strasbourg.
Under the plan, the European Courts would not be able to require the UK to change British laws, with its judgements being treated as "advisory" rather than binding.

But surely HRA as it stands does exactly this, by saying British Courts are supreme: they should "take into account" judgments of the European court; they are not bound by them.

And to the extent Strasbourg does have "final say" it is not HRA, but the fact we signed the treaty to follow ECHR. Scrapping HRA in UK, but keeping ECHR, still leaves the court with the same powers (just as they had before 1988).

So the proposed changes are unnecessary and will fail on their own terms.

The Question: What about Wales?

You mention Scotland & and NI (GFA)

Cardiff has said it too has devolved powers, and so it too must consent – just like Scotland.

And they are saying they would not agree

"But because the Human Rights is embedded in the Government of Wales Act 2006, it is not so easy for them.

"Under the Sewel Convention, the UK Government should ask the Assembly's permission to remove the Human Rights Act from the Government of Wales Act.

"I'm sure the majority of AMs would not agree to that."
http://www.walesonline.co.uk/news/wales-news/could-plan-scrap-human-rights-9250984

Now that has similar political issues to Scotland, but a weirder legal one.

Scotland has a separate legal system – so it would be possible to have HRA in Scotland, and not in England. Politically that is a mess but legally I think you could see a way to it.

But what about Wales? If Cardiff decides to keep HRA, England doesn't – then what is "the law of England & Wales"?

REPLY

David Allen Green

15th May 2015 at 10:29

On Wales: I did not mean to be rude by missing out Wales. I had just not seen any materials or news reports on this with a Welsh angle, and I do not have the expertise about Welsh devolution to work a Welsh angle out for myself. I have seen people say the Sewel Convention applies to Northern Ireland and Wales as well, but that is not what Lord Sewel said. However, the Memorandum of Understanding I quote above is about all the dissolved administrations and so i should make that clear(er).

REPLY

David Allen Green

16th May 2015 at 07:13

"Add" now added.

REPLY

Helen Anthony

15th May 2015 at 10:28

A great piece bringing together the various hurdles raised so far (I like no. 7 in particular).
I suggest an eighth, in relation to the 100 days – Cabinet Office guidelines re consultation ('For a new and contentious policy, 12 weeks or more may still be appropriate.') followed by the small matter of parliamentary scrutiny.

REPLY

Pingback: Musings on the ECHR, the EU and a 'British Bill of Rights' | Law & Religion UK

Korhomme

15th May 2015 at 11:20

Very interesting analysis. I'm not a lawyer, but I understand that the Good Friday Agreement, involving as it did the government of the Republic of Ireland, is an 'international' agreement (and I read that a copy of the 'treaty' has been deposited at the UN). Can the UK government really change it in N Ireland without the consent of the Dublin government? (And any change might need to be passed by a referendum in both parts of Ireland.)

One idea mooted is that the ‘British’ Rights Act might really be an ‘English’ Rights Act, with the original HRA applying to the Celtic fringes. Is this anyway possible?

REPLY

Korhomme

17th May 2015 at 09:35

Professor Patterson’s remarks which you have linked show just how difficult (impossible?) it would be for the UK government to change or repeal the HRA in relation to N Ireland and the Republic of Ireland.

REPLY

David Farbey

15th May 2015 at 11:35

As a concerned citizen who is not a lawyer, I want to thank you for your very clear account of the issues. What the “Repeal HRA” lobby fail to grasp, is that the essence of Human Rights is that they are for all humans, not just the humans the government of the day happens to like. At least, I hope they’ve failed to grasp that point. It would be too frightening to imagine that they do fully understand it.

REPLY

Alan Henness

15th May 2015 at 12:04

As always, clear, simple yet thoroughly informative.

One point. You said:

> *somehow come up with a draft Bill of British Rights, and also explain why any of this is really necessary, and can do all this (or to do something dramatic) in "one hundred days"*

Although unlike the top-down 'reform' of the NHS that Cameron had said was not going to happen, the Tories managed to draft the 400-odd pages of the top-down 'reform' the Health and Social Care Bill imposed in pretty short order. A cynic might think that they already had most, if not all, of that sitting on a desk somewhere waiting to be wheeled out at at the appropriate moment.

I don't see the British Bill of Rights as being any different.

REPLY

Steve Peers

15th May 2015 at 12:57

Excellent analysis. You don't discuss the EU law angle, but I have discussed that here: http://eulawanalysis.blogspot.co.uk/2015/05/is-repealing-human-rights-act.html

REPLY

SpinningHugo (@SpinningHugo)

15th May 2015 at 15:52

That quote from Bingham is great rhetoric but dreadful reasoning. It is perfectly reasonable to give the answer "All of them" in response to his question.

See

https://spinninghugo.wordpress.com/2015/05/15/four-bad-arguments-and-a-good-one-for-the-human-rights-act/

I would retain the HRA, but it is not as easy a question as that Bingham quote suggests.

REPLY

Aled Griffiths

15th May 2015 at 17:27

The HRA is also embedded into the devolution settlement for Wales, and the majority of Assembly Members are against its repeal.

REPLY

Aled Griffiths

15th May 2015 at 17:29

Just saw the comment on Wales by You Savid above. Sorry for repeating

REPLY

David Allen Green

16th May 2015 at 07:14

No worries – “Add” now added.

REPLY

Pingback: Forgot for a moment that my law blog is supposed to have some LAW in it… | Charon QC

Pingback: » Worth Reading 173: Special Containment Procedures ¦ What You Can Get Away With

Pingback: (UK) IS REPEALING THE HUMAN RIGHTS ACT COMPATIBLE WITH EU LAW? | European Area of Freedom Security & Justice

Pingback: Morning round-up: Monday 18 May - Legal Cheek

Pingback: On the Left and the Human Rights Act | The Condition of the Left in England

Pingback: Religion and law round-up – 24th May | Law & Religion UK

Pingback: Why Michael Gove must think carefully about the Human Rights Act | Head of Legal

Pingback: 2015 Week Notes 21 | Licence to Roam

Pingback: Is repealing the Human Rights Act compatible with EU law? | Legal Aid

Pingback: Just where is the Tories' British Bill of Rights? – The Right Dishonourable

Pingback: Why Michael Gove should drop his Bill of Rights plans | Head of Legal

Leave a Reply

Your email address will not be published. Required fields are marked *

COMMENT

NAME *

EMAIL *

WEBSITE

Post Comment

Notify me of follow-up comments by email.

Notify me of new posts by email.

PREVIOUS

Round-up: five posts on the constitutional problems with Human Rights Act repeal

NEXT

The hurdles for Human Rights Act repeal now seem higher than before

Human Rights Act 1998

1998 c. 42 ▸ Table of Contents

Table of Contents Content More Resources

Plain View Print Options

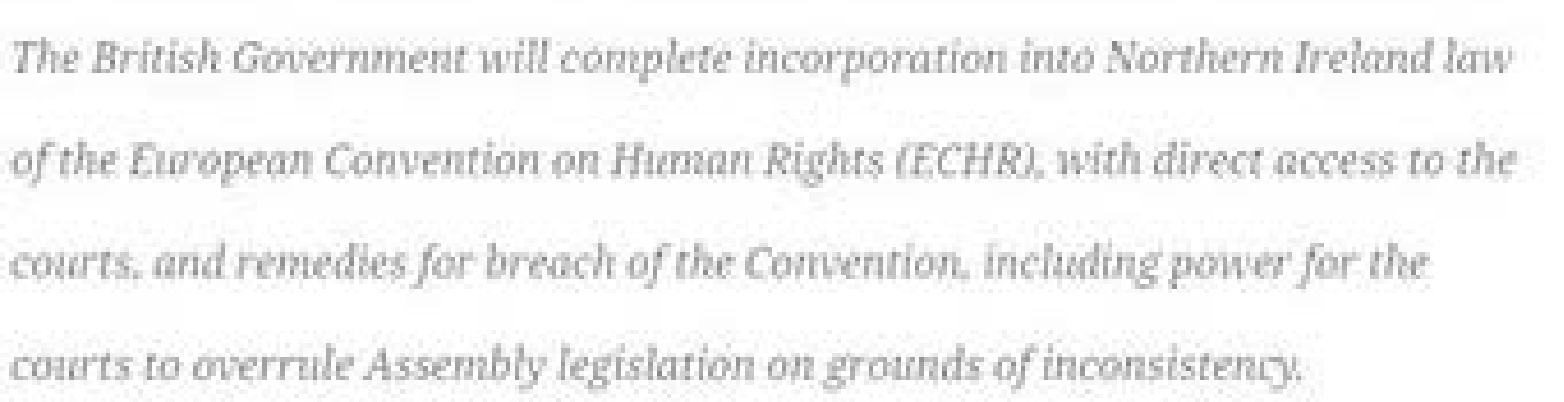
Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998.

Collapse all -

Back to top

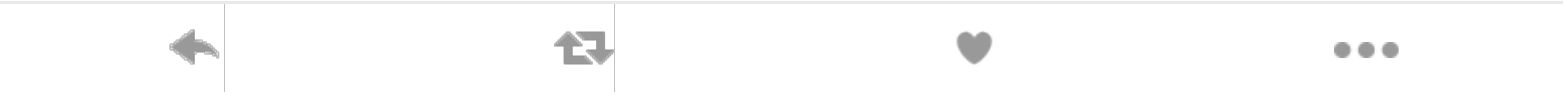
David Allen Green
@DavidAllenGreen

This is the provision of the Good Friday agreement of which UK will be in breach if Theresa May got her way on ECHR.
pic.twitter.com/1NnI3dM9sT
9:10 AM - 25 Apr 2016



Twitter

By: **David Allen Green** @DavidAllenGreen



Chris Murphy Apr 25
@ChrisMurphy201
@DavidAllenGreen what's the remedy for a breach? NI voters get to sue her or Gvt en masse?! £££££?
View conversation ·

David Allen Green Apr 25
@DavidAllenGreen
Full text of Good Friday agreement at gov.uk/government/pub…
View conversation ·

Alan Renwick Apr 25
@alrenwick66
@DavidAllenGreen I think it is also direct in Scottish statute via Scotland Act?
View conversation ·

Jettatura Apr 25
@J3tt4tur4
@DavidAllenGreen Oh dear! That really is a massive blunder. Surely, pivotal Govt policies are more well thought-out than that, aren't they?
View conversation ·

Boro Hippie Apr 25
@HippBoro
@DavidAllenGreen Which begs the question what civil servants & the Perm Sec in Home Office are advising her. Did they not understand?
View conversation ·

Tim Hill Apr 25
@Tim_JR_Hill
@DavidAllenGreen May wants a change to Human Rights because she is already abusing them through mass surveillance.
View conversation ·

dlp234 Apr 25
@dlp234
@DavidAllenGreen Potential withdrawal from ECHR is already HMG policy given ongoing work to repeal HRA.
View conversation

dlp234 Apr 25
@dlp234
@DavidAllenGreen Would it be impossible to renegotiate the GFA?
View conversation

Daragh O Brien Apr 25
@daraghobrien
@DavidAllenGreen @fergal has been quietly pointing this out since last year. fergalcrehan.com/2015/05/12/why…
View conversation

dlp234 Apr 25
@dlp234
@DavidAllenGreen Especially given that the changes UK wants to human rights law might not trouble the parties in NI?
View conversation

Robin Levett Apr 25
@Roblev0
@ChrisMurphy201 The worry is presumably that the Europa Hotel starts regularly getting it in the neck again. @DavidAllenGreen
View conversation

Nigel Tolley Apr 25
@discreetsecure
@DavidAllenGreen You do know they'll just rant on about "politicians of the past can't be allowed to bind future politicians". The gits.
View conversation

Robin Levett Apr 25
@Roblev0
@TJCleaver There are other provisions which mean it has to stay incorporated. Srand one, para 5(b)&(c), frex. @DavidAllenGreen
View conversation

Shell Apr 25
@shell_here
@DavidAllenGreen Point is made in this sketch too: twitter.com/AmnestyUK/stat…
View conversation

David Allen Green Apr 25
@DavidAllenGreen
@shell_here Thank you, tweeted.
View conversation

mark berryman Apr 25
@markberrymanx
@DavidAllenGreen what I love most is it was us brits post ww2 who came up with & pitched the rules the echr runs on. Our finest hour.
View conversation

baldutere Apr 25
@baldutere
@dlp234 @DavidAllenGreen human rights standards to the devolved government is a central part of the GFA it would be pretty impossible, yes
View conversation

dlp234 Apr 25
@dlp234
@baldutere @DavidAllenGreen I see, but what if replacement for HRA implemented 95% of ECHR?
View conversation

mark berryman Apr 25
@markberrymanx

@DavidAllenGreen @ifdestroyed how smart is the echr as law there are rules for suspension if shit gets really bad. Has Britain used them? No

View conversation ·   

Human Rights Act Guardian Legal Network

Catgate: another myth used to trash human rights

The home secretary is wrong,the decision not to deport an illegal immigrant had nothing to do with the pet cat

Theresa May, who claimed the Human Rights Act was responsible for blocking the deportation of an illegal immigrant because he had a pet cat. Photograph: Ray Tang / Rex Features

Adam Wagner on the UK Human Rights blog, part of the Guardian Legal Network

Tuesday 4 October 2011 15.00 BST

Today the home secretary Theresa May gave a speech to the Conservative Party Conference in which she announced new immigration rules which would make it easier to deport foreign criminals.

May also gave three examples in support of the view that the Human Rights Act "has to go":

"We all know the stories about the Human Rights Act. The violent drug dealer who cannot be sent home because his daughter – for whom he pays no maintenance – lives here. The robber who cannot be removed because he has a girlfriend. The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat."

The most startling of those examples is of course the final one, that an illegal immigrant could not be deported because he "had a pet cat". As regular readers of this blog will know, there are plenty of mythical examples regularly peddled in order to criticise human rights law. Is the cat deportation one of them?

Straightforwardly, yes. The decision of the Asylum and Immigration Tribunal by Senior Immigration Judge Gleeson (IA/14578/2008), dated 1 December 2008, can be read here. It is only two and a half pages long. Judge Gleeson explained that the reconsideration was granted in reference to

"the inappropriate weight placed on the appellant having to leave behind not only his partner but also their joint cat, [ ]"

The judge rather cheekily anonymised the cat's name, which is almost certainly an attempt at humour, given the final line of the judgment:

"The Immigration Judge's determination is upheld and the cat, [ ], need no longer fear having to adapt to Bolivian mice."

This misplaced (in retrospect) humour aside, why did the Home Office lose the reconsideration? Because it had failed to follow its own guidance, specifically paragraph 53.4.1: Procedures when dealing with an offender who is the unmarried partner of a person present and settled in the UK of the United Kingdom Border Agency enforcement instructions and guidance.

That guidance had been issued earlier in the same year. It essentially compelled the UKBA to give more weight to the relationships of unmarried couples who had been together for over 2 years, that is "partnerships akin to marriage", when making immigration decisions. In such cases:

"Where a person makes representations after the commencement of enforcement action, on the basis of a common law or same sex relationship, the normal course will be to proceed to enforcement action unless it is clear that the couple had lived together for 2 years or more before enforcement action commenced and that the parties are not involved in a consanguineous relationship with one another."

The guidance had not been considered by the Home Office until the day of the appeal. Counsel for the Home Office "accepted [it] applied to the present appeal" and therefore

"accepted that any error in the determination was immaterial. Had the transitional provisions been properly applied, the Immigration Judge would have been entitled to allow the appeal under DP3/96 as he had in fact done."

So had the policy been properly applied, the immigration judge would have had to allow the appeal anyway, cat or no cat. And not only did the decision have nothing to do with a cat, it also had nothing to do with human rights either.

The home secretary's confusion probably arises as a result of a number of press articles in 2009 which wrongly blamed the cat for the decision, as pointed out in this post by Tabloid Watch at the time.

It was heartening to hear the home secretary read out article 8 of the European Convention on Human Rights in full during her speech. More politicians should go back to the source to explain what the law means. And there are undoubtedly some difficult issues to be approached in relation to the European court of human rights' somewhat expansive interpretation of article 8.

The head of the court of appeal Lord Neuberger said in a recent speech:

"It is a sign of a healthy democracy that there are different views within society and that the outcome of individual cases, and the balance struck between individual rights, can be vigorously debated. But such debates must be based on fact not misconception, deliberate or otherwise. Persuasion should be based on truth rather than propaganda."

Human rights should be debated vigorously but also accurately. In this case, a bit more curiosity could have killed the cat.

More comment

Topics

Human Rights Act Human rights Immigration and asylum Theresa May Conservative conference 2011

---

more on this story

Tory conference cat-fight: Clarke and May clash over Human Rights Act story

Justice secretary challenges veracity of claim by home secretary that illegal immigrant's ownership of pet cat prevented his deportation

4 Oct 2011

Theresa May claims cat prevented immigrant's deportation - video

4 Oct 2011

UK could introduce 'fat tax', says David Cameron

4 Oct 2011

Conservatives crack down on jobseekers with tougher rules

4 Oct 2011

Boris Johnson: people swearing at police should expect to be arrested

4 Oct 2011

popular

UK		
education	media	society
law	scotland	wales
northern ireland		
world		
europe	US	americas
asia	australia	africa
middle east	cities	development
sport		
football	cricket	rugby union
F1	tennis	golf
cycling	boxing	racing
rugby league		
football		
live scores	tables	competitions
results	fixtures	clubs
opinion		
columnists		
culture		
film	tv & radio	music
games	books	art & design
stage	classical	
business		
economics	banking	retail
markets	eurozone	
lifestyle		
food	health & fitness	love & sex
family	women	home & garden
fashion		
environment		
climate change	wildlife	energy
pollution		
tech		
travel		
UK	europe	US

skiing
money
property | savings | pensions
borrowing | careers
science
professional networks
the observer
today's paper
editorials & letters | obituaries | g2
weekend | the guide | saturday review
sunday's paper
comment | the new review | observer magazine
membership
crosswords
blog | editor | quick
cryptic | prize | quiptic
genius | speedy | everyman
azed
video

uk news › law › human rights act

Case No. CO/13246/2012

Neutral Citation Number: [2012] EWHC 3783 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Wednesday 19 December 2012

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Judge)

LORD JUSTICE BURNETT

and

HIS HONOUR JUDGE PETER THORNTON QC

– – – – – – – – – – – –

B E T W E E N:

HER MAJESTY'S ATTORNEY GENERAL **Applicant**

- v -

(1) HER MAJESTY'S CORONER OF SOUTH YORKSHIRE (WEST)
(2) HER MAJESTY'S CORONER OF WEST YORKSHIRE (WEST) **Respondents**

– – – – – – – – – – – –

Computer Aided Transcription by
Wordwave International Ltd (a Merrill Communications Company)
190 Fleet Street, London EC4
Telephone No: 020 7421 4040
(Official Shorthand Writers to the Court)

– – – – – – – – – – – –

The Attorney General (Mr Dominic Grieve QC) and Mr Jonathan Glasson (instructed by the Treasury Solicitor)
appeared on behalf of the Applicant

Miss Alison Hewitt
(appeared on behalf of the First Defendant)

The Second Defendant was not represented

Mr Michael Mansfield QC and Mr Patrick Roach (instructed by Messrs Birnberg and Partners,

London NW1 7HJ)
(appeared on behalf of 63 families)

Mr Peter Weatherby QC (instructed by Broudie Jackson Canter Solicitors, Liverpool
(appeared on behalf of 14 families)

Miss Fiona Barton QC (instructed by Chief Officer, Legal Advice Team, Sheffield S3 8LY)
(appeared on behalf of South Yorkshire Police)

Mr Paul Greaney QC (instructed by Messrs Russell Jones & Walker, Manchester M1 4DZ)
(appeared on behalf of the Police Federation)

_ _ _ _ _ _ _ _ _ _ _

Judgment

THE LORD CHIEF JUSTICE:

1. Just about everyone in this country remembers the catastrophe that took place at the Hillsborough Stadium in Sheffield on 15 April 1989. Over 50,000 fans made their different ways to watch the football match between Liverpool and Nottingham Forest, who were competing for a place in the FA Cup Final. In the words of Lord Justice Taylor, written less than four months later, "The prevailing mood was one of carnival, good humour and expectation". Yet, within a few short minutes of the start of the match disaster struck. Ninety five spectators died that afternoon: one, Anthony Bland, having been left as a result of his injuries in a persistent vegetative state, died a few years later in March 1993. Eighty eight of the ninety six victims of the disaster were male. The youngest of them was but 10 years old, and the oldest 67. Thirty eight of them were under 20, and three were over 50. In addition to the appalling toll of the dead, many more spectators were injured but fortunately they survived.

2. The death of each victim was and remains the source of anguish and grief to those to whom they were precious. For a number of different reasons there is, however, more to their suffering than the natural and inevitable grief which follows every untimely death.

3. We shall identify some of them. Perhaps the first is that within a very short time it was being peddled about that this disaster was one more consequence of the kind of hooliganism which had manifested itself at and around football matches during the 1980s. There was therefore fertile ground for the acceptance of rumour, gossip and deliberate misinformation. In short the disaster was attributed to the drunken misbehaviour of the fans, and the Liverpool fans in particular. Yet in August 1989, in a Report which the then Prime Minister, Margaret Thatcher described as a "devastating criticism of the police", Taylor LJ stated in quite unequivocal terms that: "the main reason for the disaster was the failure of police control".

4. That should have been that. Unfortunately the culpability of the police was not acknowledged, and indeed a campaign was mounted to undermine confidence in Taylor LJ's conclusions. These were developed at the inquest which took place in the winter of 1990/1991 and continued thereafter. Notwithstanding its falsity the tendency to blame the fans was disappointingly tenacious and it lingered on for many years.

5. This aspect of the problem was typified by the decision that the blood alcohol levels of every one of the deceased should be checked. Whatever the reason for it in the immediate proximity of the disaster –– and we do not underestimate the enormous burden suddenly thrust on the Coroner of the district in its immediate aftermath -- this decision conveyed the impression to the suffering families that it was expressly or impliedly being suggested that the victims themselves, who were, by definition, football supporters, had somehow caused or contributed to the disaster. In fact not only had many of the deceased consumed no alcohol whatsoever, but those who had done so had consumed minimal or at most normal social amounts. Taylor LJ expressed himself satisfied that the great majority of the fans were not drunk or even the worse for drink, and he effectively exonerated each of the deceased from the slightest culpability or any criticism, whether express or implied. Each was the helpless victim of these terrible events.

6. That is the background to this application by Her Majesty's Attorney General under section 13 of The Coroners Act 1988 to quash the inquisitions into the deaths of the ninety six individuals who died as a consequence of the disaster. The inquests were opened on 19 April 1989. Following the publication of Lord Justice Taylor's Interim Report in August 1989, the opening session of what were described as "mini-inquests" were started. The jury were informed that they would inquire into the identity of the deceased, and "when" and "where" each deceased had died. The coroner added that the jury would not be concerned with the question of "how" they had died because of an ongoing investigation into possible criminal proceedings then being conducted by the Director of Public Prosecutions. Crucially, he imposed a "cut off" period so that the inquiry into events on that afternoon never extended beyond 3.15pm. After the "mini-inquests" were concluded, the full inquests resumed on 19 November 1990. The jury retired on 26 March 1991. The coroner left alternative verdicts of unlawful killing, accidental death, and an open verdict to the jury. On 28 March the longest inquest then known to English legal history ended. The verdict of the jury in each case was "accidental death". The later inquest at Bradford into the death of Tony Bland returned the same verdict.

7. The families of the victims did not regard the process which culminated in this verdict as satisfactory. Indeed they believed that it was wholly inadequate. Over the next years there were further inquiries and repeated attempts, some involving the judicial process, to overturn or set aside or simply to question the verdicts. None was successful. These are all matters of public record. Throughout there has been a profound, almost palpable, belief that justice has not been done and that it cannot be done without and until the full truth is revealed. We must record our admiration and respect for this determined search for the truth about the causes of the disaster, and why and how it had occurred, which, despite disappointments and set-backs, has continued for nearly a quarter of a century, and simultaneously express our regret that the process has been so unbearably dispiriting and prolonged.

8. The jurisdiction to hold a second or further inquest is created by section 13 of the Coroners Act 1988. Section 13(1) provides:

> "This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner .... either –-

(a) ....

(b) where an inquest has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that another inquest should be held."

Section 13(2) vests the High Court with jurisdiction to quash an earlier inquest, and to order that another inquest should be held. We shall use the singular, "inquest", rather than the more accurate, "inquests", for convenience.

9. In carefully prepared written submissions by the Attorney General, but also by other counsel representing different members of the family of the victims, our attention has been drawn to a number of authorities which bear on these provisions. They include R v Divine ex p Walton [1930] 2 KB 29, Re Rapier [1988] 1 QB 26, R (Sutovic) v HM Coroner for Northern District of Greater London [2006] EWHC 1095 (Admin), R v HM Coroner for Derbyshire (Scarsdale) ex p Fletcher [1992] 156 JP 522, Re Maddison [2002] EWHC 2567 (Admin), Re Tabarn, (unreported, 20th January 1989 (DC)), R v Manchester Coroner ex p Tal [1985] 1 QB 67, R (Amin) v Home Secretary [2004] 1 QC 653, R (George Francis) v HM Deputy Coroner for Inner South London [2005] EWHC 980 (Admin), HM Coroner for Wiltshire and Swindon v Ministry of Defence [2002] EWHC 2567 (Admin), R (Takoushis) v HM Coroner for Inner North London [2006] 1 WLR 461, and Duggan v HM Coroner for North London [2010] EWHC 1263 (Admin). We need not cite any passages from any of these judgments.

10. We shall focus on the statutory language, as interpreted in the authorities, to identify the principle appropriate to this application. The single question is whether the interests of justice make a further inquest either necessary or desirable. The interests of justice, as they arise in the coronial process, are undefined, but, dealing with it broadly, it seems to us elementary that the emergence of fresh evidence which may reasonably lead to the conclusion that the substantial truth about how an individual met his death was not revealed at the first inquest, will normally make it both desirable and necessary in the interests of justice for a fresh inquest to be ordered. The decision is not based on problems with process, unless the process adopted at the original inquest has caused justice to be diverted or for the inquiry to be insufficient. What is more, it is not a pre-condition to an order for a further inquest that this court should anticipate that a different verdict to the one already reached will be returned. If a different verdict is likely, then the interests of justice will make it necessary for a fresh inquest to be ordered, but even when significant fresh evidence may serve to confirm the correctness of the earlier verdict, it may sometimes nevertheless be desirable for the full extent of the evidence which tends to confirm the correctness of the verdict to be publicly revealed. Without minimising the importance of a proper inquest into every death, where a national disaster of the magnitude of the catastrophe which occurred at Hillsborough on 15 April 1989 has occurred, quite apart from the pressing entitlement of the families of the victims of the disaster to the public revelation of the facts, there is a distinct and separate imperative that the community as a whole should be satisfied that, even if belatedly, the truth should emerge.

11. With these principles in mind, we can turn to the basis of the present application. In 2009 it was decided that the normal 30-year rule, prohibiting the publication of documents in the possession of government departments, should be waived. In January 2010 the Hillsborough Independent Panel, chaired by the Right Reverend James Jones, Bishop of Liverpool, was appointed. All the documents relating to the disaster were made available to it. In total the Panel reviewed over 450,000 pages of documentation. This came from eighty four different organisations and individuals. The mammoth task of examining all this material began in February 2010, and the report of the Hillsborough Independent Panel was published two and a half years later on 12 September 2012. We have each studied the Report in full.

12. We immediately acknowledge our indebtedness and gratitude to the Independent Panel for the commitment and dedication necessary to examine and evaluate such a massive body of material, and to the Attorney General and those who assist him for analysing that material and reducing it to manageable proportions for the purpose of the application. That has enabled the case to be listed very rapidly. It is clear that there are sound grounds for the present application, and that there are a number of features of the evidence which cast new light on the circumstances in which the deceased came to meet their deaths. We shall summarise them briefly.

The cut-off point

13. In our judgment the 3.15pm cut-off point provides not only the most dramatic but perhaps the most distressing aspect revealed by the new material. It was a critical feature of the original inquest, based on the evidence of distinguished pathologists, that the deceased had all suffered the injuries which caused their deaths before 3.15pm. In other words, by that time their deaths were inevitable.

14. The unchallenged evidence before Taylor LJ was that "in virtually every case, the cause of death was basically compression of the chest wall –– against the bodies of the person immediately around the deceased or against fixed structures such as the walls of the stadium and the crash barriers. In the vast majority of the cases, this pressure caused the condition of traumatic or crush asphyxia –– the two terms are synonymous .... If the impediment to breathing is not removed in four to six minutes –– perhaps less if the victim is struggling and thus using up oxygen at a higher rate –– then the brain cells cease to function, unconsciousness supervenes and ultimately the vital centres in the hind brain are damaged and die and then life is no longer possible".

15. With the same evidence before the inquest, the coroner rejected the concern expressed by counsel instructed on behalf of some of the families of the deceased that "to ignore concerns as to the adequacy of the attention and the rescue efforts after 3.15" would constitute a failure to "investigate what could well have been a major reason for why somebody died and did not survive". The coroner ruled that no evidence relating to events beyond 3.15pm on the day of the disaster would be heard. That was the time when the first ambulance arrived on the pitch. The inquest therefore proceeded on the basis that the injuries sustained by those who died were already fatal, and that anything that happened after that time was irrelevant.

16. The report of every single post-mortem examination has now been examined. In brief, no single unvarying pattern of death "irreversibly established at the outset of the injury" has been established. In short, the unchallenged evidence from the pathologists given at the Taylor Inquiry

and indeed at the original inquest is no longer accepted. The State Pathologist for Northern Ireland, Professor Crane, accepts that while "crushing in the enclosures undoubtedly was responsible for the development of asphyxia in the victims", there was no simple uniform rapid mechanism of death in all cases. The pathological findings indicate a number of mechanisms leading to death some of which, particularly the development of cerebral oedema, would indicate that death was not as rapid as initially suggested. Furthermore it is unclear if all the victims were dead when removed from the enclosures, with some evidence indicating that in fact some might still have been alive. Whilst in a number of instances attempts at resuscitation were made, these attempts would appear to have been uncoordinated, sporadic and inadequate. A number of victims, having been removed from the enclosures, were found by police personnel and others simply lying on the pitch, presumably on the initial assumption that they were dead. If this assumption was erroneous, or if they had suffered a cardio-respiratory arrest, the potential for survival could have been compromised by "(i) inappropriate prone posture and (ii) a lack of rapid effective resuscitation and early transfer to hospital".

17. Dr Kirkup, the medical member of the Hillsborough Independent Panel, concluded that there was "clear evidence that in some cases there had been partial asphyxiation for a prolonged period, certainly more than the four to six minutes presented in evidence at the inquests, and extending beyond 3.15pm". After a close examination of the material, he concluded that there was clear evidence of prolonged survival and what he describes as "susceptibility to events post 3.15pm" in forty one of the deceased, and in a further seventeen cases some, but less conclusive, evidence to the same effect. In short, therefore, events after 3.15pm were potentially at any rate, of major significance.

18. The Independent Panel therefore rejected the evidence which had formed the basis for the conclusions of the coroner, the High Court in the judicial review proceedings and the Stuart-Smith Scrutiny, which depended on the evidence of the pathologists offered when the inquest began "that the effects of asphyxia were irreversible by the time each of those who died was removed from the pens". Rather the Panel's view was that "individuals in each of the groups now identified could have had potentially reversible asphyxia. .... It is not possible to establish with certainty that any one individual would or could have survived under different circumstances. It is clear, however, that some people who were partially asphyxiated survived, while others did not. It is highly likely that what happened to these individuals after 3.15pm was significant in determining the outcome. On the basis of this disclosed evidence, it cannot be concluded that life or death was inevitably determined by events prior to 3.15pm, or that no new fatal event could have occurred after that time".

19. The material now available is sufficient to enable Professor Crane to confirm that forensic pathologists could even now provide the necessary advice and assistance to enable a coroner to carry out what he describes as "effective inquests" in relation to the victims.

20. In short, therefore, there is ample evidence to suggest that the 3.15pm cut-off was seriously flawed. The decision had several linked troublesome consequences. We shall identify four. First, there was no investigation as to whether, contrary to the evidence of the pathologists at the inquest, some of those who died might well have survived if they had been rescued and quickly and properly treated. The importance of this consideration is self-evident. Second, none of the

activities, or omissions, of those involved in the co-ordination of the rescue process, and the rescue process itself after the first ambulance arrived on the scene, were examined to see whether their actions or omissions may have made a causal contribution to any of the deaths of those who might have survived. Third, if with proper rescue facilities some of the deceased might have survived, then the question arises whether deficiencies in the police control of this part of the rescue operation may have aggravated the level of police culpability found by Taylor LJ. Fourth, if the rescue facilities were inadequate or disorganised, then there may have been a level of culpability in the emergency services extending beyond the police which contributed to at least some of the deaths. Any such considerations (and others may occur) were precluded by the imposition of the cut off period.

21. In our judgment this area of credible evidence is sufficient on its own to justify the quashing of the original inquest. As to the delay, it is worth remembering that although the evidence of the pathologists was not challenged at the original inquest, the decision to adopt the 3.15pm cut-off was taken in the face of legitimate objection by counsel acting on behalf of the families. In short, this issue has always seemed to be important to the families, and the new evidence demonstrates that their concerns were justified. We also note that within a relatively short period of the original inquest, the question whether one of the young victims was still alive after 3.15pm was raised in a letter from Dr Iain West, a highly respected pathologist, dated 29 October 1993. The letter was not sufficient to persuade the court that it could form the basis of a successful application for the original inquest to be quashed, but it was undoubtedly reflective of the constant complaint that the 3.15pm cut-off imposed artificial limitations on the inquiry process. It is not suggested that an order for a new inquest would cause disproportionate prejudice to any one or anybody which might be open to criticism if the 3.15pm limitation were removed for the purposes of a full investigation of events after that time. Finally, the evidence on these issues is not merely available, it is much more complete than it was when the original inquest took place.

Further considerations

22. There are a number of further considerations which reinforce the conclusion that the original inquest should be quashed.

Alcohol

23. At the inquest, by contrast with the Taylor Report, the relevant findings of which we have already described, evidence relating to alcohol levels among the football fans was given prominent importance. Plainly, the greater the level of drunkenness and hooliganism among the fans, the more difficult the crowd control would become from the point of view of the police. Accordingly, evidence about drunkenness among the fans might have had a bearing on the level of culpability involved in the loss of police control identified by Taylor LJ. Therefore, any purported mitigation for police failures may have been much less persuasive than the coroner appeared to suggest in his summing-up.

Amendments and alterations to police statements

24. The inquest jury was ignorant of the full extent of the amendments and alterations to police statements. The process of alteration was not confined to the South Yorkshire Police. It appears to have extended to the South Yorkshire Metropolitan Ambulance Service and the South Yorkshire Fire Service. Of 164 police statements, something like 116 were amended or altered. Of course, some of the amendments related to the removal of expletives and matters which might cause

distress. Alterations of that kind are not, in the present context, important. But alterations which were designed to conceal evidence which was critical of any part of the police operation -- and indeed the rescue operation as a whole -- fall into a quite different category.

25. A few examples will suffice for the purposes of this judgment. One observation deleted from the original statement of a police constable was: "Sergeants and Inspectors appeared to be aimlessly milling about and direct radio control appeared to be lost. There did not appear to be any leadership". Another statement initially read: "It was noticeable that the only supervisory officers above the rank of Inspector on the pitch were Chief Inspectors Beale and Sumner and Superintendent Greenwood. Certain supervisory officers were conspicuous by their absence. It was utter chaos". After the alterations this statement read: "On the pitch were Chief Inspectors Beale and Sumner and Superintendent Greenwood". The rest had been excised. Another example was that references to "chaos", "fear", "panic" and "confusion" made by no less than 23 officers were altered or deleted from their original statements when their new statements were produced.

26. In fact only one of the police witnesses whose statements were analysed by the Independent Panel for this purpose gave evidence at the generic hearing. Reprehensible as any alteration or amendment (save for the purposes of removing expletives and the like) seems to us, the relevance of these alterations to the cause of death is not immediately obvious and does not necessarily follow, and indeed whether or not these events will give rise to a criminal prosecution will involve a completely separate examination and decision by the Director of Public Prosecutions. It may also be that to some extent the nature and extent of the alteration to the statements has been sufficiently established and made public by the Independent Panel. In other words, what was concealed for very many years on this aspect of the inquiry has now been revealed. Nevertheless, it seems to us open to the new inquest to reflect whether the efforts made by some of the authorities to conceal evidence relating to neglect and breach of duty may have some relevant bearing on the cause of death.

Safety concerns at the stadium

27. Finally, the material available to the Independent Panel has raised serious concerns about the safety of Hillsborough as the venue for such an important football match, inevitably likely to draw a very heavy crowd of spectators, and whether this stadium was safe for the use to which it was put. What Taylor LJ spoke of as the "culture of complacency" is now highlighted by the section of the Report by the Independent Panel, "1981-1989: Unheeded Warnings, the Seeds of Disaster". We are told that yet more documentary evidence relevant to these issues may be available; but whether they are or not, the safety issue now highlighted by the Independent Panel merits close consideration both for its own importance and for its possible impact on issues relating to the response of all the authorities.

Conclusion

28. It will be for the coroner conducting the new inquest to decide what evidence bears on the questions which the inquest is required to answer. The inquest will take place in public, but it will not be a public inquiry. It will be a coronial process. The inquest will be conducted in accordance with those processes and with the objectives of the inquest in mind. The coroner will have to decide the format of the inquest and whether Article 2 of the European Convention on Human Rights is engaged in this inquest, and, if so, the form that it should take to address these issues.

(See R (Middleton) v HM Coroner for Somerset [2004] 1 AC 182). Finally, like the Independent Panel, we should deprecate this new inquest degenerating into the kind of adversarial battle which, looking back on it, scarred the original inquest.

29. This combination of circumstances, as we have narrated, makes inevitable the order for a new inquest. The interests of justice must be served. Within the limits of the coronial system, the facts must be investigated and reanalysed in a fresh inquest when, however distressing or unpalatable, the truth will be brought to light. In this way the families of those who died in this disaster will be vindicated and the memory of each victim will be properly respected.

30. All the inquisitions will be quashed. There will be new inquests in each and every case. The legislation relating to venue is, as we have said in argument, problematic. The inquests will be remitted to another coroner for the same administrative area as the original inquests: in relation to the 95 victims the South Yorkshire (East) area at Doncaster; and in relation to the inquest into Anthony Bland, to the West Yorkshire (West) Coroner at Bradford.

31. An assistant deputy coroner will be appointed in accordance with the appropriate processes, and pre-inquest hearings will then be organised. One of the features which will have to be addressed at a very early stage is the state of any investigation being made into possible criminal offences and whether or not that investigation might be prejudiced or held back by the order for an inquest. Our earnest wish is that the new inquests shall not be delayed for a moment longer than necessary.

http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2012/3783.htm

_____

Judgments - Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)

HOUSE OF LORDS

SESSION 2003-04
19th REPORT
[2004] UKHL 10
on appeal from: [2002] EWCA Civ 390

APPELLATE COMMITTEE

Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and other (Appellant) ex parte Middleton (FC) (Respondent)

< tr>

REPORT

Ordered to be printed 11 March 2004

LONDON

(HL Paper 51)

19th REPORT
from the Appellate Committee

---

11 MARCH 2004

Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell) have met and considered the cause Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent). We have heard counsel on behalf of the appellant and both respondents.

1. This is the considered opinion of the Committee.

2. The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. See, for example, *LCB v United Kingdom* (1998) 27 EHRR 212, para 36; *Osman v United Kingdom* (1998) 29 EHRR 245; *Powell v United Kingdom* (App No 45305/99, unreported 4 May 2000), 16-17; *Keenan v United Kingdom* (2001) 33 EHRR 913, paras 88-90; *Edwards v United Kingdom* (2002) 35 EHRR 487, para 54; *Calvelli and Ciglio v Italy* (App No 32967/96, unreported, 17 January 2002); *Öneryildiz v Turkey* (App No 48939/99, unreported, 18 June 2002).

3. The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated. See, for example, *Taylor v United Kingdom* (1994) 79-A DR 127, 137; *McCann v United Kingdom* (1995) 21 EHRR 97, para 161; *Powell v United Kingdom*, *supra* p 17; *Salman v Turkey* (2000) 34 EHRR 425, para 104; *Sieminska v Poland* (App No 37602/97, unreported, 29 March 2001); *Jordan v United Kingdom* (2001) 37 EHRR 52, para 105; *Edwards v United Kingdom*, *supra*, para 69; Öneryildiz *v Turkey*, *supra*, paras 90-91; *Mastromatteo v Italy* (App No 37703/97, unreported, 24 October 2002).

4. The scope of the state's substantive obligations has been the subject of previous decisions such as *Osman* and *Keenan* but is not in issue in this appeal. Nor does any issue arise about participation in the official investigation by the family or next of kin of the deceased, as recently considered by the House in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2003] 3 WLR 1169. The issue here concerns not the conduct of the investigation itself but its culmination. It is, or may be, necessary to consider three questions.

   (1)What, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of article 2?

   (2)Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984 (SI 1984/552), as hitherto understood and followed in England and Wales, meet those requirements of the Convention?

(3)If not, can the current regime governing the conduct of inquests in England and Wales be revised so as to do so, and if so how?

5. Before turning to consider these questions it should be observed that they are very important questions. Compliance with the substantive obligations referred to above must rank among the highest priorities of a modern democratic state governed by the rule of law. Any violation or potential violation must be treated with great seriousness. In the context of this appeal the questions have a particular importance also. For, as the facts summarised in paragraphs 39-43 below make clear, the appeal concerns an inquest into the suicide, in prison, of a serving prisoner. Unhappily, this is not a rare event. The statistics given in recent publications, (notably "Suicide is Everyone's Concern, A Thematic Review by HM Chief Inspector of Prisons for England and Wales" (May 1999), the Annual Report of HM Chief Inspector of Prisons for England and Wales 2002-2003, and Evidence given to the House of Lords and House of Commons Joint Committee on Human Rights (HL Paper 12, HC 134, January 2004) make grim reading. While the suicide rate among the population as a whole is falling, the rate among prisoners is rising. In the 14 years 1990-2003 there were 947 self-inflicted deaths in prison, 177 of which were of detainees aged 21 or under. Currently, almost two people kill themselves in prison each week. Over a third have been convicted of no offence. One in five is a woman (a proportion far in excess of the female prison population). One in five deaths occurs in a prison hospital or segregation unit. 40% of self-inflicted deaths occur within the first month of custody. It must of course be remembered that many of those in prison are vulnerable, inadequate or mentally disturbed; many have drug problems; and imprisonment is inevitably, for some, a very traumatic experience. These statistics, grim though they are, do not of themselves point towards any dereliction of duty on the part of the authorities (which have given much attention to the problem) or any individual official. But they do highlight the need for an investigative regime which will not only expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations. The death of any person involuntarily in the custody of the state, otherwise than from natural causes, can never be other than a ground for concern. This appeal is concerned with the death of a long-term convicted prisoner but the same principles must apply to the death of any person in the custody of the prison service or the police.

6. Question (1) What, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of article 2?

7. The European Court has never expressly ruled what the final product of an official investigation, to satisfy the procedural obligation imposed by article 2 of the Convention, should be. This is because the Court applies principles and does not lay down rules, because the Court pays close attention to the facts of the case before it and because it recognises that different member states seek to discharge their Convention obligations through differing institutions and procedures. In this appeal the Committee heard oral submissions on behalf of the Secretary of State, HM Coroner for the Western District of Somerset and Mrs Jean Middleton, and received written submissions on behalf of the Coroners' Society of England and Wales, the Northern Ireland Human Rights Commission and Inquest. It was not suggested that the express terms of the Convention or any ruling of the Court provide a clear answer to this first question before the House.

8. The Court has recognised (in *McCann v United Kingdom*, para 146) that its approach to the interpretation of article 2

> "must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective."

Thus if an official investigation is to meet the state's procedural obligation under article 2 the prescribed procedure must work in practice and must fulfil the purpose for which the investigation is established.

9. What is the purpose for which the official investigation is established? The decided cases assist in answering that question. In *Keenan v United Kingdom*, which concerned a prisoner who had committed suicide, the article 2

argument was directed to the state's performance of its substantive, not its procedural, obligation. The Court did, however, note the limited scope of an inquest in England and Wales (paragraphs 75-78), which was relevant to the applicant's complaint under article 13 that national law afforded her no effective remedy. In the context of that complaint the Government agreed (paragraph 121)

> "that the inquest, which did not permit the determination of issues of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities or obtaining damages."

In paragraph 122 the Court, still with reference to this complaint, ruled:

> "Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life . . ."

On the facts, the Court held (paragraph 131) that a civil action in damages would not have afforded the applicant an effective remedy which would have established where responsibility lay for the death of the deceased.

10. *Jordan v United Kingdom* arose from the fatal shooting of a young man by a police officer in Northern Ireland. The Court found a violation of article 2 in respect of failings in the investigative procedures concerning the death. The Court held:

> "105The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures . . .
>
> 107The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

There was argument whether the inquest, which had been opened but not concluded, would satisfy the state's investigative obligation, but the Court concluded that, on the facts of this case, it would not:

> "128It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case law of the national courts, the procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend

> his inquiry into the broader circumstances. This was the standard applicable in the *McCann* inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of Art. 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined.
>
> 129Nonetheless, unlike the *McCann* inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death. In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including 'unlawful death'. As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed. It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In this case it appears that the DPP did reconsider his decision not to prosecute when the Coroner referred to him information about a new eye witness who had come forward. The DPP maintained his decision however and gave no explanation of his conclusion that there remained insufficient evidence to justify a prosecution.
>
> 130Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Art. 2."

The Court held (paragraph 142) that the Northern Irish inquest procedure fell short of what article 2 required because (among other shortcomings) it

> "did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed."

11. The killing in *Edwards v United Kingdom* was of a prisoner by another prisoner with whom he shared a cell. The killer was charged with murder but his plea of guilty to manslaughter by reason of diminished responsibility was accepted, and there was accordingly no investigation in the criminal trial of how the two men came to be sharing a cell. This, not surprisingly, was a feature of the case which greatly concerned the family of the deceased. In paragraph 69 of its judgment, the Court described the purpose of the investigation required by article 2 in exactly the same terms as it had used in paragraph 105 of its judgment in *Jordan*, quoted above. A violation was found.

12. In *Mastromatteo v Italy* the deceased had been killed by a group of criminals, some of whom were on leave of absence from prison and one of whom had absconded from prison. A complaint that the state had violated its substantive obligation under article 2 was rejected (paragraph 79). So too was a complaint that the state's procedural obligation had been violated (paragraph 96). This complaint was primarily directed to the possibility of obtaining compensation (paragraphs 80-82), but the Court, while finding (paragraph 92) that there was a procedural obligation to determine the circumstances of the death, found the obligation to be met by the trial and conviction of two of the murderers and the making of a compensation order.

13. Basing themselves primarily on *Keenan, Jordan* and *Edwards*, the parties made competing submissions on what

the procedural investigative obligation under article 2 requires. For the Secretary of State, it was argued that what is required, where the obligation arises, is a full, thorough, independent and public investigation of the facts surrounding and leading to the death but not necessarily culminating in any decision on whether the state or any individual is responsible. The duty is to investigate, no more. If the investigation yields evidence of delinquency on the part of the state or its agents, then the victim must have a remedy. But that is a requirement of article 13, not of the procedural obligation under article 2. Counsel for Mrs Middleton challenged this approach. If an investigation is to ensure the accountability of state agents or bodies for deaths occurring under their responsibility (*Jordan*, paragraph 105) and be capable of leading to a determination of whether the force used had been justified (*Jordan*, paragraph 107) and to establish the cause of death or the person or persons responsible (*Jordan*, paragraph 107), then it must culminate in a finding which, while it need not convict any person of crime nor constitute an enforceable civil judgment against any party, must express the fact-finding body's judgment on the cardinal issues concerning the death.

14. In choosing between these submissions assistance is gained by comparing the Court's decisions in *McCann* and *Jordan*. *McCann* arose from the fatal shooting by soldiers of three people, believed to be terrorists, in Gibraltar. A lengthy and detailed inquest was held, also in Gibraltar, when much evidence was heard. It was clear from the outset when and where the deceased had died, and that they had been shot by the soldiers. The central question was whether the soldiers had been justified in shooting and killing the deceased. On this issue the coroner directed the jury in some detail, giving illustrations of conduct which would amount to unlawful killing, and leaving to the jury three verdicts which he regarded as reasonably open to them (paragraph 120): these were unlawful killing (unlawful homicide), lawful killing (justifiable reasonable homicide) or an open verdict. The jury could thus indicate, by returning an open verdict, their inability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central, and very important, issue. Although criticism was made of the adequacy of the inquest proceedings as an investigative mechanism, the Court concluded that the alleged shortcomings in the proceedings had not substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings (paragraph 163). The inquest could not, of course, have culminated in an award of compensation.

15. In *Jordan*, to which reference is made in paragraph 10 above, the central issue was very much the same but a different result was reached. One of the reasons for this was that the jury were only permitted in their verdict to give the identity of the deceased and the date, place and cause of death and not, as in England, Wales and Gibraltar, to return any one of several verdicts including "unlawful death". A verdict in the permitted form would not, the Court held, operate to trigger criminal prosecution. In a situation where the Director of Public Prosecutions of Northern Ireland had decided not to prosecute, with no reasons given, and with no effective means of requiring reasons to be given (paragraph 122), the Court regarded the inquest as inadequate to investigate the possible breach of the state's substantive obligation under article 2.

16. It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required.

17. Does that requirement apply only to the very limited category of cases just defined, or does it apply to other cases as well? The decision in *Keenan* shows that it does apply to a broader category of cases, since although in that case no breach of the state's investigative obligation was alleged or found, the Court based its conclusion that article 13 had been violated in part on its opinion (paragraph 121) that the inquest, which did not permit any determination of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities nor did it (paragraph 122) constitute an investigation capable of leading to the identification and punishment of those responsible for the deprivation of life. A statement of the inquest jury's conclusions on the main facts leading to the suicide of Mark Keenan would have precluded that comment.

18. Two considerations fortify confidence in the correctness of this conclusion. First, a verdict of an inquest jury

(other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased's family or next-of-kin. Yet they, like the deceased, may be victims. They have been held to have legitimate interests in the conduct of the investigation (*Jordan*, paragraph 109), which is why they must be accorded an appropriate level of participation (see also *R (Amin) v Secretary of State for the Home Department, supra*). An uninformative jury verdict will be unlikely to meet what the House in *Amin*, paragraph 31, held to be one of the purposes of an article 2 investigation:

> "… that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

19. The second consideration is that while the use of lethal force by agents of the state must always be a matter of the greatest seriousness, a systemic failure to protect human life may call for an investigation which may be no less important and perhaps even more complex: see *Amin*, paragraphs 21, 41, 50 and 62. It would not promote the objects of the Convention if domestic law were to distinguish between cases where an agent of the state may have used lethal force without justification and cases in which a defective system operated by the state may have failed to afford adequate protection to human life.

20. The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public enquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case.

21. Question (2)Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984 (SI 1984/552) as hitherto understood and followed in England and Wales, meet the requirements of the Convention?

22. The historical and statutory background to the Coroners Act 1988 and the Coroners Rules 1984 was accurately summarised by the Court of Appeal in *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1. There has been little significant legislative change in England and Wales since then, and that account need not be repeated. It is enough to identify the main features of the regime so far as relevant to this appeal.

23. By section 8(1) of the Act an inquest must be held where there is reasonable cause to suspect that a deceased person

> "(a) has died a violent or an unnatural death;
>
> (b)has died a sudden death of which the cause is unknown; or
>
> (c)has died in prison or in such a place or in such circumstances as to require an inquest under any other Act."

If there is reason to suspect that the death occurred in prison or in police custody or resulted from an injury caused by a police officer in the purported execution of his duty, the inquest must be held with a jury (section 8(3)), and the independence of jurors dealing with prison deaths is specifically protected (section 8(6)). The requirement to summon a jury in such cases recognises the substantive and procedural obligations of the state which are now derived from article 2 as well as from domestic law. If a coroner fails to hold an inquest when he should, he may be ordered to do so, and if a coroner misconducts an inquest, another inquest may be ordered (section 13).

24. The task of the jury is to "inquire as jurors into the death of the deceased" (section 8(2)(a)) and they are sworn "diligently to inquire into the death of the deceased and to give a true verdict according to the evidence" (section

8(2)(b)). The coroner is to "examine on oath concerning the death all persons who tender evidence as to the facts of the death and all persons having knowledge of those facts whom he considers it expedient to examine" (section 11(2)). Thus the character of the proceedings is quite different from that of an ordinary trial, civil or criminal. The jury, where there is one, must hear the evidence and give their verdict (section 11(3)(a)). Section 11(5) requires that the inquisition, to be signed by the jury or a majority of them, must set out in writing, so far as such particulars have been proved, and in such form as the Lord Chancellor may by rule prescribe,

> "(i)who the deceased was; and
>
> (ii)how, when and where the deceased came by his death."

25. The 1988 Act recognises that a death which is the subject of an inquest may also be the subject of criminal proceedings, and also recognises the general undesirability of investigating publicly at an inquest evidence pertinent to a forthcoming criminal trial. In a departure from previous practice, section 11(6) of the Act provides:

> "At a coroner's inquest into the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings shall not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition shall in no case charge a person with any of those offences."

Thus the inquest jury may no longer perform its former role as a grand jury. Section 16 of the Act (and rules 27 and 28 of the Rules) make provision for the adjourning of an inquest when criminal proceedings are or may be pending on certain specified charges or in certain specified circumstances (but not solely because any criminal proceedings arising out of the death of the deceased have been instituted: rule 32 of the Rules). After the conclusion of criminal proceedings the coroner may resume the adjourned inquest "if in his opinion there is sufficient cause to do so" (section 16(3)). Section 17A makes provision for the adjourning of an inquest when a public inquiry into a death is to be conducted or chaired by a judge. A coroner may only resume an inquest so adjourned "if in his opinion there is exceptional reason for doing so", and then subject to conditions (section 17A (4)).

26. The Coroners Rules 1984 have effect as if made under section 32 of the 1988 Act, which gives the Lord Chancellor, with the concurrence of the Secretary of State, a wide power to make rules for regulating the practice and procedure at inquests and to prescribe forms for use in connection with inquests. The 1984 Rules prescribe a hybrid procedure, not purely inquisitorial or purely adversarial. On the one hand, notice of the inquest must be given to the next-of-kin of the deceased and a widely defined group of other interested parties (rule 19), who are entitled to examine witnesses either in person or by an authorised advocate (rule 20); witnesses are privileged against self-incrimination; notice must be given to, and attendance facilitated of, persons whose conduct is likely to be called into question (rules 24 and 25). On the other hand, the coroner calls and first examines all witnesses, the representative of a witness questioning him last (rule 21); no person is allowed to address the coroner or the jury as to the facts (rule 40); and there is no particularised charge or complaint as in criminal or civil proceedings. In addition to examining the witnesses the coroner (rule 41) sums up the evidence to the jury and directs them as to the law, drawing their attention to rules 36(2) and 42. Rule 43 provides:

> "A coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have power to take such action and he may report the matter accordingly."

Attention should be drawn to two important rules. The first of these, rule 36, provides:

> "(1)The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely -

> (a)who the deceased was;
>
> (b)how, when and where the deceased came by his death;
>
> (c)the particulars for the time being required by the Registration Acts to be registered concerning the death.
>
> (2)Neither the coroner nor the jury shall express any opinion on any other matters."

The second, rule 42, provides:

> "No verdict shall be framed in such a way as to appear to determine any question of -
>
> (a)criminal liability on the part of a named person, or
>
> (b)civil liability."

27. Rule 60 provides that the forms set out in Schedule 4 may be used for the purposes for which they are expressed to be applicable, with such modifications as circumstances may require. Schedule 4 includes, as form 22, a model form of inquisition. This suggests that, when recording the conclusion of the jury as to the death, one or other of certain forms should be adopted. The form provides that a finding that "the cause of death was aggravated by lack of care/self-neglect" should be added only where the finding is of a death caused by natural causes, industrial disease, dependence on or abuse of drugs, or want of attention at birth. In the case of murder, manslaughter or infanticide the suggested form of conclusion is that the deceased was "killed unlawfully".

28. Remarkably, as it now seems, the Court of Appeal made no reference to the European Convention in *Ex p Jamieson*, and the report does not suggest that counsel referred to it either. Counsel for Mrs Middleton criticised the reasoning of that decision, but it appears to the committee to have been an orthodox analysis of the Act and the Rules and an accurate, if uncritical, compilation of judicial authority as it then stood. Thus emphasis was laid on the function of an inquest as a fact-finding inquiry (page 23, conclusion (1)). Following *R v Walthamstow Coroner, Ex p Rubenstein* (19 February 1982, unreported), *R v HM Coroner for Birmingham, Ex p Secretary of State for the Home Department* (1990) 155 JP 107 and *R v HM Coroner for Western District of East Sussex, Ex p Homberg* (1994) 158 JP 357, the Court of Appeal interpreted "how" in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the Rules narrowly as meaning "by what means" and not "in what broad circumstances" (page 24, conclusion (2)). It was not the function of a coroner or an inquest jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame (page 24, conclusion (3)). Attention was drawn to the potential unfairness if questions of criminal or civil liability were to be determined in proceedings lacking important procedural protections (page 24, conclusion (4)). A verdict could properly incorporate a brief, neutral, factual statement, but should express no judgment or opinion, and it was not for the jury to prepare detailed factual statements (page 24, conclusion (6)). It was acceptable for a jury to find, on appropriate facts, that self-neglect aggravated or contributed to the primary cause of death, but use of the expression "lack of care" was discouraged and a traditional definition of "neglect" was adopted (pages 24-25, conclusions (7), (8) and (9)). Where it was found that the deceased had taken his own life, that was the appropriate verdict, and only in the most extreme circumstances (going well beyond ordinary negligence) could neglect be properly found to have contributed to that cause of death (pages 25-26, conclusion (11)). Reference to neglect or self-neglect should not be made in a verdict unless there was a clear and direct causal connection between the conduct so described and the cause of death (page 26, conclusion (12)). It was for the coroner alone to make reports with a view to preventing the recurrence of a fatality (page 26, conclusion (13)). Emphasis was laid on the duty of the coroner to conduct a full, fair and fearless investigation, and on his authority as a judicial officer (page 26, conclusion (14)).

29. How far, then, does the current regime for conducting inquests in England and Wales match up to the investigative obligation imposed by article 2?

30. In some cases the state's procedural obligation may be discharged by criminal proceedings. This is most likely to

be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in *Edwards)*, or the issue at trial is the mental state of the defendant (as in *Amin*), because in such cases the wider issues will probably not be explored.

31. In some other cases, short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest. *McCann* has already been given as an example: see paragraph 14 above. The same would be true if the central issue at the inquest were whether the deceased had taken his own life or been killed by another: by choosing between verdicts of suicide and unlawful killing, the jury would make clear its factual conclusion. But it is plain that in other cases a strict *Ex p Jamieson* approach will not meet what has been identified above as the Convention requirement. In *Keenan* the inquest verdict of death by misadventure and the certification of asphyxiation by hanging as the cause of death did not express the jury's conclusion on the events leading up to the death. Similarly, verdicts of unlawful killing in *Edwards* and *Amin*, although plainly justified, would not have enabled the jury to express any conclusion on what would undoubtedly have been the major issue at any inquest, the procedures which led in each case to the deceased and his killer sharing a cell.

32. The conclusion is inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the Convention. This is a conclusion rightly reached by the judge in this case (see paragraph 44 below) and by the Court of Appeal both in the present case (see paragraph 44 below) and in cases such as *R (Davies) v HM Deputy Coroner for Birmingham* [2003] EWCA Civ 1739 (2 December 2003, unreported), paragraph 71.

33. Question (3) Can the current regime governing the conduct of inquests in England and Wales be revised so as to meet the requirements of the Convention, and if so, how?

34. Counsel for the Secretary of State rightly suggested that the House should propose no greater revision of the existing regime than is necessary to secure compliance with the Convention, even if it were (contrary to his main submission) to reach the conclusion just expressed. The warning is salutary. There has recently been published "Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review" (June 2003, Cm 5831). Decisions have yet to be made on whether, and how, to give effect to the recommendations. Those decisions, when made, will doubtless take account of policy, administrative and financial considerations which are not the concern of the House sitting judicially. It is correct that the scheme enacted by and under the authority of Parliament should be respected save to the extent that a change of interpretation (authorised by section 3 of the Human Rights Act 1998) is required to honour the international obligations of the United Kingdom expressed in the Convention.

35. Only one change is in our opinion needed: to interpret "how" in section 11(5)(b)(ii) of the Act and rule 36 (1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply "by what means" but "by what means and in what circumstances".

36. This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others (paragraphs 30-31 above). In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues. This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of Schedule 4 to the Rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner. If the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death. It would be open to parties appearing or represented at the inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the

courts unless strong grounds are shown.

37. The prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of "how" in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus there must be no finding of criminal liability on the part of a named person. Nor must the verdict appear to determine any question of civil liability. Acts or omissions may be recorded, but expressions suggestive of civil liability, in particular "neglect" or "carelessness" and related expressions, should be avoided. Self-neglect and neglect should continue to be treated as terms of art. A verdict such as that suggested in paragraph 45 below ("The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so") embodies a judgmental conclusion of a factual nature, directly relating to the circumstances of the death. It does not identify any individual nor does it address any issue of criminal or civil liability. It does not therefore infringe either rule 36(2) or rule 42.

38. The power of juries to attach riders of censure or blame was abolished on the recommendation of the *Report of the Departmental Committee on Coroners* under the chairmanship of Lord Wright (Cmd 5070, 1936). It has not been reintroduced. Juries do not enjoy the power conferred on Scottish sheriffs by the 1976 Act to determine the reasonable precautions, if any, whereby the death might have been avoided (section 6(1)(c)). Under the 1984 Rules, the power is reserved to the coroner to make an appropriate report where he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. Compliance with the Convention does not require that this power be exercisable by the jury, although a coroner's exercise of it may well be influenced by the factual conclusions of the jury. In England and Wales, as in Scotland, the making of recommendations is entrusted to an experienced professional, not a jury. In the ordinary way, the procedural obligation under article 2 will be most effectively discharged if the coroner announces publicly not only his intention to report any matter but also the substance of the report, neutrally expressed, which he intends to make.

The present case.

39. Colin Campbell Middleton took his own life by hanging himself in his cell at HMP Horfield on 14 January 1999. He had been in custody since, aged 14, he was convicted in April 1982 of murdering his eighteen-month old niece.

40. His career in prison was uneven, periods of progress being interrupted by setbacks, some of his own making, some attributable to the hostility of fellow-prisoners. After trial periods in open prisons in 1993, 1994 and 1996 he was transferred to Horfield where, in November 1998 he harmed himself seriously. A self-harm at risk form (F2052SH) was then opened, but closed a few days later. There was evidence that he was depressed, and he was receiving medication at the time of his death. On 11 January 1999 he wrote to the Wing Governor, unhappy about his status and referring to his mental illness. He spoke of suicide to another prisoner who may, or may not, have passed on this information to the authorities. Although he was aged only 30, he had spent more than half his life in custody.

41. The verdict reached at a first inquest was quashed for want of sufficient enquiry, and a second inquest was held over three days in October 2000, when oral evidence was received from eleven witnesses and written evidence from a further seven. It is accepted by Mrs Middleton and the family of the deceased that at this inquest the issues surrounding the death were thoroughly, effectively and sensitively explored.

42. At the end of the evidence the coroner ruled that the issue of "neglect" should not be left to the jury. But he told the jury that if they wished to do so they could give him a note regarding any specific areas of the evidence about which they were concerned, and he would consider the note, which would not be published, when considering exercise of his power under rule 43.

43. The jury found the cause of death to be hanging and returned a verdict that the deceased had taken his own life when the balance of his mind was disturbed. The jury also gave the coroner a note which communicated the

jury's opinion that the Prison Service had failed in its duty of care for the deceased. The family asked that the note should be appended to the inquisition, but the coroner declined to do so. The contents of the note remained private until, in the course of these proceedings, two points made by the jury were revealed. As the judge put it, the jury

> "(a)expressed concern that a form F2052SH had been closed by two officers who had no prior knowledge of Mr Middleton; and
>
> (b)expressed their belief that a letter of 11 January 1999 written by him contained sufficient information to warrant an F2052SH being opened."

In exercise of his power under rule 43, the coroner wrote a full letter to the Chief Inspector of Prisons, drawing attention to the jury's point (a) and to the jury's noting of "a failure in the prison's responsibilities towards Middleton and a total lack of communication between all grades of prison staff". The coroner pointed out that on the day before his death the deceased had not left his cell, even for meals, and had placed a rug all day over the inspection port window into the cell.

44. In her judicial review application Mrs Middleton did not question the adequacy of the coroner's investigation nor seek an order that there be a further inquest. She sought an order that the jury's findings as set out in their note be publicly recorded, and that there should thus be a formal public determination of the responsibility of the Prison Service for the death of the deceased. The issue was thus raised whether the current regime for holding inquests in England and Wales meets the requirements of article 2 of the Convention. In his reserved judgment given on 14 December 2001 ([2001] EWHC Admin 1043), paragraph 54, Stanley Burnton J said:

> "However, where there has been neglect on the part of the State, and that neglect was a substantial contributory cause of the death, my view is that a formal and public finding of neglect on the part of the State is in general necessary in order to satisfy those requirements [of article 2]."

He therefore concluded (paragraph 56) that an inquest would not necessarily satisfy the procedural requirements of article 2 in a case such as the present. But the judge declined to order that the jury's note be incorporated in the inquisition, for a series of reasons but most importantly because he considered that the coroner had acted unlawfully in suggesting production of the note. The judge recorded (paragraph 60) that in the view of the jury and the coroner there had been significant deficiencies in the Prison Service's care of the deceased. He considered that no declaration was needed but, at the request of the Secretary of State, declared that:

> "by reason of the restrictions on the verdict at the inquest into the death of [the deceased] . . . that inquest was inadequate to meet [the] procedural obligation in Article 2 of the European Convention . . ."

The Secretary of State appealed to the Court of Appeal which delivered its reserved judgment on 27 March 2002: [2002] EWCA Civ 390, [2003] QB 581. It was found to be necessary, to comply with article 2, that a verdict of neglect be available, but the Court of Appeal distinguished between individual and systemic neglect:

> "87 A verdict of neglect can perform different functions. In particular, in the present context, it can identify a failure in the system adopted by the Prison Service to reduce the incidence of suicide by inmates. Alternatively it may do no more than identify a failure of an individual prison officer to perform his duties properly. We offer two illustrations, which demonstrate the distinction we have in mind. On the one hand, the system adopted by a prison may be unsatisfactory in that it allows a prisoner who is a known suicide risk to occupy a cell by himself or does not require that prisoner to be kept under observation. On the other hand, the system may be perfectly satisfactory but the prison officer responsible for keeping observation may fall asleep on duty.
>
> 88 For the purpose of vindicating the right protected by article 2 it is more important to

> identify defects in the system than individual acts of negligence. The identification of defects in the system can result in it being changed so that suicides in the future are avoided. A finding of individual negligence is unlikely to lead to that result. If the facts have been investigated at the inquest the evidence given for this purpose should usually enable the relatives to initiate civil proceedings against those responsible without the verdict identifying individuals by name. The shortcomings of civil proceedings in meeting the requirements of article 2 do not in general prevent actions in the domestic courts for damages from providing an effective remedy in cases of alleged unlawful conduct or negligence by public authorities.
>
> 89 In contrast with the position where there is individual negligence, not to allow a jury to return a verdict of neglect in relation to a defect in the system could detract substantially from the salutary effect of the verdict. A finding of neglect can bring home to the relevant authority the need for action to be taken to change the system, and thus contribute to the avoidance of suicides in the future. The inability to bring in a verdict of neglect (without identifying any individual as being involved) in our judgment significantly detracts, in some cases, from the capacity of the investigation to meet the obligations arising under article 2."

Later, the court continued:

> ". . . In a situation where a coroner knows that it is the inquest which is in practice the way the state is fulfilling the adjectival obligation under article 2, it is for the coroner to construe the Rules in the manner required by section 6(2)(b) [of the Human Rights Act 1998]. Rule 42 can and should, contrary to *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, when necessary be construed (in relation to both criminal and civil proceedings) only as preventing an individual being named, with the result that a finding of system neglect of the type we have indicated will not contravene that rule. If the coroner is acting in accordance with the rule for this purpose he will not be offending in this respect section 6(1).
>
> 92 For a coroner to take into account today the effect of the Human Rights Act 1998 on the interpretation of the Rules is not to overrule *Jamieson's* case by the back door. In general the decision continues to apply to inquests, but when it is necessary so as to vindicate article 2 to give in effect a verdict of neglect, it is permissible to do so. The requirements are in fact specific to the particular inquest being conducted and will only apply where in the judgment of the coroner a finding of the jury on neglect could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into at the inquest. Subject to the coroner, in the appropriate cases, directing the jury when they can return what would in effect be a rider identifying the nature of the neglect they have found, the rules will continue to apply as at present. The proceedings should not be allowed to become adversarial. We appreciate there is no provision for such a rider in the model inquisition but this technicality should not be allowed to interfere with the need to comply with section 6 of the Human Rights Act 1998."

The Court of Appeal set aside the judge's declaration and instead declared:

> "In a case where
>
> (a)a coroner knows that it is the inquest which is in practice the way the State is to fulfil the adjectival obligation under Article 2 of the European Convention on Human Rights, and
>
> (b)a finding of neglect by the jury at the inquest could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into,

rule 42 of the Coroners Rules 1984 can and should be construed as allowing such a finding, providing no individual is named therein."

45. It follows from the reasoning earlier in this opinion that the judge's declaration was correctly made, although not for all the reasons he gave. There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain that he had. The crux of the argument was whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. The jury's verdict, although strictly in accordance with the guidance in *Ex p Jamieson*, did not express the jury's conclusion on these crucial facts. This might have been done by a short and simple verdict (eg "The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so"). Or it could have been done by a narrative verdict or a verdict given in answer to the coroner's questions. By one means or another the jury should, to meet the procedural obligation in article 2, have been permitted to express their conclusion on the central facts explored before them.

46. Had this been done (and the coroner cannot of course be criticised for applying the law as it stood) it would not have been necessary to invite the jury to submit a note. Their assessment of the facts and probabilities would have been clear, and the coroner (having also heard the evidence) could have judged what report he should make under rule 43. As it was, he was not constrained by the jury's note in what he reported. But the judge was right to view private communications between the jury and the coroner with disfavour, since such a practice must derogate from the public nature of the proceedings.

47. The declaration made by the Court of Appeal found no friend in argument before the House. In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2. There is force in the criticism made by all parties of the distinction drawn between individual and systemic neglect, since the borderline between the two is indistinct and there will often be some overlap between the two: there are some kinds of individual failing which a sound system may be expected to detect and remedy before harm is done. There will, moreover, be individual failings which need to be identified even though an individual is not to be named. "Self-neglect" and "neglect" are terms of art in the law of inquests, and there is no reason to alter their meaning. The recommending of precautions to prevent repetition is for the coroner, not the jury.

48. There has been in this case a full and satisfactory investigation. Mrs Middleton does not seek another inquest. The conclusions of the jury, which Mrs Middleton sought to publicise, have been published to the world. No purpose is served by a declaration.

49. The arguments of the Secretary of State and Mrs Middleton on the acceptability of the inquest regime to discharge the state's procedural investigative obligation under article 2 have, in each case, succeeded in part and failed in part. But the Secretary of State has succeeded in persuading the House that the Court of Appeal's declaration should be set aside. To that extent his appeal succeeds. We make no order for the payment of costs by any party.

50. In this appeal no question was raised on the retrospective application of the Human Rights Act and the Convention. They were assumed to be applicable. Nothing in this opinion should be understood to throw doubt on the conclusion of the House in *In re McKerr* [2004] UKHL 12.

APPENDIX I ORDERS OF REFERENCE, ETC.

WEDNESDAY 20 JUNE 2001

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

_____

THURSDAY 4 JULY 2002

Regina *v.* H M Coroner for the Western District of Somerset (Respondent) and another (Petitioner) *ex parte* Middleton (Respondent)—The petition of the Secretary of State for the Home Department praying for leave to appeal was presented and referred to an Appeal Committee (lodged 25th April).

_____

TUESDAY 24 SEPTEMBER 2002

Regina *v*. H M Coroner for the Western District of Somerset (Respondent) and another (Petitioner) *ex parte* Middleton (FC) (Respondent)—The certificate of public funding of Jean Middleton was lodged.

_____

WEDNESDAY 13 NOVEMBER 2002

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

_____

THURSDAY 14 NOVEMBER 2002

Regina *v*. H M Coroner for the Western District of Somerset (Respondent) and another (Petitioner) *ex parte* Middleton (FC) (Respondent)—That leave to appeal be given, and that the petition of appeal be lodged by 28th November.

_____

MONDAY 2 DECEMBER 2002

Regina *v*. H M Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent) (England)—The appeal of the Secretary of State for the Home Department was presented and it was ordered that in accordance with Standing Order VI the statement and appendix thereto be lodged on or before 13th January next (lodged 28th November).

_____

MONDAY 13 JANUARY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the appellant praying that the time for lodging the statement and appendix and setting down the cause for hearing might be extended to 10th February next (the agents for the respondent consenting thereto) was presented; and it was ordered as prayed.

_____

MONDAY 10 FEBRUARY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the appellant praying that the time for lodging the statement and appendix and setting down the cause for hearing might be extended to 10th March next (the agents

for the respondent consenting thereto) was presented; and it was ordered as prayed.

_____

MONDAY 10 MARCH 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the appellant praying that the time for lodging the statement and appendix and setting down the cause for hearing might be extended to 31st March next (the agents for the respondent consenting thereto) was presented; and it was ordered as prayed.

_____

TUESDAY 1 APRIL 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The appeal was set down for hearing and referred to an Appellate Committee.

_____

FRIDAY 18 JULY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of Inquest and its associated charitable trust praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

_____

THURSDAY 31 JULY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—That the petition of Inquest and its associated charitable trust that they might be heard or otherwise intervene in the said appeal be allowed to the extent that they may lodge written submissions only.

_____

THURSDAY 2 OCTOBER 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the Northern Ireland Human Rights Commission praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

_____

THURSDAY 9 OCTOBER 2003

Regina *v*. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—That the petition of the Northern Ireland Human Rights Commission that they might be heard or otherwise intervene in the said appeal be allowed to the extent that they may lodge written submissions only.

_____

WEDNESDAY 26 NOVEMBER 2003

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

———————————

MONDAY 26 JANUARY 2004

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the Coroners' Society of England and Wales praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

——

WEDNESDAY 28 JANUARY 2004

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—That the petition of the Coroners' Society of England and Wales that they might be heard or otherwise intervene in the said appeal be allowed to the extent that they may lodge written submissions only.

———————

APPENDIX II MINUTES OF PROCEEDINGS

MONDAY 2 FEBRUARY 2004

Present:

L. Bingham of Cornhill

B. Hale of Richmond

L. Lord Hope of Craighead

L. Carswell

L. Walker of Gestinghorpe

The Lord Bingham of Cornhill in the Chair.

The Orders of Reference are read.

The Committee deliberate.

Counsel and Parties are called in.

Mr J. Crow and Mr R. Singh QC appear for the appellant.

Mr B. Emmerson QC, Mr P. Weatherby and Mr D. Friedman appear for the respondent Middleton.

Mr H. Mercer and Mr R. Eaton appear for the respondent Her Majesty's Coroner for the Western District of Somerset.

Mr Crow heard.

Mr Mercer heard.

In part heard and adjourned until tomorrow.

TUESDAY 3 FEBRUARY 2004

Present:

L. Bingham of Cornhill

B. Hale of Richmond

L. Lord Hope of Craighead

L. Carswell

L. Walker of Gestinghorpe

The Lord Bingham of Cornhill in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

The Committee deliberate.

Counsel and Parties are again called in.

Mr Mercer further heard.

Mr Emmerson heard.

Further heard and adjourned until tomorrow.

WEDNESDAY 4 FEBRUARY 2004

Present:

L. Bingham of Cornhill

B. Hale of Richmond

L. Lord Hope of Craighead

L. Carswell

L. Walker of Gestinghorpe

The Lord Bingham of Cornhill in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

The Committee deliberate.

Counsel and Parties are again called in.

Mr Emmerson further heard.

Mr Crow heard in reply.

Further and fully heard.

Bar cleared; and the Committee deliberate.

A draft Report is laid before the Committee by the Lord Bingham of Cornhill.

The Report is considered and agreed to unanimously.

Ordered, That the Lord Bingham of Cornhill do make the Report to the House.

Ordered, That the Committee be adjourned.

Middleton, R (on the application of) v HM Coroner for West Somersetshire [2002] EWCA Civ 390 (27th March, 2002)

Neutral Citation Number: [2002] EWCA Civ 390
Case No: C/2001/2263
C/2002/0079

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(Mr Justice Hooper)
(Mr Justice Stanley Burnton)

Royal Courts of Justice
Strand, London, WC2A 2LL
27 March 2002

B e f o r e :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE LAWS
and
LORD JUSTICE DYSON

Between:

THE QUEEN on the APPLICATION OF JEAN MIDDLETON	**1st Respondent**
- v -	
HM CORONER FOR WEST SOMERSETSHIRE	**Appellant**
2. THE QUEEN on the APPLICATION OF AMIN	

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**2nd Respondent**
AND	**Appellant**
HM CORONER OF WEST LONDON	**Interested Party**

**(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)**

Mr Patrick O'Connor QC and Mr Martin Sorjoo (instructed by Messrs Imran Khan and Partners, Bloomsbury) for the 2nd Respondent
Mr Ben Emmerson QC and Mr Peter Weatherby (instructed by Howells of Sheffield, S3 8NL for the 1st Respondent
Mr Jonathan Crow, Mr Rabinder Singh and Mr Martin Chamberlain (instructed by the Treasury Solicitor) for the 1st and 2nd Appellants

---

**HTML VERSION OF JUDGMENT
(AS APPROVED BY THE COURT)**

This is the judgment of the court, to which all three members have contributed.

Introduction

1. These two appeals raise important issues as to the application in United Kingdom domestic law of Article 2 of the European Convention on Human Rights and Freedoms ("the Convention") which provides that "everyone's right to life shall be protected by law". Article 2 imposes two distinct but complementary obligations on the State. Putting the matter very shortly, the first is a substantive obligation not intentionally to take life, and also to take reasonable preventive measures to protect an individual whose life is at risk whether from the criminal acts of others or suicide. The second is an adjectival procedural obligation to investigate deaths where arguably there has been a breach of the substantive obligation. This adjectival obligation, whose nature and reach we shall discuss in due course, was first articulated by the European Court of Human Rights in *McCann v United Kingdom* (1996) 21 EHRR 97, paragraph 161 where, in the context of an allegation of deliberate killing by agents of the State, the court said:

> "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State."

2. These two appeals concern the extent to which there is a duty on the State to conduct an investigation into the death of an individual where it is alleged that, exercising reasonable care, the State could and should have prevented the death. The case of *Imtiaz Amin* concerns the murder of a young man by his cellmate at Feltham

Young Offenders' Institution. The case of *Jean Middleton* concerns the death of a young man who hanged himself in HMP Bristol.

3. In *Amin*, Hooper J considered that the investigations carried out thus far were insufficient to meet the requirements of Article 2. He held that "the obligation to hold an effective and thorough investigation can only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses". He granted a declaration to give effect to this conclusion. Its terms are set out at paragraph 20 below. The Secretary of State appeals against this declaration.

4. In *Middleton,* Stanley Burnton J granted a declaration that:

> "By reason of the restriction on the verdict at the Inquest into the death of Colin Campbell Middleton held on 8/10th days of October 2000, that Inquest was inadequate to meet the procedural obligation in Article 2 of the ECHR as set out in Schedule I to the Human Rights Act 1998".

5. The Secretary of State appeals against this declaration.

6. With this barest of introductions, we turn to the facts in the two cases. Our object in the next two sections of the judgment is to set the scene for our later discussion of the issues that arise. It follows that we shall give little more than an outline of the facts. We shall elaborate later in so far as it is necessary to do so in order to resolve the issues.

Imtiaz Amin – the Facts

7. Mr Amin is the uncle of Zahid Mubarek. Mr Mubarek was killed by his cellmate Robert Stewart at Feltham Young Offenders' Institution on 22 March 2000. He had been bludgeoned to death with the wooden leg of a table. Mr Stewart had a history of violent and racist behaviour and had been in custody almost continuously since September 1997. Mr Mubarek was serving his first custodial sentence. They had been sharing a cell since 8 February 2000. With commendable speed on 28 March Mr Martin Narey, Director General of the Prison Service, wrote to Mr Mubarek's parents in terms whose humanity and sensitivity have rightly been acknowledged by the family in this case. He said:

> "Dear Mr and Mrs Mubarek,
>
> I was extremely concerned to hear about the death of your son. My deepest sympathies are with you and your family at this very difficult time. I would like to repeat the most important thing I said to you when we met. You had a right to expect us to look after Zahid safely and we have failed. I am very, very sorry. What I am determined to do now is to ensure we are completely open with you. If mistakes have been made we shall not conceal them from you.
>
> When we met I also undertook to do what I could to help you. I would like to repeat that offer and to outline what action I have already taken and what action I propose to take. I would like as far as it is possible and to the extent that you wish, to involve you and keep you informed.
>
> To ensure we keep in contact with you in the most effective way, I suggest that Peter Windsor, Feltham's deputy or whom you met last week, is your main point of contact. He can be contacted at Feltham (telephone 0208 890 0061 extension 253). However, if you would prefer not to contact someone at Feltham, then I suggest you contact William Payne, my Staff Officer, through the telephone number at the top of this letter. Additionally, you already have contact with Maqsood Ahmed my Muslim adviser. The police, who have begun their formal investigation, will liaise with you separately.
>
> While the police are investigating the specific circumstances in which Zahid was so seriously

> assaulted and its consequence, I have set up an internal inquiry which will look at the wider issues. The person leading this internal inquiry is Ted Butt. He would like to meet you to explain how he intends to proceed. However, he will only meet you if you think that would be helpful to you. If you would like to meet him then I suggest you contact him through Peter Windsor. As I said to you when we met, I want to be open and honest with you. Accordingly, it is my intention to give you a copy of the inquiry report.
>
> You might also find it helpful to visit Feltham. Peter Windsor would be very willing to enable you to talk to staff who worked on the unit where Zahid was held. You may wish to ask questions about how Feltham operates, particularly at night for example, and to see parts of the establishment. Peter also has the possessions Zahid had with him in Feltham and, depending upon your wishes, is ready to hand these to you when and where you think most appropriate.
>
> If there is anything else you think the Prison Service could do to help you and your family, please do not hesitate to let me know.
>
> Yours sincerely
>
> MARTIN NAREY"

8. On 31 March the inquest was formally opened. Evidence was taken from the police and the inquest was then adjourned since Mr Stewart had been charged with murder. On 3 April, solicitors representing the Mubarek family wrote to the Secretary of State asking for an independent public inquiry. The response dated 12 April was that it was too early to make a decision about a public inquiry "when a wide-ranging and rigorous police investigation and the now broader internal inquiry are on-going".

9. The police investigation examined the question whether the Prison Service or any of its employees should be prosecuted for manslaughter by gross negligence and/or under section 3 of the Health and Safety at Work Act 1974. The broader internal inquiry ("the Butt inquiry") was conducted by Mr Ted Butt, a senior investigating officer in the Prison Service. His terms of reference were very detailed. In summary they were to investigate the circumstances surrounding the murder, and in particular to consider the issue of shared accommodation both generally and with particular reference to Mr Stewart, in the light of what was known about his criminal history and institutional behaviour.

10. The trial of Mr Stewart started on 24 October 2000. He admitted the killing. The issue was whether he was guilty of murder or manslaughter by reason of diminished responsibility. On 1 November, he was convicted of murder.

11. On 17 November 2000, the Commission for Racial Equality ("CRE") announced that it would be conducting a formal investigation into racial discrimination in the Prison Service. The terms of reference were wide-ranging and general, but they included:

> "5. The circumstances leading to the murder of Zahid Mubarek in HM YOI Feltham, and any contributing act or omission on the part of the Prison Service".

12. Upon completion of the police investigation into the Prison Service, counsel advised that there was insufficient evidence to provide a realistic prospect of convicting the Prison Service or any of its employees of any offence in relation to the death of Mr Mubarek. The Mubarek family were so informed by a letter dated 8 August 2001.

13. Mr Butt produced a report in two parts. Part 1 was completed at the end of October 2000, and Part 2 (in its amended version) at the end of November 2000. Copies of both reports were provided to the family within a short time of their completion. In summary, Mr Butt identified in Part 1 a number of shortcomings at Feltham and made 26 recommendations for change. He noted that an effective induction programme was not in place, which "should have led to a more considered opinion as to whether it was appropriate for Robert

Stewart and Zahid Mubarek to share a cell, or Robert Stewart and any other prisoner to share a cell". As regards allocating responsibility, he concluded (paragraph 41 of the Executive Summary):

> "I cannot apportion all the blame to the management team at Feltham at the time of this investigation. Management oversight appears to have been poor for many years, and it would have been impossible for the present team to have dealt with all the deficiencies in such a short time. Therefore I am unable to recommend disciplinary action against any single individual member of staff".

14. On 30 November 2000, the family wrote to the CRE asking that they be allowed to participate in its inquiry and for its hearings to be in public. By its letter dated 1 December 2000, the CRE refused this request. It stated that the inquiry had to be seen to be impartial and that, although there was to be a "public component" in its proceedings, it could not conduct the whole inquiry in public. On 3 May 2001, the family started judicial review proceedings against the CRE in which they sought to challenge the decision of the CRE to refuse to hold its proceedings in public and to allow the family to participate. The CRE has not yet completed its inquiry.

15. Meanwhile, the family had sought to persuade the Coroner to resume the inquest. By letters dated 25 June and 27 July 2001 the Coroner communicated her decision not to do so. The family started judicial review proceedings challenging that decision.

16. On 31 July 2001, the family's solicitors wrote to the Secretary of State. They said that many questions remained outstanding as to how Zahid Mubarek came to be sharing a cell with Mr Stewart, a man who "was manifesting extreme racist views in correspondence, and was diagnosed during the criminal proceedings as a psychopath". In the light of (a) the decision of the CRE not to allow the family to participate in its investigation in "any meaningful manner" or to allow any part of its investigation to be held in public, (b) the decision of the Coroner not to reconvene the inquest, and (c) the findings of the Butt inquiry, they asked the Secretary of State to reconsider his decision not to hold a public inquiry.

17. On 15 August, the family started judicial review proceedings challenging the refusal of the Secretary of State to hold a public inquiry.

18. On 20 August 2001, the Secretary of State replied to the family's solicitors saying that he saw no basis for reversing his earlier decision not to hold an inquiry. He wrote:

> "Zahid Mubarek's death was a tragic event and the Prison Service have admitted full responsibility for it from the start. The Director General met Zahid Mubarek's father at Charing Cross hospital and has apologised to the family in person and in writing. An internal Prison Service report examined the circumstances surrounding the death in detail. It was completed in September 2000 and was shown to the Mubarek family. This report made 26 procedural recommendations in areas such as screening on reception; the availability and scrutiny of medical records; Protection from Harassment procedures; policy and procedures for reading and stopping mail; the availability of security information files from previous establishments; security, reception and Duty Governor training; reception boards; and the searching strategy. All the major recommendations from the Prison Service investigation are being implemented at Feltham. Most are already in place, and those that are taking longer are being implemented to clear deadlines. Probably the most important is the proposal to introduce a cell-sharing risk assessment across the prison estate. This is being piloted at Feltham.
>
> An inquest into the death was opened by the Coroner for West London. As you will know, the statutory function of an inquest is to ascertain who the deceased was, and how, when and where he came by his death. In this case the Coroner adjourned the proceedings, as required under section 16 of the Coroners Act 1988, pending the outcome of the trial of Robert Stewart for the murder of Zahid Mubarek. The circumstances of the death were thoroughly examined during the trial, which resulted in Stewart's conviction in November 2000. Following the trial, the Coroner

> decided that there was not sufficient cause to resume the inquest. That is a matter for her, but she will have taken into account the extent to which the facts about the death had emerged during the course of the trial.
>
> After the trial, the Mubarek family and their representatives met Paul Boateng, who was then the Prisons Minister, on 2 November and 13 November 2000. He emphasised our determination to tackle the systematic failures that had resulted in Zahid Mubarek's death. We recognised at that stage that this would require the involvement of an external agency. For that reason we welcomed the decision of the Commission for Racial Equality to mount an investigation into racism in the Prison Service with particular reference to the events at Feltham leading up to Zahid Mubarek's death. We also welcomed the appointment of Ray Singh, both a district judge and a CRE commissioner, as the chairman of the investigation team. The Prison Service has co-operated fully with the CRE investigation, which includes a special team looking at Feltham.
>
> The CRE investigating team decided to hold a public hearing during which both the Prisons Minister and the Director General of the Prison Service would be cross-examined by Counsel for the investigation. I understand that this will now take place in September and that the CRE have offered the Mubarek family a meeting with Counsel at which they can raise topics that they would like to be covered in the cross-examination. I also understand that the investigation should be completed in November. I shall pay close attention to the recommendations in the report and it will, of course, be available to the Mubarek family.
>
> In view of all that has been done to investigate the circumstances of Zahid Mubarek's death and to learn the lessons from it, I do not believe that a separate public inquiry would add anything of substance or that it would be in the public interest to hold one."

19. It will be seen, therefore, that by mid-August 2001, there were three judicial review challenges on foot. The application for permission to apply for judicial review of the decision of the CRE was first heard by Hooper J on 30 July 2001. He adjourned it until 3 and 4 September on the basis that, if the family decided (as they did shortly thereafter) to start proceedings against the Coroner and the Secretary of State, all three applications should be heard during those two days, with full hearings to follow if permission was given.

20. On 3 September, Hooper J decided to adjourn the applications against the CRE and the Coroner (by consent of the parties sine die) on the grounds that there was insufficient time. He decided that he should deal with the application against the Secretary of State first. He granted permission to the family in this application and found that the refusal to hold a public inquiry was a breach of Article 2 of the Convention. He granted a declaration in these terms:

> "On the facts known to the Secretary of State (including the fact that the inquest would not be resumed), an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights".

Jean Middleton – the Facts

21. Colin Campbell Middleton hanged himself on 14 January 1999 while in custody in HMP Bristol. He was 30 years of age. Jean Middleton is his mother. An inquest was held on 13 May 1999 before the Coroner for Avon and a jury. Its verdict was quashed by consent for failure to enquire sufficiently into the death. A second inquest was held before the Coroner for the Western District of Somersetshire and a jury on 8, 9 and 10 October 2000. Both the family and the Prison Service were represented by counsel. The verdict of the jury was that Mr Middleton had killed himself whilst the balance of his mind was disturbed. The jury received the oral evidence of 11 witnesses, and the written evidence of a further 7 witnesses. It dealt not only with the immediate circumstances of the death, but also the background. Thus the jury heard that he had harmed himself seriously in November 1998, and that this had led to the raising of a "self-harm at risk" form known

as F2052SH; the F2052SH had been "closed" a few days later; Mr Middleton had suffered from depression and was receiving medication at the time of his death; on 11 January 1999 he had written to the Wing Governor referring to his "mental illness" and unhappiness; and that on the same day, Mr Middleton had expressed suicidal intentions to a Mr Prosser, who had passed this information on to the Wing Governor the following day (the truth of this last piece of evidence was hotly contested by the Prison Service)..

22. There was no dispute that Mr Middleton had committed suicide: a suicide note was found in his cell. But it was alleged by the family that, if proper attention had been paid to the warning signs, an F2052SH would have been raised before he died, and that if that had been done, he would have been placed on "suicide watch", in which event the death would have been prevented. It is accepted on behalf of the family that all of these matters were thoroughly, effectively and sensitively explored during the inquest.

23. After the close of the evidence, the Coroner ruled that the issue of "neglect" should not be left to the jury, and he summed up accordingly. At the end of his summing up, he told the jury that, if they wished to do so, they could give him a note regarding any specific areas of the evidence about which they were concerned, and that he would consider it when deciding whether to make any recommendation under Rule 43 of the Coroners Rules 1984. He told the jury that any such note would not be published.

24. When the jury announced their verdict, they did produce a note which was handed to the Coroner. After they had been discharged, the Coroner showed the note to both counsel. It contained four conclusions on the facts which, in the words of the judge, "indicated that the Prison Service had failed in their duty of care for Mr Middleton". The family's solicitors subsequently wrote to the Coroner inviting him to append the note to the inquisition, thereby putting the findings of the jury into the public domain. By letter dated 15 December 2000, the Coroner refused to do so. No part of the contents of the note had been made public before the judge handed down his judgment on 14 December 2001.

25. In his judgment, the judge published the following parts of the note, viz. that the jury:

> "(a) expressed concern that a form F2052SH had been closed by two officers who had no prior knowledge of Mr Middleton; and
>
> (b) expressed their belief that a letter of 11 January 1999 written by him "contained sufficient information to warrant an F2052SH being opened".

26. Other comments in the note were of a general nature and not directed specifically to the facts of this case. Moreover, the note contained no express finding as to whether the failings on the part of the Prison Service were a contributory cause of the death of Mr Middleton.

27. In her claim form in the proceedings before Stanley Burnton J, Ms Middleton sought a mandatory order requiring the Coroner to record the jury's findings as set out in the note. She did not seek an order directing the holding of a new inquest. During the hearing, various declarations and quashing orders were sought as well. The central submissions advanced on behalf of the family were that (a) Article 2 of the Convention requires the State to take reasonable care of those in its custody, (b) where a death in the custody of the State has occurred, and it is arguable that the State has failed to take reasonable steps to prevent that death, then it is under an obligation to conduct an investigation which is capable of determining whether a breach of the substantive obligation to take reasonable care has in fact occurred, and (c) in the present case, the inquest did not determine whether such a breach had occurred, because the jury were instructed that they could not make a finding of neglect.

28. The judge concluded that the procedural obligation to investigate arose on the facts of this case. He did not, however, consider that the inquisition should be supplemented by incorporation of the jury's conclusions contained in the note because two of the comments were of a general nature, there was no finding that the failings had any causative effect, the note was a private communication between jury and Coroner, and the Coroner should not have suggested the production of the note (paragraph 58 of the judgment). In view of the terms of his judgment, (not least his decision to publish the relevant parts of the note), and the fact that the

family did not want a further inquest, he concluded that no relief was necessary. He decided, however, to grant the declaration which we have set out at paragraph 4 above because it reflected the views expressed in his judgment and so that the Secretary of State might have an order against which to appeal.

Amin – the Issues in the Appeal Confronted

29. We turn to the issues arising in the *Amin* appeal. Mr Crow for the appellant Secretary of State advanced four submissions as follows.

(1) The judge was wrong to determine the judicial review challenge against the Secretary of State before first considering the claims against the Coroner and the CRE.

(2) The adjectival or procedural obligation to investigate a death, arising under ECHR Article 2, was not triggered on the facts of the case.

(3) The judge fell into error in his approach to the scope of the procedural obligation. He should not have concluded that an investigation will not satisfy Article 2 unless two independent and cumulative requirements are fulfilled, namely that (a) there is a sufficient element of public scrutiny and (b) the next of kin are involved to an appropriate extent.

(4) The judge should have held that the procedural obligation had been discharged on the facts of the case.

Mr Crow's position at the hearing was that if he succeeded on any one of these arguments the appeal must be allowed. (2), (3) and (4) respectively arise only to the extent that their predecessors fail. However (2) has been conceded by Mr Crow in a written submission put in (at the court's invitation) to address the reasoning in a judgment of the Court of Human Rights which was promulgated after the hearing before us. We shall explain the position more fully in due course, but we should say at once that Mr Crow's concession is in our judgment entirely correct. Herewith it remains convenient to deal with all four points in the order in which they were presented as we have set it out above.

30. There are, however, some important preliminaries. First, in light of some of the arguments addressed to us, we should set out the text not only of ECHR Article 2 but also of Articles 3 and 13:

> "2(1). 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.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
>
> 3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> 13. 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."

Secondly, it is useful at this stage to state in outline at least what is the nature of the primary obligations of the State which arise under Article 2 on its face. Mr Crow for the appellant submitted that the substance of Article 2 contains three elements as follows:

(1) Each Contracting State is required to put in place a legal regime for the protection of the right to life. That is the consequence of the opening words, "Everyone's right to life shall be protected by law". In England and Wales, this requirement is satisfied by the criminal law of murder and manslaughter (and no doubt the statutory offences relating to fatal road traffic incidents), and by the civil law of negligence.

(2) The State is itself precluded from taking life intentionally, save in a case falling within Article 2(2).

(3) In addition the State has a positive duty to take steps ("operational measures" in Mr Crow's phrase) to protect life in cases where its servants are or ought reasonably to be aware that a particular individual who is in the State's care – being a prisoner is the plainest instance – is at immediate risk of death or serious injury. This positive obligation is engaged in these two cases.

31. We did not understand counsel for the respondents to offer any dissent to this description of the Article 2 duty, save perhaps to jib at the qualification "immediate" in (3). The view of the Strasbourg court of the extent of the substantive obligations owed by the State arising under Article 2 is clearly set out in *Osman* (1998) 29 EHRR 245 at paragraphs 115 – 116:

> "115. The court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual…
>
> 116… In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life… [I]t is sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."

This treatment of Article 2 entirely supports Mr Crow's tripartite formulation, which in our judgment may be taken as a correct statement of the law.

32. Against this framework of obligations created by Article 2, it is useful – and here is our third preliminary – to make some general observations about the nature of the procedural duty to investigate. Plainly there is *no* duty on the face of the Convention to investigate a death. It is clear that such a duty has been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by Article 2 would or might in some cases be rendered nugatory or ineffective. Thus the duty to investigate is adjectival to the duty to protect the right to life, and to the prohibition of the taking of life. It follows that by its nature it cannot be a duty defined by reference to fixed rules. It only has life case by case; contingent upon what is required in any individual instance for the substantive right's protection. Across the spectrum of possible Article 2 violations, there are classes of case which can readily be distinguished. One class is that of

allegations of deliberate killing - murder - by servants of the State. A second is that of allegations of killing by gross negligence – manslaughter – by servants of the State. A third is that of plain negligence by servants of the State, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the State has concealed or is concealing its responsibility for the death. That possibility gives rise to the paradigm case of the duty to investigate. The duty is in every instance fashioned to support and make good the substantive Article 2 rights. We shall see, as we go through the movements of the argument, that this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic.

33. With this preamble we may turn to the discrete arguments.

(1) Was the judge wrong to determine the judicial review challenge against the Secretary of State before first considering the claims against the Coroner and the CRE?

34. We should briefly recapitulate the facts relevant to this part of the case in chronological order. On 3rd May 2001 the respondent lodged his application for permission to seek judicial review of the refusal of the CRE to conduct its proceedings in public and to allow the family to participate. That application came before Hooper J on 30th July 2001. By then no applications against the Coroner or against the Secretary of State had been launched though both were, so to speak, in the offing, since as we have indicated Hooper J adjourned the CRE application to be heard over two days on 3rd and 4th September 2001 and further directed that if proceedings were launched against the Coroner and the Secretary of State, they too should be listed on the same dates with full hearings to follow if permission were granted. Mr O'Connor QC for Amin told us that the judge himself raised the possibility of claims being made against the Coroner and the Secretary of State.

35. At length proceedings against the Coroner, complaining of her decision not to resume the inquest, were launched on 6th August 2001; and against the Secretary of State, complaining of his refusal to institute a public inquiry, on 15th August 2001. All three applications were then listed before Hooper J (in accordance with his earlier direction) on 3rd September 2001. He ordered further adjournments of the claims against the Coroner and the CRE, and proceeded to deal in substance with the claim against the Secretary of State. He explained his reasons for taking this course in his reserved judgment of 5th October 2001, the subject of the present appeal. He stated (paragraph 12) that the limited scope of the CRE inquiry could not assist the defendant (appellant): the CRE "could only concern itself with the circumstances leading to the murder insofar as they related to racial matters". As regards the Coroner, the judge considered that since in his letter of 20th August 2001 the Secretary of State had implicitly assumed that the inquest would not be resumed, "the lawfulness of the 20 August letter could properly be determined without first deciding the Coroner application" (paragraph 15). It is plain also that Hooper J took the view that the Secretary of State through Mr Crow was adopting an impermissible approach to the case, namely that "the family should 'exhaust any remedies' against the public authorities before turning to the Minister" (paragraph 18).

36. Mr Crow's complaint on this part of the case was not altogether easy to follow. He first submitted that the judge "mistook his function": he should have confined himself to the legality or otherwise of the Secretary of State's discretionary decision given in the letter of 20th August 2001, whereas in fact he proceeded to consider a different question, namely whether there had been overall compliance with the State's obligations under Article 2. Mr Crow submitted secondly that the declaration granted by the judge was in any event premature. We assume that the first of these submissions was intended to support the proposition that, had the judge confined himself to the question whether the Secretary of State's decision of 20th August fell to be reviewed on conventional public law grounds, he would have heard the other challenges first because he could not determine the rationality or fairness of the decision without knowing what the outcome would be in relation to the CRE and the Coroner.

37. But this argument as to the judge's role sits ill with Mr Crow's later submission (no. 4 as we have tabulated them) to the effect that the procedural obligation had been discharged on the facts of the case, though of

course we acknowledge that the later argument is only advanced if the earlier fail. It is however notable that in submission 4 Mr Crow was at pains to emphasise that the court should look at the matter pragmatically, in the round, taking account of all the investigative initiatives which had been undertaken, to see whether overall the procedural obligation had been satisfied on the particular facts.

38. That submission, which we must address in its context in due course, was to our mind entirely correct. We do not accept the position taken by the Secretary of State on this first part of the case. If one puts on one side the circumstance that much of the factual history took place before 2nd October 2000, when the principal measures of the Human Rights Act 1998 ("HRA") came into force (it was not suggested that anything turned on the chronology: and the Secretary of State's decision of course well post-dated the incorporation date), it seems to us that the question for the judge was indeed the objective one, whether the State had fulfilled its obligations under Article 2.

39. To this question the Secretary of State is a proper respondent. He represents the State in a sense and to an extent not mirrored by the functions or responsibilities of the Coroner or the CRE. Of course those bodies, which owe public duties under statute, may be said to be emanations of the State. They are plainly public authorities for the purposes of the HRA. But we are clear, certainly in the present context, that central government is the proper body to stand in the shoes of the State when it is called on to answer an alleged violation of ECHR Article 2, including and in particular a violation of the implicit procedural duty to investigate.

40. Mr Crow's submission that the declaration granted by Hooper J was premature does not in our judgment support a conclusion that the proceedings against the Secretary of State should have been adjourned. It may support a different conclusion, namely that the declaration should simply not have been made on the facts then appearing to the judge. If the overall question for the court is whether the State has fulfilled its procedural obligation to investigate under Article 2, as we believe it is, then one can see the sense of evaluating all the investigatory processes being undertaken before arriving at any conclusion as to violation of the Convention right.

41. There is nothing in this first point.

(2) Was the procedural obligation to investigate triggered on the facts of the case?

42. This is a point which was not contested in the court below on behalf of the Secretary of State; Mr Crow reserved his position for this court (see the judgment of Hooper J at paragraph 59). He did so out of respect for the then recent decision of Jackson J in *Wright* [2001] EWHC Admin 520, to which we will refer in due course, and because of time constraints in the court below. Mr Crow's submission before us at the hearing was to the effect that the procedural obligation to conduct an "effective official investigation" only arises if "the relevant death occurred (or is alleged to have occurred) as a result of the use of force by State agents" (skeleton argument, paragraph 19). It does not arise otherwise. Where the putative accusation under Article 2 is within the third category described by Mr Crow, that is, an accusation of failure to fulfil the State's positive duty to take steps to protect the life of someone in its care against a perceived risk - or a risk that should have been perceived – of death or serious injury at the hands of another, then the availability of the ordinary civil remedies in the domestic courts was said to suffice for Article 2 purposes. Mr Crow said that the evolution of the procedural requirement of investigation through a series of cases at Strasbourg shows that the adjectival duty is limited as he submits.

43. Since the conclusion of the hearing, the European Court of Human Rights has promulgated, on 14th March 2002, its decision in *Edwards v UK* (app. no. 46477/99), which also concerned the killing of a prisoner by his cellmate. It will be convenient to address this case when we come shortly to deal with the authorities generally. But we may make it clear at once that Mr Crow, responding (as of course did counsel for the other parties) to the court's request for written submissions on the effect of *Edwards*, in light of that authority now accepts on behalf of the Secretary of State that the procedural obligation to investigate was indeed triggered on the facts in *Amin.* This concession, plainly in our view correct, has abbreviated what we would otherwise

have found it necessary to say on this part of the case. However it is right that we should indicate, with respect, that we should without hesitation have concluded that the procedural duty was engaged, without the assistance offered by the case of *Edwards*. A death in State custody, at the hands of another prisoner or (as in *Middleton*) at the deceased's own hands, excites very anxious public concern. The State owes a pressing duty to minimise the risk of such a calamity, even if it cannot be altogether extinguished. The common law would impose such a duty, if it could find an appropriate litigious framework within which to make it good. Now, however, it is enough to say that such a duty lies within the scope of Article 2. When such a death takes place, the procedural duty to investigate is in our judgment undoubtedly engaged. That is not to say that what is required to satisfy the duty is necessarily the same in a case where the death has allegedly been allowed to happen by virtue of negligence on the part of State servants, as in a case where it is said that State servants have themselves killed the victim by the use of unlawful force; but distinctions between those instances fall to be considered under Question 3 below.

44. We should add that we consider it clear from the cases before *Edwards* that the European Court of Human Rights has laid down no rule to the effect that the adjectival duty to investigate only arises where there is an allegation, real not fanciful, of unlawful killing by State agents. It is plain that the court has left open wider possibilities. We need only cite paragraph 161 of *McCann* 21 EHRR 97:

> "… a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision… requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State."

This formula, including the tell-tale Latinism *inter alios*, is repeated in a number of the decisions. *Gulec v Turkey* (54/1997/838/1044) paragraph 77 and *Ergi v Turkey* (66/1997/850/1057) paragraph 82 are examples. And there is other learning, such as *Erikson* (App. No. 37900/97) and *Salman* (App. No. 21986/93, 27/6/00) which we would have cited had it been necessary to go deeper into this point.

(3) What is the required scope of the procedural investigation?

45. In the terms in which it was articulated by Mr Crow at the hearing, the focus of this part of the case appeared to be relatively narrow. Building on Jackson J's judgment in *Wright* at paragraph 41, which we need not set out, Hooper J held (paragraphs 81 – 86) that for an investigation to satisfy the procedural requirements of Article 2 a number of conditions must be met, including these two: (a) there must be a sufficient element of public scrutiny, and (b) the next of kin must be involved to the appropriate extent. Mr Crow submitted that that is a wrong approach. There are not discrete and cumulative requirements of publicity and family participation. Depending on the particular facts, participation by the next of kin may itself satisfy applicable standards of openness without any additional requirement of public hearings. Now, while these two elements are plainly of great potential importance, it seems to us that this part of the case raises a deeper, or at any rate a more general question. How far may the nature and quality of any investigation embarked upon in satisfaction of the Article 2 adjectival duty vary according to the context and subject-matter of the case? Are such requirements as publicity and family participation, and other virtuous procedures, *constant*? It was broadly the respondents' position that they are: the duty is essentially a uniform one, whether the death is due to unlawful violence by State servants, or to recklessness or to negligence. In so submitting Mr O'Connor built especially on *Jordan* (App. No.24746/94, 4/5/01), and now also on *Edwards*.

46. We turn then to the authorities, from which it is convenient to collect comprehensive citations at this stage, although many of the references are at least as material to Questions 2 and 4 as to the issue in hand. A very considerable portion of the Strasbourg cases involve on their facts actual or alleged killings or brutality by agents of the State: *McCann* (1995) 21 EHRR 97, *Assenov* (1998) 28 EHRR 652, *Kaya* (App. No. 158/1996/777/978, 19/2/98), *Salman* (App. No. 21986/93), and *Jordan*. We shall not cite all these cases. As we have indicated, special emphasis was laid in the course of argument on *Jordan*. The facts were that the applicant's son had been shot and killed by a sergeant of the Royal Ulster Constabulary after a car chase in

the Falls Road in Belfast. The applicant alleged that his son had been unlawfully killed and there had been no effective investigation. The case was consolidated with three others which arose out of events in Northern Ireland, *McKerr* no. 2883/95, *Kelly* no. 30054/96, and *Shanaghan* no. 37715/97. Judgment was given in Strasbourg in each of these cases on 4th May 2001.

47. We should set out these following passages from the judgment in *Jordan.*

> "103. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation…
>
> 105. The obligation to protect the right to life under Article 2 of the Convention… also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force... *The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances.* However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures… [our emphasis]
>
> 106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events… This means not only a lack of hierarchical or institutional connection but also a practical independence…
>
> 107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances… and to the identification and punishment of those responsible… This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death… Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.
>
> …
>
> 109… [T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests…
>
> …

i) Civil proceedings

> 141… [C]ivil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does

> not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.
>
> …
>
> 143. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing for all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner…"

48. In the course of counsel's submissions the "*Jordan* requirements" (to use the shorthand that was deployed in argument) came to be summarised thus: the investigation must be undertaken by the authorities on their own initiative; it must be effective and independent of those to be investigated; it must be capable of leading to a determination of State responsibility; it must be prompt; there must be a sufficient element of public scrutiny to ensure effective accountability; the next of kin must have adequate opportunity to participate. Mr Crow submitted that the approach taken by the Strasbourg court in *Jordan* is and is intended to be limited to circumstances where the allegation is one of unlawful killing – in domestic terms, murder or manslaughter – by servants of the State. He said that that position is supported by the other cases where allegations of unlawful force by State servants were in play. We should make it clear, in the interests of reporting the argument fairly, that much of this learning was deployed by Mr Crow in support of his original position on Question 2 – that the adjectival obligation to investigate did not arise on the facts of the case. As we have said that is now conceded in light of the decision in *Edwards*, to which we must come shortly. But Mr Crow's scan of the cases seems to us to touch this present issue, the nature and scope of the investigative duty, no less closely. His case is that the *Jordan* requirements are not to be rigidly applied, nor to be treated as having to possess the same unchanging qualities in every case.

49. Mr Crow drew attention, by way of contrast as he would have it, to the reasoning in *Z v UK* (app. no. 29392/95) 10 BHRC 384. In that case the four applicants, who were siblings, lodged complaints with the European Commission of Human Rights to the effect that their local authority had failed to protect them from incidents of very grave neglect and abuse at the hands of their parents. There had been municipal litigation as far as the House of Lords. It was not a right to life case; it was put under Article 3 and Article 13, and there were some issues raised under other articles. The Commission referred the case to the European Court of Human Rights. The court's reasoning is, as with respect it seems to us, greatly conditioned by the part played by Article 13. We should cite the passage in *Z* relied on by Mr Crow:

> "109. The court has previously held that where a right with as fundamental an importance as the right to life or the prohibition against torture… is at stake, art 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure… These cases however concerned alleged killings or infliction of treatment contrary to art 3 involving potential criminal responsibility on the part of security force officials. Where alleged failure by the authorities to protect persons from the acts of others is concerned, art 13 may not always require that the authorities undertake the responsibility for investigating the allegations…."

50. To some extent the case of *Z* marches with that of *Keenan v UK* (app. no. 27229/95) which, like *Middleton*, was a case of suicide by a serving prisoner. The deceased was 28 when he killed himself in Exeter Gaol. He

had intermittently been prescribed anti-psychotic medication from the age of 21, and before the European Court of Human Rights it was common ground that he was mentally ill. The court found no breach of Article 2 essentially on the basis (paragraph 95) that the deceased was not at immediate risk of suicide throughout his detention, and that (paragraph 100) the issues which were raised "regarding the standard of care with which Mark Keenan was treated in the days before his death fall rather to be examined under Article 3 of the Convention." The court proceeded to find a violation of Article 3. It held (paragraph 115) that in the context of what it considered to be a lack of effective monitoring of his condition and a lack of "informed psychiatric input" into his assessment and treatment, the imposition on him only nine days before his expected date of release of a serious disciplinary punishment (involving 7 days segregation in the punishment block and an addition of 28 days to his sentence) in the particular circumstances constituted inhuman and degrading treatment.

51. The court in *Keenan* addressed the issue of any investigative duty only within the context of Article 13. It said at paragraph 122:

> "… Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedures…"

The court proceeded to indicate (paragraph 127) that it was "common ground" that the inquest did not provide a remedy for the determination of State liability or the provision of compensation, and there was a violation of Article 13. Lord Justice Sedley (sitting as the *ad hoc* British judge) delivered a concurring opinion in which he stated at paragraph 8 that what was required by way of remedy was "a proper and effective inquiry into responsibility for the death."

52. We consider that the Strasbourg learning which is geared to considerations arising under Article 13 is of limited assistance in this appeal. While Mr O'Connor certainly relied on *Keenan*, we do not see the substance of this case as being so much concerned with effective remedies as with the vindication of Article 2 itself.

53. We should notice next the decision of Jackson J in *Wright*, to which we have referred in passing. *Wright* was a case of a young man's death in prison following a severe asthma attack. After citing a number of authorities including *Jordan* the learned judge stated (paragraph 43) that he derived five propositions from the learning:

> "1. Articles 2 and 3 enshrine fundamental rights. When it is arguable that there has been a breach of either article, the State has an obligation to procure an effective official investigation.
>
> 2. The obligation to procure an effective official investigation arises by necessary implication in articles 2 and 3. Such investigation is required, in order to maximise future compliance with those articles.
>
> 3. There is no universal set of rules for the form which an effective official investigation must take. The form which the investigation takes will depend on the facts of the case and the procedure available in the particular State.
>
> 4. Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in Jordan v United Kingdom at paragraphs 106 to 109.
>
> 5. The holding of an inquest may or may not satisfy the implied obligation to investigate arising under article 2. This depends upon the facts of the case and the course of events at the inquest."

54. Propositions 1 and 2 may be regarded as uncontentious, not least given Mr Crow's concession on Question 2,

with which we have dealt. Proposition 5 calls up what we shall have to say in the *Middleton* appeal. Propositions 3 and 4 are engaged in the Question we are presently confronting. Before we express any further views it is convenient to turn at last to the Strasbourg court's decision in *Edwards*.

55. Christopher Edwards was arrested by the police in Colchester on 27th November 1994. He had been making indecent or obscene suggestions to young women in the street and his behaviour was sufficiently bizarre to lead to suspicions on the part of the police that he was mentally ill. At length he was remanded in custody by the magistrates, who concluded that they had no power to remand him to hospital. He was at first detained in a cell on his own. But then another prisoner, Richard Linford, was moved in with him. He had previously been variously diagnosed as a schizophrenic, or suffering from a personality disorder, and had a history of abuse of drugs and alcohol. In the very early hours of 29th November 1994 he stamped and kicked Christopher Edwards to death in the cell they shared. There is no doubt that he was acutely mentally ill. He was on the same day transferred to Rampton Special Hospital.

56. Various procedures were then undertaken. Linford's plea at the Chelmsford Crown Court to manslaughter by reason of diminished responsibility was accepted, and appropriate orders were made under the Mental Health Act 1983. An inquest was opened, adjourned, and then closed without proceeding to a verdict after Linford's conviction. The Criminal Injuries Compensation Board made an award to the applicants (Edwards' parents) of £4,550. An *ad hoc* non-statutory inquiry was jointly commissioned by the Prison Service, Essex County Council, and North Essex Health Authority. It sat in private and heard evidence on 56 days. It had no power to compel witnesses, and two prison officers declined to give evidence. One of them (according to the Inquiry Report) could have given potentially significant evidence. The Inquiry Report was published in June 1998 and found "a systemic collapse of the protective mechanisms that ought to have operated to protect this vulnerable prisoner". It identified a long series of particular failures and shortcomings. The applicants were advised that there was no civil remedy available on the facts. The Crown Prosecution Service took the view that there was no sufficient evidence to prosecute anyone (Linford, of course, aside). The Police Complaints Authority upheld a number of complaints.

57. The Strasbourg court made the clearest possible finding that on the facts a procedural obligation to investigate the death arose which could not be satisfied by the availability of civil proceedings (so far as they were available): paragraph 74. We make it clear that for our part we accept that the bare possibility of civil proceedings will not of itself generally satisfy the procedural obligation. The court's conclusion on the question whether that obligation was indeed fulfilled in *Edward's* case was expressed thus at paragraph 87:

> "The Court finds that the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded save when they were giving evidence failed to comply with the requirements of Article 2 of the Convention to hold an effective investigation…"

It is, we consider, clear from paragraph 78 (which we need not set out) that the importance which the court attached to the absence of any power in the inquiry to compel witnesses was very closely linked to the refusal of two prison officers to give evidence. As regards the "private character" of the inquiry proceedings, the court said this:

> "83. The Government argued that the publication of the report secured the requisite degree of public scrutiny. The Court has indicated that publicity of proceedings or the results may satisfy the requirements of Article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as theory of the State agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the Court considers that the public interest attaching to the issues thrown up by the case were such as to call for the widest exposure possible. No reason has been put forward for holding the inquiry in private…

> 84. The applicants, parents of the deceased, were only able to attend three days of the Inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the Inquiry Panel. They had to wait until the publication of the final version of the Inquiry Report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject-matter of the Inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests."

58. Mr O'Connor submits in effect that *Edwards* constitutes a ringing endorsement of the applicability of the *Jordan* requirements to the facts of a death bearing a very great similarity to those of the *Amin* case, particularly as regards public accountability and family participation. Mr Crow's position is that *Edwards* is perfectly consistent with, indeed supports, the proposition that the *Jordan* requirements are inherently flexible; and there is nothing in the court's decision in *Edwards* which must lead to a condemnation of what has been done (or not done) in *Amin* as disclosing a violation of the Article 2 procedural duty.

59. It is in our judgment noteworthy that paragraphs 69 – 71 of the judgment in *Edwards* effectively replicate paragraphs 105 – 107 of *Jordan*, therefore including the passage in paragraph 105 which we italicised earlier. It is worth setting out again:

> *"The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances."*

60. In our view *Edwards* represents no fresh departure in the Strasbourg jurisprudence, which in this area, as it is generally, is essentially pragmatic. The *Jordan* requirements are by no means set in stone. Particular considerations – the absent witnesses, the relative exclusion of the family – coloured the court's decision in *Edwards*, just as they might colour the decision of a common law court.

61. In light of the arguments on *Edwards* it is right to draw special attention to two matters in particular. The first is that the procedural duty to investigate does not appear on the Convention's face: it is no more nor less than an adjectival duty, imposed as a corollary of the substantive right guaranteed by Article 2. Secondly, the task of our courts is to develop a domestic jurisprudence of fundamental rights, drawing on the Strasbourg cases of which by HRA s.2 we are enjoined to take account, but by which we are not bound. In this present context, these two features march together. The reason is that the nature and scope of an adjectival duty, which by definition is not expressly provided for in the Convention, must especially be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive Convention rights.

62. Accordingly, this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. Just as, in our view, on Question 2 Mr Crow originally adopted too rigid an approach to the Human Rights Court's jurisprudence in submitting that the duty to investigate was only triggered in cases of the use of unlawful force by State agents, so also on Question 3 Mr O'Connor makes the same error in submitting that there are fixed requirements of publicity and family participation, uniformly applicable to every investigation. What is required will vary with the circumstances. A credible accusation of murder or manslaughter by State agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the State has laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards* are perfectly consistent with this. And it is an approach which embraces what we will say in the *Middleton* appeal about the Coroner's jurisdiction and inquest verdicts of neglect.

63. In all these circumstances we agree with Mr Crow that publicity and family participation are not necessarily discrete compulsory requirements which must be distinctly and separately fulfilled in every case where the procedural duty to investigate is engaged. Further, and somewhat more broadly, we consider that Jackson J's fourth proposition in paragraph 43 of his judgment in *Wright* cannot be accepted at face value. For convenience we set it out again:

> "4. Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in Jordan v United Kingdom at paragraphs 106 to 109."

This might seem to suggest something of a universal formula for all investigations undertaken in fulfilment of Article 2, and to that extent we disagree with it. In fairness the judge had just indicated, in proposition (3), that "[t]here is no universal set of rules for the form which an effective official investigation must take", and in our judgment that is entirely correct.

(4) Should the judge have held that the procedural obligation to investigate was in any event discharged on the facts of the case?

64. Although on this part of the case Mr O'Connor's submissions invited our attention to many points of detail, it is in our judgment necessary to stand back to see clearly what is in truth involved in the question. We consider that the starting-point consists in the proposition that all the measures taken by public authorities to respond to and investigate the death, whether instituted by central government or otherwise, have to be taken into account in deciding whether the procedural duty is satisfied. We have already approved (paragraph 38) Mr Crow's submission to that effect: the court should look at the matter pragmatically, in the round, taking account of all the investigative initiatives which have been undertaken. Our views on Question 3, set out above, support this approach.

65. On the facts in *Amin's* case, it seems to us that there are three very significant circumstances which have to be considered at the outset. It is important to notice that to a greater or lesser extent they serve to distinguish the case from *Edwards*. The first of these circumstances is the content of the letter of 28th March 2000 from the Director General of the Prison Service, written on the date of the death. The second is the conviction of the killer, Stewart, of the offence of murder after a contest as to whether he was guilty of manslaughter only on grounds of diminished responsibility. The third is Mr O'Connor's express (and, if we may say so, plainly correct) acceptance that no further information is required for the family to mount a civil claim.

66. The significance of the Director General's letter is twofold. First, it contains an unqualified acceptance of fault on the part of the Home Office. Secondly, it made it plain that the Department desired to involve the parents in the inquiry immediately to be undertaken - that is, the Butt inquiry - "as far as it is possible and to the extent that you wish…" Upon this second point, Mr O'Connor did not accept that the letter offered sufficient guarantees of participation by the family. In our judgment there is nothing in that. It is clear that the intention from the start was to conduct an inquiry to whose processes the family would have substantial access, at least by way of consultation and information. We cannot know whether there might have come a sticking-point at which the Department jibbed at further participation, since (and this is no criticism) the parents declined the offers made in the letter. Upon this aspect, the case is quite unlike that of *Edwards*, where the Strasbourg court held that the family's rights of participation were unacceptably restricted. In our case, given the family's refusal to accept the offer of participation and involvement held out to them, it would be entirely wrong to speculate or suppose that had the offer been accepted, its fulfilment might not have been adequate for the purposes of Article 2.

67. The significance of Stewart's conviction is a little more diffuse. It established that there was no question of the death having been caused by the use of lethal force by State agents; and that is itself an important fact. But it also established facts such as that the assault took place at night (when there was no prospect of intervention by a prison officer); how Stewart came to be in possession of the murder weapon; and that (by the jury's rejection of the defence plea of diminished responsibility) Stewart was mentally responsible for

what he did.

68. The significance of the third circumstance, that is Mr O'Connor's correct concession, speaks for itself: no further inquiry is needed for the enabling of the family's civil rights.

69. It is also important to have in mind these further matters. First, there is, as we understand it, no suggestion that the criminal investigation into the Prison Service should have had any different outcome, so that prison officers should be prosecuted for offences in relation to the death. Secondly, the CRE investigation is engaged in a rigorous examination of the race elements in the case. In *Edwards* there was no analogue of the CRE inquiry.

70. In summary, then, (1) there is no contest but that the Prison Service was at fault in relation to the death; (2) an inquiry (Butt) into the nature of this fault was undertaken, and the family were expressly invited to be involved; (3) the primary responsibility for the death was established by Stewart's conviction for murder; (4) there is no basis for the prosecution of any member of the Prison Service; (5) there are no factual unknowns which now impede the bringing of any proper civil claim by the family; (6) the race dimension in the case is subject to substantial scrutiny.

71. What remains to investigate? A principal thrust of Mr O'Connor's argument on this part of the appeal was to the effect that, in various respects which he enumerated, the Butt report was an inadequate exercise for the fulfilment of the Article 2 duty to investigate because it did not nail down the responsibility of particular individuals. However he first made the more general submission that there was no public hearing; and relied on the Strasbourg decision in *McKerr* (app. no. 2883/95) to support the proposition that even an investigation which is factually exhaustive will not necessarily satisfy Article 2. That case is of no help at all; it was one where it was said evidence had been deliberately concealed, and in that case no doubt a special degree of scrutiny would rightly apply. Nor is Mr O'Connor's argument on this aspect advanced by *Edwards*, which as we have said is consistent with an overall approach of pragmatic flexibility.

72. Mr O'Connor's complaints about the substance of the Butt report may be summarised thus. There were something like 206 statements obtained by the police which Butt did not see. There were officers whom Butt should have interviewed, but did not. There were conflicts between the information seemingly given to Butt about immediately relevant events and what was said to the police. The police identified specific faults – three in particular - by specific prison officers which Butt failed to identify. In short, the work done by the police shows that Butt was less than rigorous. Mr O'Connor listed before the judge (judgment, paragraph 34) some 23 items or topics which he said had been left unresolved by Butt.

73. There are disputes about some of these matters, as is shown by the statement of Roger Gaines, a Senior Manager in the Prison Service, which was put in with the court's permission for the purposes of the appeal. And Mr Crow submits (and to our satisfaction demonstrates) that a number of the 26 points of detail are not real points at all, being in the nature of rhetorical questions; others are answered or considered by the police. It is unnecessary to travel through all this material. In general, anyone reading the Butt report (as we have of course done) will not fail to be impressed by the independent stance it takes and the comprehensive nature of the investigation. The investigators spent five weeks at Feltham, working closely with the police. The report provides a detailed explanation of the systemic failings which led to the murderer sharing a cell with the deceased (Part I Section C ##20-42, Section I and Section J ##1-22), and made detailed recommendations (Part I Section J, Part II Section R). The evidence is that most of these are already in place at Feltham, and those which are not are to be introduced within a strict time-table.

74. Mr O'Connor's specific criticisms of the Butt report, and in particular his case to the effect that there was a failure to identify and condemn specific failings by specific officers, seem to us if anything to emphasise the importance of looking at all the investigative processes in the round: here including the police investigation. He suggests also that it was not institutionally independent from the subject of the investigation; and of course it is right that Mr Butt was an official within the Prison Service. But any required standards of independence must, in this case, be seen against the very sharp focus of the Director General's plain

acceptance of responsibility at the outset. Against that particular circumstance allegations of a want of independence are in our judgment formalistic and not realistic.

75. The position is that all the facts required to be exposed to support the State's substantive duty under Article 2 have been, or - given that the CRE investigation is ongoing – will be exposed. Asked at the end of his submissions what would be the benefit of any further inquiry, Mr O'Connor answered that the primary benefit would be to the public: the State must be accountable for defaults for which it is responsible. That is no more than a truism. In this case, in light of all the events which have happened, we are clear that no distinct public inquiry is now called for by any imperative of democratic accountability; and there is no violation by the State of ECHR Article 2.

76. Of the four issues which we identified at the outset, the judge, with respect, was right on (1) and (2) but wrong on (3) and (4). We will allow the appeal in the case of *Amin.*

Middleton – the Issues in the Appeal Confronted

77. It is, of course, against the same background of Articles 2 and 3 of the Convention and Strasbourg and domestic jurisprudence that the single issue in *Middleton's* case remains to be determined: whether the declaration set out in paragraph 4 should have been granted by Stanley Burnton J? The issue arises because of the decision of this Court in *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1. The case followed a prisoner hanging himself in prison. Similar issues there arose as to possible neglect by prison staff and the Prison Service contributing to the death of the prisoner as arise in the case of this appeal.

78. This court decided in that case that neglect could rarely, if ever, be a permissible free-standing verdict of a jury at Coroners' inquests. In giving the judgment of the Court Sir Thomas Bingham MR traced the history of the role of a Coroners Court. Conveniently, the Master of the Rolls summarised the Court's general conclusions in fourteen paragraphs which we will now set out together with the most important provisions of the Coroners Act 1988 and Rules referred to in those conclusions.

> "Coroners and inquests are today regulated by the Coroners Act 1988. The duty to hold an inquest arises under section 8(1), which provides:
>
> > 'Where a Coroner is informed that the body of a person ('the deceased') is lying within his district and there is reasonable cause to suspect that the deceased – (a) has died a violent or an unnatural death; (b) has died a sudden death of which the cause is unknown; or (c) has died in prison or in such circumstances as to require an inquest under any other Act, then, whether the cause of death arose within his district or not, the Coroner shall as soon as practicable hold an inquest into the death of the deceased either with or, subject to subsection (3) below, without a jury.'
>
> Section 8(3)(a) requires that the inquest be held with a jury where, as here, the death occurred in a prison.
>
> Section 11 governs the proceedings at the inquest, providing, inter alia:
>
> > '(3) In the case of an inquest held with a jury, the jury shall, after hearing the evidence – (a) give their verdict and certify it by an inquisition; . . . (5) An inquisition- (a) shall be in writing under the hand of the Coroner and, in the case of an inquest held with a jury, under the hands of the jurors who concur in the verdict; (b) shall set out, so far as such particulars have been proved – (i) who the deceased was; and (ii) how, when and where the deceased came by his death; and (c) shall be in such form as the Lord Chancellor may by rules made by statutory instrument from time to time prescribe'.

The Coroners Rules 1984 provide, inter alia:

> '36 (1) The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely – (a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the Registration Acts to be registered concerning the death. (2) Neither the Coroner nor the jury shall express any opinion on any other matters.
>
> 40. No person shall be allowed to address the Coroner or the jury as to the facts.
>
> 41. Where the Coroner sits with a jury, he shall sum up the evidence to the jury and direct them as to the law before they consider their verdict and shall draw their attention to rules 36 (2) and 42.
>
> 42. No verdict shall be framed in such a way as to appear to determine any questions of – (a) criminal liability on the part of a named person, or (b) civil liability.
>
> 43. A Coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have power to take such action and he may report the matter accordingly.'

General conclusions

This long survey of the relevant statutory and judicial authority permits certain conclusions to be stated.

> (1) An inquest is a fact-finding inquiry conducted by a Coroner, with or without a jury, to establish reliable answers to four important but limited factual questions. The first of these relates to the identity of the deceased, the second to the place of his death, the third to the time of death. In most cases these questions are not hard to answer but in a minority of cases the answer may be problematical. The fourth question, and that to which evidence and inquiry are most often and most closely directed, relates to how the deceased came by his death. Rule 36 requires that the proceedings and evidence shall be directed solely to ascertaining these matters and forbids any expression of opinion on any other matter.
>
> (2) Both in section 11 (5) (b) (ii) of the Act of 1988 and in rule 36(1)(b) of the Rules of 1984, "how" is to be understood as meaning "by what means." It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but "how. . . the deceased came by his death," a more limited question directed to the means by which the deceased came by his death.
>
> (3) It is not the function of a Coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. This principle is expressed in rule 42 of the Rules of 1984. The rule does, however, treat criminal and civil liability differently: whereas a verdict must not be framed so as to appear to determine any question of criminal liability on the part of a named person, thereby legitimating a verdict of unlawful killing provided no one is named, the prohibition on returning a verdict so as to appear to determine any question of civil liability is unqualified, applying whether anyone is named or not.

(4) This prohibition in the Rules is fortified by considerations of fairness. Our law accords a defendant accused of crime or a party alleged to have committed a civil wrong certain safeguards rightly regarded as essential to the fairness of the proceedings, among them a clear statement in writing of the alleged wrongdoing, a right to call any relevant and admissible evidence and a right to address factual submissions to the tribunal of fact. These rights are not granted, and the last is expressly denied by the Rules, to a party whose conduct may be impugned by evidence given at an inquest.

(5) It may be accepted that in case of conflict the statutory duty to ascertain how the deceased came by his death must prevail over the prohibition in rule 42. But the scope for conflict is small. Rule 42 applies, and applies only, to the verdict. Plainly the Coroner and the jury may explore facts bearing on criminal and civil liability. But the verdict may not appear to determine any question of criminal liability on the part of a named person nor any question of civil liability.

(6) There can be no objection to a verdict which incorporates a brief, neutral, factual statement: “the deceased was drowned when his sailing dinghy capsized in heavy seas,” “the deceased was killed when his car was run down by an express train on a level crossing,” “the deceased died from crush injuries sustained when gates were opened at Hillsborough Stadium.” But such verdict must be factual, expressing no judgment or opinion, and it is not the jury's function to prepare detailed factual statements.

(7) Cases arise, usually involving the old, the infirm and the senile where the deceased contributes to his or her own death by a gross failure to take adequate nourishment or liquid, or to obtain basic medical attention, or to obtain adequate shelter or heating. In such a case it may be factually accurate and helpfully descriptive to State that self-neglect aggravated, or preferably contributed to, the primary cause of death. Rarely, if ever, can it be factually accurate or helpfully descriptive to regard self-neglect as the primary cause of death (that is, in the language of the cases, to adopt it as a free-standing verdict).

(8) Much of the difficulty to which verdicts of lack of care have given rise appear to be due to an almost inevitable confusion between this expression and the lack of care which is the foundation for a successful claim in common law negligence. Since many of those seeking that verdict do so as a stepping-stone towards such a claim the boundary is bound to become blurred. But lack of care in the context of an inquest has been correctly described as the obverse of self-neglect. It is to be hoped that in future the expression “lack of care” may for practical purposes be deleted from the lexicon of inquests and replaced by “neglect.”

(9) Neglect in this context means a gross failure to provide adequate nourishment or liquid, or provide or procure basic medical attention or shelter or warmth for someone in a dependent position (because of youth, age, illness or incarceration) who cannot provide it for himself. Failure to provide medical attention for a dependent person whose physical condition is such as to show that he obviously needs it may amount to neglect. So it may be if it is the dependent person’s mental condition which obviously calls for medical attention (as it would, for example, if a mental nurse observed that a patient had a propensity to swallow razor blades and failed to report this propensity to a doctor, in a case where the patient had no intention to cause himself injury but did thereafter swallow razor blades with fatal results). In both cases the crucial consideration will be what the dependent person’s condition, whether physical or mental, appeared to be.

> (10) As in the case of self-neglect, neglect can rarely, if ever, be an appropriate verdict on its own. It is difficult to think of facts on which there would not be a primary verdict other than neglect. But the notes to form 22 in the Rules of 1984, although in themselves of no binding force, are correct to recognise that neglect may contribute to a death from natural causes, industrial disease or drug abuse. Want of attention at birth, also mentioned in the notes, may itself be regarded as a form of neglect. A verdict that, for instance, "the deceased died from natural causes [or industrial disease, or drug abuse] to which neglect contributed" would seem perhaps more apt than a verdict that "the deceased died from natural causes [or industrial disease, or drug abuse] aggravated by neglect," since "aggravated" in this context means "made worse", and in truth the neglect probably did not make the fatal condition worse but sacrificed the opportunity to halt or cure it.
>
> (11) Where it is established that the deceased took his own life, that must be the verdict. On such facts, as the applicant in the present case accepted, there is no room for a verdict of neglect (or, as he would have put it, lack of care). It is also inappropriate in such a case, as the applicant also accepted, to describe that cause of death as aggravated by neglect (or lack of care). On certain facts it could possibly be correct to hold that neglect contributed to that cause of death, but this finding would not be justified simply on the ground that the deceased was afforded an opportunity to take his own life even if it was careless (as that expression is used in common speech or in the law of negligence) to afford the deceased that opportunity. Such a finding would only be appropriate in a case where gross neglect was directly connected with the deceased's suicide (for example, if a prison warder observed a prisoner m his cell preparing to hang a noose around his neck, but passed on without any attempt to intervene).
>
> (12) Neither neglect nor self-neglect should ever form any part of any verdict unless a clear and direct causal connection is established between the conduct so described and the cause of death.
>
> (13) It is for the Coroner alone to make reports with a view to preventing the recurrence of a fatality. That is the effect of rules 36(2) and 43.
>
> (14) It is the duty of the Coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry. He must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or overruled."

79. The fact that a jury cannot under domestic law normally return a verdict of "neglect" does appear at first sight surprising. They are after all entitled to return a more serious verdict, in the shape of "unlawful killing". However, as the Master of the Rolls then explained, "neglect" raises issues routinely determined in litigation alleging negligence and civil proceedings are a more appropriate forum in which to resolve questions of negligence. The seeming limitation does not arise out of a desire to limit the issues canvassed at the inquest, because the Rules in fact allow the wider inquiry to take place. So much is demonstrated by what happened in this particular case. The first inquest was quashed by the High Court because the Coroner did not permit a sufficient investigation of neglect to be carried out. The second inquest did consider this issue but when the jury expressed their views on neglect, after the issue had been investigated before them, the Coroner felt he

was not permitted by the rules to reveal their views.

80. The virtues of the restriction on verdicts of neglect are two-fold. First, the restriction avoids conflicts occurring between the verdict of a Coroner's jury and a decision of the courts. Secondly, the restriction avoids a potential defendant being found guilty of negligence without having the greater protection which he would have as a defendant contesting an allegation of negligence in civil proceedings. These virtues should not be lightly discarded. On the other hand the inhibition on a Coroner's jury bringing in a verdict of neglect can impede the ability of an inquest to fulfil the requirements of Article 2. Despite this inquests still make an important contribution, in the majority of cases, to meeting the implicit obligations of the UK under Article 2.

81. This is because usually the Coroners Rules achieve a sensible reconciliation between conflicting interests, namely:

    i) the interests of the victims and the public in being able to investigate the circumstances surrounding a death, particularly a death in prison and

    ii) the interests of those who might be held responsible for the death of the deceased and

    iii) the need to restrict the scope of the inquest in the interests of expedition, affordability and proportionality.

82. The Rules have to be applied in many different circumstances. While they achieve a better balance in some circumstances than others, in general they enable coroners to conduct inquests in a way which satisfactorily reconciles those conflicting interests.

83. *Jamieson* was decided before the HRA came into force. Now it is in force Mr Ben Emmerson QC, on behalf of the respondents, submits that it is necessary to take into account Article 2 and in particular the implicit adjectival procedural obligation for there to be an effective inquiry into the circumstances of a death, at least when there is an alleged involvement of the State in the events which have happened. This obligation raises considerations which did not have to be taken into account in *Jamieson.* It is now necessary to decide whether the requirements of Article 2 are achieved by applying the Rules in accordance with the guidance in *Jamieson* and if not, whether the application of the Rules can be modified so as to take into account the requirements of Article 2, if those requirements include permitting the jury to enquire into and return a verdict of “neglect” in a broader range of circumstances than contemplated by the approach laid down in *Jamieson.*

84. In the court below, Stanley Burnton J, as we have seen, decided the Rules had to be modified to take into account Article 2. Mr Crow submits on behalf of the Crown that, in the case of a death by suicide, when there is no suggestion that the death is caused by the use of force by State agents the usual range of civil remedies (now supplemented by the possibility of proceedings under the HRA) are sufficient to comply with the State's obligations under Article 2. We have already indicated that the obligations of the State can be triggered if there is a breach of duty by the State which contributed to the death of the deceased even though no agents of the State were directly involved. In addition civil proceedings are not regarded by Strasbourg as satisfying the obligations of the State under Article 2 (see *Edwards* paragraph 74); though we would suggest that if civil proceedings are a practical proposition, they are a factor which should not be ignored in considering whether there has been compliance with Article 2.

85. While we do not accept Mr Crow’s submission, the question still arises as to whether any particular inquest satisfies the procedural requirements of Article 2. Whether it does so or not depends on whether the inquest, in the circumstances being enquired into, should be “any particular matter elevant to the death being *examined” (emphasis added).* We base this view on paragraph 128 of *Jordan*, to which we have not yet referred, which is in these terms:

    “128. It is also alleged that the inquest in this case is restricted in the scope of its examination.

> According to the case law of the national courts, the procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. This was the standard applicable in the McCann inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of Article 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined."

86. Mr Crow also submits that the procedural obligation under Article 2 is an obligation as to means, not an obligation of results. (See *Jordan* paragraph 107 cited above). Mr Crow is here drawing attention to the distinction between the matters into which the jury can inquire and those in relation to which they can return a verdict; and he emphasises that the complaint on this approach relates only to the verdict.

87. A verdict of neglect can perform different functions. In particular, in the present context, it can identify a failure in the system adopted by the Prison Service to reduce the incidence of suicide by inmates. Alternatively it may do no more than identify a failure of an individual prison officer to perform his duties properly. We offer two illustrations, which demonstrate the distinction we have in mind. On the one hand, the system adopted by a prison may be unsatisfactory in that it allows a prisoner who is a known suicide risk to occupy a cell by himself or does not require that prisoner to be kept under observation. On the other hand, the system may be perfectly satisfactory but the prison officer responsible for keeping observation may fall asleep on duty.

88. For the purpose of vindicating the right protected by Article 2 it is more important to identify defects in the system than individual acts of negligence. The identification of defects in the system can result in it being changed so that suicides in the future are avoided. A finding of individual negligence is unlikely to lead to that result. If the facts have been investigated at the inquest the evidence given for this purpose should usually enable the relatives to initiate civil proceedings against those responsible without the verdict identifying individuals by name. The shortcomings of civil proceedings in meeting the requirements of Article 2 do not in general prevent actions in the domestic courts for damages from providing an effective remedy in cases of alleged unlawful conduct or negligence by public authorities.

89. In contrast with the position where there is individual negligence, not to allow a jury to return a verdict of neglect in relation to a defect in the system could detract substantially from the salutary effect of the verdict. A finding of neglect can bring home to the relevant authority the need for action to be taken to change the system, and thus contribute to the avoidance of suicides in the future. The inability to bring in a verdict of neglect (without identifying any individual as being involved) in our judgment significantly detracts, in some cases, from the capacity of the investigation to meet the obligations arising under Article 2.

90. The Coroner of West London is not directly involved in the Middleton appeal, but being present for the Amin appeal requested permission to make submissions in writing as a party interested. We gave permission and the submissions prepared by Miss Linda Sullivan QC on behalf of the Coroner have proved to be extremely helpful. The submissions are as follows.

> "1. The Respondent, in his submissions, equates the State's responsibilities under Article 2 with those of the Coroner. In conducting an Inquest a Coroner is not in the same position as the State in terms of obligations under Article 2. An Inquest alone may or may not satisfy the State's obligations to carry out an investigation under Article 2, with or without an adjectival finding of neglect. Whether it does or not will depend upon the particular circumstances of the individual

case.

2. Submissions to the effect that the Coroners Act 1988 and the Coroners Rules 1984 must be re-interpreted to be Article 2 compliant are based upon the false premise that an Inquest is the only way in which the State can comply with its duties under Article 2. A re-interpretation is not necessary if it is accepted that the State's obligations can be satisfied by the cumulative effect of a number of procedures, the Inquest being only one possible one.

3. We submit that it would be wrong in principle to hold that the Coroner must bear the residual responsibility for the State's obligations under Article 2, in the event that all other possible procedures have been excluded or held to be ineffective to so comply with Article 2.

4. It is open to the Government to amend the legislation if the Government wishes to rely more extensively upon Inquests to satisfy the State's obligations under Article 2, we submit that it is not appropriate for the Courts to make that decision.

5. In effect the Respondent's submissions amount to an Appeal of Jamieson by the back door. "How" in s.11 (5)(c) of the Coroners Act 1988 and Rule 36(b) and "neglect" are open to a number of interpretations and is a question of semantics. The narrow interpretations in Jamieson have led, in practice, to inconsistent applications by Coroners, some of whom have applied a wider interpretation than Jamieson permits without challenge in the higher Courts. A number of Coroners are of the view that a more liberal interpretation than Jamieson permits is both practical and desirable. Whilst accepting that a more liberal interpretation would have the effect of making more Inquests Article 2 compliant as far as the State's obligations are concerned, it is submitted that the Human Rights legislation does not make such a liberal interpretation compelling and binding on Coroners.

6. In the Coronial jurisdiction "neglect" has never been equated with the civil court's concept of negligence which incorporates the concept of fault, it is the obverse of "self neglect", and is concerned with the effect of particular circumstances on the deceased rather than an evaluation of the conduct of others. In so far as the Respondent contends for a finding of "responsibility" for lack of reasonable care, by a Coroner's Court, this would change the fundamental purpose of the Inquest. An Inquest is a fact-finding procedure and its inquisitorial nature would be transformed into an adversarial one. In those circumstances both the Coroners Act and the Rules would require wholesale redrafting, for example, inter alia: Rule 40 prevents any person from addressing the Coroner or the jury as to the facts; Rule 42 prevents a verdict being framed in such a way as to determine any question of criminal liability on the part of a named individual and prevents determination of any question of civil liability; there are no statutory powers for compelling the production of documents prior to the Inquest hearing itself; nor for advance disclosure of documents to interested parties; the summoning of witnesses and sanctions for non-compliance are not comprehensively dealt with as in the civil courts; State funding for representation of the parties is not readily available. Significant breaches of Article 6 are likely to be alleged by those found at fault without such amendment. (Sic)"

91. We accept that submissions 1 to 4 possess considerable force. The Article 2 duty is primarily that of the State; any shortcomings in the jurisdiction of a Coroner's inquest have to be made good by the State. However, coroners are themselves public bodies for the purposes of section 6(1) of the HRA and are therefore now required under domestic law not to act in a way which is incompatible with a Convention right subject to section 6(2). The effect of section 6(2)(b) is that a Coroner can only rely on the Coroners Rules to excuse his not acting in accordance with Convention rights if the relevant rule "cannot be read or given effect in a way which is compatible with Convention rights". In a situation where a Coroner knows that it is the inquest which is in practice the way the State is fulfilling the adjectival obligation under Article 2, it is for the Coroner to construe the Rules in the manner required by section 6 (2) (b). Rule 42 can and should, contrary to *Jamieson*, when necessary be construed (in relation to both criminal and civil

proceedings) only as preventing an individual being named, with the result that a finding of system neglect of the type we have indicated will not contravene that rule. If the Coroner is acting in accordance with the rule for this purpose he will not be offending in this respect section 6(1).

92. For a Coroner to take into account today the effect of the HRA on the interpretation of the Rules is not to overrule *Jamieson* by the back door. In general the decision continues to apply to inquests, but when it is necessary so as to vindicate Article 2 to give in effect a verdict of neglect, it is permissible to do so. The requirements are in fact specific to the particular inquest being conducted and will only apply where in the judgment of the Coroner a finding of the jury on neglect could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into at the inquest. Subject to the Coroner, in the appropriate cases, directing the jury when they can return what would in effect be a rider identifying the nature of the neglect they have found, the rules will continue to apply as at present. The proceedings should not be allowed to become adversarial. We appreciate there is no provision for such a rider in the model inquisition but this technicality should not be allowed to interfere with the need to comply with section 6 of the HRA.

93. The declaration granted by Stanley Burnton J has served its purpose in providing a vehicle for appeal. We do not need to express any view as to whether it would have been correctly made if the “riders” had not been published. They have been published and the claimants are satisfied. This appeal is allowed in part.

Order: Appeals allowed in part; detailed assessment in case of Amin; Respondent Middleton to have half her costs; Mr Crow to draft a declaration; leave to appeal refused.
(Order not part of approved judgment)

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

640

European Court of Human Rights

CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF L.C.B. v. THE UNITED KINGDOM

(14/1997/798/1001)

JUDGMENT

STRASBOURG

9 June 1998

The Netherlands: B.V. Juridische Boekhandel & Antiquariaat

A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC ‘s-Gravenhage)

SUMMARY[1]

Judgment delivered by a Chamber

United Kingdom – failure to take measures in respect of child of serviceman present during Christmas Island nuclear tests

i. article 2 of the convention

A. Scope of case under Article 2

Complaint concerning failure to monitor extent of father’s exposure to radiation not raised before Commission and based on events before United Kingdom’s Articles 25 and 46 declarations.

Conclusion: no jurisdiction to consider this complaint (unanimously).

B. Failure to take measures in respect of applicant

Article 2 § 1 enjoins State to take appropriate steps to safeguard lives of those within its jurisdiction.

Cannot be known whether father dangerously irradiated – contemporaneous records indicate radiation did not reach dangerous levels in areas where ordinary servicemen stationed – State authorities between 1966 and 1970 could reasonably have been confident of this.

State required to warn applicant’s parents and monitor her health only if it had appeared likely that irradiation of father engendered risk to applicant’s health – causal link between irradiation of father and leukaemia in child not established – no obligation to take measures in respect of applicant.

Conclusion: no violation (unanimously).

ii. Article 3 of the convention

No violation for reasons referred to in connection with Article 2.

Conclusion: no violation (unanimously).

iii. articles 8 and 13 of the convention

Complaints concerning failure to monitor father’s exposure to radiation and withholding of radiation levels records not raised before Commission.

In principle open to Court to consider complaint about failure to take measures in respect of applicant from standpoint of Article 8 – unnecessary since no separate issue arises.

Conclusion: no jurisdiction to consider complaints concerning State’s failure to measure father’s exposure to radiation and withholding of radiation levels records (unanimously); not necessary to consider under Article 8 complaint concerning failure to take measures in respect of applicant (unanimously).

COURT'S CASE-LAW REFERRED TO

25.2.1997, Findlay v. the United Kingdom; 19.2.1998, Guerra and Others v. Italy

In the case of L.C.B. v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. Bernhardt, *President*,
Mr F. Gölcüklü,
Mr F. Matscher,
Mr I. Foighel,
Sir John Freeland,
Mr M.A. Lopes Rocha,
Mr B. Repik,
Mr K. Jungwiert,
Mr J. Casadevall,

and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 29 November 1997 and 3 February and 21 May 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 23413/94) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 by Ms L.C.B., a British national, on 21 April 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2 and 3 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30). On 27 February 1997 the President of the Court, Mr R. Ryssdal, authorised this lawyer to represent the applicant despite the fact that he was not resident in one of the Contracting States (Rule 30 § 1), and also granted her request to be known by the initials L.C.B. for the purposes of the proceedings before the Court.

3. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and the President of the Court (Rule 21 § 4 (b)). On 21 February 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gölcüklü, Mr F. Matscher, Mr B. Walsh, Mr I. Foighel, Mr B. Repik, Mr K. Jungwiert and Mr J. Casadevall (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in

consequence on 25 March 1997, the Registrar received the applicant's and the Government's memorials on 2 October 1997.

5. On 31 October 1997, the President granted the applicant leave to submit further written observations (Rule 37 § 1 *in fine)*, which were received by the Registrar on 18 November 1997.

6. On 21 November 1997, Mr R. Bernhardt, Vice-President of the Court, replaced, as President of the Chamber, Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 § 5).

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 November 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. Eaton, Foreign and Commonwealth Office, *Agent*,
Mr J. Eadie, Barrister-at-Law,
Mr N. Lavender, Barrister-at-Law, *Counsel*,
Mrs J. Alexander, Ministry of Defence,
Mr T. Wilson, Ministry of Defence,
Mr D. Smith, Department of Social Security,
Dr C. Sharp, National Radiological Protection Board, *Advisers*;

(b) *for the Commission*
Mrs J. Liddy, *Delegate*;

(c) *for the applicant*
Mr I. Anderson, *Advocate, Counsel*.

The Court heard addresses by Mrs Liddy, Mr Anderson and Mr Eadie.

8. On 2 December 1997 the Chamber granted the Government leave to submit further written observations (Rule 37 § 1 *in fine*). These were received by the Registrar on 30 January 1998. The applicant's submissions in reply were received on 9 March 1998.

9. Subsequently, Mr M.A. Lopes Rocha, substitute judge, replaced as a full member of the Chamber Mr Walsh, who had died (Rule 22 § 1).

AS TO THE FACTS

I. the circumstances of the case

A. The Christmas Island nuclear tests

10. Between 1952 and 1967 the United Kingdom carried out a number of atmospheric tests of nuclear weapons in the Pacific Ocean and at Maralinga, Australia, involving over 20,000 servicemen. Among these tests were the "Grapple Y" and "Grapple Z" series of six detonations at Christmas Island in the Pacific Ocean (November 1957–September 1958) of weapons many times more powerful than those discharged at Hiroshima and Nagasaki.

11. During the Christmas Island tests, service personnel were ordered to line up in the open and to face away from the explosions with their eyes closed and covered until twenty seconds after the blast.

The applicant alleged that the purpose of this procedure was deliberately to expose servicemen to radiation for experimental purposes. The Government denied this and stated that it was believed at the time of the tests, and was the case, that personnel were sufficiently far from the centre of the detonations to avoid being exposed to radiation at any harmful level

and that the purpose of the line-up procedure was to ensure that they avoided eye damage and other physical injury caused by material blown about by the blast.

B. The particular circumstances of the applicant's case

12. While the applicant's father was serving as a catering assistant in the Royal Air Force, he was present at Christmas Island during four nuclear tests in 1957 and 1958. He also participated in the clean-up programme following the tests.

13. The applicant was born in 1966. In or about 1970 she was diagnosed as having leukaemia, a cancerous disease of the organs which manufacture blood. Her records of admission to hospital state, under the heading "Summary of Possible Causative Factors", "Father – Radiation exposure".

14. The applicant received chemotherapy treatment which lasted until she was 10 years old. Because of her illness and associated treatment she missed half of her primary school education and was unable to participate in sports or other normal childhood activities.

15. In December 1992 the applicant became aware of the contents of a report prepared by the British Nuclear Tests Veterans' Association ("BNTVA") indicating a high incidence of cancers including leukaemia in the children of Christmas Island veterans. The applicant is a member of the BNTVA.

16. She still has regular medical check-ups and is afraid to have children of her own in case they are born with a genetic predisposition to leukaemia.

ii. relevant domestic law and practice

Reay* and *Hope v. British Nuclear Fuels PLC

17. In 1983 an Independent Advisory Group, chaired by Sir Douglas Black, was set up in the United Kingdom to investigate reports of an abnormally high number of children contracting leukaemia in the area around the nuclear power reactor at Sellafield (formerly called Windscale) in northern England. The Group confirmed that childhood leukaemia was more common in this area than normal, but was not able to determine the reason for this. One of the members of the Group, Dr Martin Gardner, went on to conduct three studies into the phenomenon. The third, published on 17 February 1990 ("the Gardner Report"), found a statistical association

between the incidence of leukaemia in children from the town of Seascale, near Sellafield, and relatively high recorded doses of external whole-body radiation received by their fathers employed at the nuclear power plant prior to conception.

18. Following the publication of this report, two cases were brought against the authority responsible for the Sellafield reactor by plaintiffs who had contracted leukaemia and non-Hodgkin's lymphoma respectively, claiming that their fathers' employment at Sellafield had caused their illnesses. The two cases were heard concurrently in the High Court of Justice, London, on ninety days between October 1992 and June 1993. Over thirty expert witnesses gave oral evidence before the court and approximately one hundred written reports were

submitted, primarily directed at the question whether the statistical association found by Dr Gardner could be relied upon and was directly causal, as claimed by the plaintiffs.

19. Judgment was given by Mr Justice French on 8 October 1993.

He found, *inter alia*, that the Gardner Report was "a good study, well carried out and presented". However, certain technical criticisms which had been made of it were valid so as to diminish confidence in its conclusions and underline the need to seek confirmation from other independent studies before relying on it. He did, however, find that the evidence bore out a strong prima facie association between paternal preconceptional irradiation and childhood leukaemia in Seascale, although considerable reserve was necessary before it could be concluded that there was a causal link.

Although the judge was content to assume that there was a heritable component to the plaintiffs' diseases, he considered that this was very small. He placed particular reliance on studies of the children of survivors of the Nagasaki and Hiroshima bombings, which did not show any significant increase in leukaemia or non-Hodgkin's lymphoma, and were therefore quite inconsistent with the Gardner hypothesis. One of the defendant's witnesses, Sir Richard Doll, had referred to research emphasising the role of infection in causing childhood leukaemia, particularly in areas where unusual population mixing had occurred, as was the case in Seascale, which had a very mobile population of high socio-economic class situated in a remote rural area. The judge found that a theory of causation based on such factors, combined with chance, was no less plausible than the Gardner hypothesis.

In conclusion, he held that, "on the evidence before me, the scales tilt decisively in favour of the defendants, and the plaintiffs, therefore, have failed to satisfy me on the balance of probabilities that paternal preconceptional radiation was a material contributory cause of the Seascale excess or, it must follow, of [their diseases]" (*Reay v. British Nuclear Fuels PLC; Hope v. British Nuclear Fuels PLC* [1994] 5 Medical Law Reports 1 55; and see also 'Childhood leukaemia and Sellafield: the legal cases', *Journal of Radiological Protection*, vol. 14, no. 4, pp. 293–316).

III. The United Kingdom's ArticleS 25 AND 46 DeclarationS

20. On 14 January 1966 the United Kingdom lodged with the Secretary General of the Council of Europe the following declaration:

> "… in accordance with the provisions of Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on the 4th of November 1950, … the Government of the United Kingdom of Great Britain and Northern Ireland recognise, in respect of the United Kingdom of Great Britain and Northern Ireland only …, for the period beginning on the 14th of January 1966, and ending on the 13th of January 1969, the competence of the European Commission of Human Rights to receive petitions submitted to the Secretary General of the Council of Europe, subsequently to the 13th of January 1966, by any person, non-governmental organisation or group of individuals claiming, in relation to any act or decision occurring or any facts or events arising subsequently to the 13th of January 1966, to be the victim of a violation of the rights set forth in that Convention and in the Protocol thereto…"

A declaration under Article 46 of the Convention, recognising the Court's jurisdiction subject to similar conditions, was filed on the same day. Both declarations have been renewed on several occasions subsequently.

PROCEEDINGS BEFORE THE COMMISSION

21. In her application to the Commission (no. 23413/94) of 21 April 1993, the applicant complained under Articles 2 and 3 of the Convention that she had not been warned of the effects of her father's alleged exposure to radiation, which prevented pre- and post-natal monitoring that would have led to earlier diagnosis and treatment

of her illness. In addition, she claimed to have been subjected to harassment and surveillance, in breach of Article 8.

22. On 28 November 1995 the Commission declared the application admissible in so far as it related to the complaints under Articles 2 and 3 about failure to advise and inform the applicant's parents about her father's alleged exposure to radiation. In its report of 26 November 1996, (Article 31), it expressed the unanimous opinion that there had been no violations of Articles 2 and 3. The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

23. The Government, in their written and oral pleadings, asked the Court to find no violation of the Convention.

The applicant asked the Court to find violations of Articles 2, 3, 8 and 13 of the Convention, and to award her damages under Article 50.

as to the law

i. alleged violations of article 2 of the convention

24. Before the Court, the applicant claimed that both the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests, and its earlier failure to monitor her father's radiation dose levels, gave rise to violations of Article 2 of the Convention, which provides, in paragraph 1:

> "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."

A. Arguments of those appearing before the Court

1. The applicant

25. The applicant maintained that the respondent State had deliberately exposed her father and the other servicemen stationed on Christmas Island to radiation for experimental purposes. In support of this contention, she referred to a number of documents, including a 1953 report of the British Defence Research Policy Committee on Atomic Weapons, which requested tests to be carried out during future atomic weapons trials on the effects of different types of explosion on "men with and without various types of protection"; a 1955 Royal Air Force ("RAF") memorandum which stated that "during the 1957 trials [in Maralinga, Australia] the RAF will gain invaluable experience in handling the weapons and demonstrating at first hand the effects of nuclear explosions on personnel and equipment"; and a 1957 War Office circular, again related to the tests in Australia, which stated that "all personnel selected for duty at Maralinga may be exposed to radiation in the course of their military duties".

26. She stated that, as early as 1946, serious concern had been expressed, for example in letters to the *Lancet* (a leading British medical journal), about the genetic effects of radiation. In 1947, the Medical Research Council of Great Britain ("MRC")'s Committee on the Medical and Biological Applications of Nuclear Physics had reported that "all quantitative experiments show that even the smallest doses of radiation produce a genetic effect…". In 1956 the MRC found, *inter alia*, that "doses of radiation which are of no known significance to the individual may have genetic consequences" and recommended, in connection with those exposed to radiation

used for medical or industrial purposes, that "a personal record … should be kept for all persons whose occupation exposes them to additional sources of radiation".

27. She alleged that, despite or because of this evidence, in order to avoid liability for any subsequent health problems caused by the Christmas Island tests, the military authorities had decided not to monitor the servicemen's individual radiation dose levels or to provide them with any information as to the possible health consequences, for themselves and their future offspring, of their presence on the island. It could not, therefore, be known with any certainty whether or not her father had been exposed to dangerous levels of radiation. However, a report prepared by Mr J.H. Large,

a chartered engineer who had studied, *inter alia*, a number of photographs of the detonation on Christmas Island of 28 April 1958 ("Grapple Y"), suggested that this bomb was detonated at approximately 1,000 to 1,250 metres above ground, which would have resulted in a substantial mass of surface debris being swept up, subjected to intense irradiation, and then, depending on meteorological conditions, possibly scattered as radioactive fall-out over a radius of 50 to 100 miles.

28. The applicant considered that her father's unmonitored exposure to radiation was the probable cause of her childhood leukaemia.

She submitted that the decision in *Reay* and *Hope v. British Nuclear Fuels PLC* (see paragraph 19 above) was not conclusive, for a number of reasons. First, the judge had been wrong to rely on the results of the studies of the children of Hiroshima and Nagasaki survivors, since these studies had depended on acquiring information from a foreign and hostile population in the chaotic conditions following the bombings. Moreover, the studies had only acquired data over a four-year period (1947–51), whereas childhood leukaemia had its highest mortality rate in the first five years of life. Secondly, she pointed out that the plaintiffs' leading expert witness, Professor T. Nomura, whose five reports on radiation-induced transgenerational carcinogenesis in mice were admitted in evidence, had been unable to attend to give oral evidence at the hearing.

She submitted that subsequent research had confirmed the correctness of the Gardner hypothesis (see paragraph 17 above). For example, a study carried out by members of the Russian Academy of Sciences, the Mogilev Research Institute for Radiation Medicine and the University of Leicester Genetics Department had found a 50% increase in genetic mutations in children born in 1994 to parents exposed to radiation following the 1986 Chernobyl disaster, and British and American researchers had found an association between medical X-ray exposures of male patients and lower birth weight in their offspring ('Human minisatellite mutation rate after the Chernobyl accident', *Nature*, vol. 380, pp. 683–86; 'Association between preconception parental X-ray exposure and birth outcome', *American Journal of Epidemiology*, vol. 145, no. 6, pp. 546–51). In addition, a report prepared for the BNTVA in 1992 had found that one in five of the 1,454 nuclear test veterans included in the survey had children with illnesses or defects which could have had a genetic origin.

29. The applicant claimed that, had the State provided her parents with information regarding the extent of her father's exposure to radiation and the risks which this engendered, and monitored her health from infancy, it

would have been possible to diagnose her leukaemia earlier and to provide her with treatment which could have alleviated the risk to her life. She provided the Court with the report of Dr Irwin Bross, former Director of Biostatistics at Roswell Park Memorial Institute for Cancer Research (New York), which stated that, by the early 1960s, treatments had been developed in the United States, and were coming into world-wide use, which had been proved successful in clinical trials in producing prolonged remissions in childhood leukaemia. Dr Bross considered that, depending on the attitude of the doctors who attended the applicant, such treatment could have been commenced at first diagnosis, which could have avoided the life-threatening stage of the disease.

In the applicant's comments in response to Professor Eden's report (see paragraphs 8 above and 33 below), Dr Bross emphasised that it could not at this stage be known whether Ms L.C.B. should have been diagnosed with the myeloid or the lymphatic form of leukaemia, and that, had she in fact suffered from acute lymphatic leukaemia, this would destroy the basis of Professor Eden's conclusion that earlier detection and intervention would not have improved her prognosis.

2. The Government

30. The Government submitted that they could not be held responsible for alleged breaches of the Convention which occurred prior to 14 January 1966, when the United Kingdom recognised the competence of the Commission to receive individual petitions and the jurisdiction of the Court (see paragraph 20 above). Between that date and October 1970, when the applicant was diagnosed with leukaemia, the State authorities had had no cause to give advice or information to her parents, for the following reasons.

31. In the first place, there was no reason to believe that her father had been exposed to dangerous levels of radiation, as was shown by contemporaneous samples of environmental radiation taken on Christmas Island. Contrary to Mr Large's assessment (see paragraph 27 above), the Grapple Y detonation at Christmas Island had taken place at 2,500 metres above ground level. At that height, any fall-out would have passed rapidly into the upper atmosphere to be distributed over a number of months as global fall-out. There had certainly been no intent to expose the servicemen to radiation: an experiment of the kind alleged would have been not only scandalous, but also pointless, since by the 1950s a considerable amount of information about the effects of radiation on the human body had already been derived from the survivors of the Hiroshima and Nagasaki bombs. The documents relied on by the applicant in this connection had been presented out of context and did not support the implications she had sought to draw from them.

32. In any case, they submitted that the best scientific interpretation of the available evidence was that it did not support the existence of any causative link between the exposure of parents to radiation and the onset of leukaemia in their children. The most substantial study on the subject was that of 30,000 children born to survivors of the Hiroshima and Nagasaki bombs between 1946 and 1982, which found no statistically significant increase in leukaemia. The studies relied on by the applicant in this respect were by no means conclusive. Moreover, the High Court judge, sitting in the cases of *Reay* and *Hope v. British Nuclear Fuels PLC* (see paragraph 19 above), having considered the reports of one hundred expert witnesses and the oral evidence of thirty, decided that the causal link between preconception parental radiation and leukaemia in children had not been established.

33. Finally, in response to the evidence of Dr Bross (see paragraph 29 above), the Government submitted a report by Professor Osborn B. Eden, Professor of Paediatric Oncology at the University of Manchester, who stated that Dr Bross's comments applied essentially to acute lymphatic leukaemia, rather than the form of the disease with which the applicant appeared to have been diagnosed in 1970, namely acute myeloid leukaemia (although, with the passage of time, it was not possible to ascertain whether this had been the correct diagnosis). From an extensive review of the literature, he could find no evidence to support the proposition that truly effective treatment was available for acute myeloid leukaemia throughout the 1960s. Moreover, he did not consider that an earlier diagnosis could have been made or that it would have made any difference to the outcome.

3. The Commission

34. The Commission, which had not had the benefit of seeing the reports of either Dr Bross or Professor Eden, found that the applicant had not demonstrated that earlier diagnosis and treatment of her disease could have altered its fatal nature or alleviated her physical or mental suffering in any way. Accordingly, whether or not Article 2 was applicable, her complaints did not disclose a violation.

B. The Court's assessment

1. Scope of the case under Article 2

35. The Court observes that the applicant's complaint about the failure of the respondent State to monitor the extent of her father's exposure to radiation on Christmas Island was not raised before the Commission (see paragraph 21 above). It reiterates that the scope of its jurisdiction is determined by the Commission's decision on

admissibility, it having no power to entertain new and separate complaints not raised before the Commission (see, *inter alia*, the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, pp. 277 78, § 63). In any case, this complaint is based on events which took place in 1958, before the United Kingdom's Articles 25 and 46 declarations of 14 January 1966 (see paragraph 20 above).

It follows that the Court has no jurisdiction to consider it.

2. Assessment of the complaint concerning failure to take measures in respect of the applicant

36. The applicant complained in addition that the respondent State's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia in October 1970 had given rise to a violation of Article 2 of the Convention.

In this connection, the Court considers that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (cf. the Court's reasoning in respect of Article 8 in the Guerra and Others v. Italy judgment of 19 February 1998, *Reports* 1998-I, p. 227, § 58, and see also the decision of the Commission on the admissibility of application no. 7154/75 of 12 July 1978, Decisions and Reports 14, p. 31). It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life. The Court's task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.

37. The Court notes that the applicant's father was serving as a catering assistant on Christmas Island at the time of the United Kingdom's nuclear tests there (see paragraph 12 above). In the absence of individual dose measurements, it cannot be known with any certainty whether, in the course of his duties, he was exposed to dangerous levels of radiation. However, the

Court observes that it has not been provided with any evidence to prove that he ever reported any symptoms indicative of the fact that he had been exposed to above-average levels of radiation.

The Court has examined the voluminous evidence submitted by both sides relating to the question whether or not he was so exposed. It notes in particular that records of contemporaneous measurements of radiation on Christmas Island (see paragraph 31 above) indicate that radiation did not reach dangerous levels in the areas in which ordinary servicemen were stationed. Perhaps more importantly for the issues under Article 2, these records provide a basis to believe that the State authorities, during the period between the United Kingdom's recognition of the competence of the Commission to receive applications on 14 January 1966 and the applicant's diagnosis with leukaemia in October 1970, could reasonably have been confident that her father had not been dangerously irradiated.

38. Nonetheless, in view of the lack of certainty on this point, the Court will also examine the question whether, in the event that there was information available to the authorities which should have given them cause to fear that the applicant's father had been exposed to radiation, they could reasonably have been expected, during the period in question, to provide advice to her parents and to monitor her health.

The Court considers that the State could only have been required of its own motion to take these steps in relation to the applicant if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health.

39. Having examined the expert evidence submitted to it, the Court is not satisfied that it has been established that there is a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived. As recently as 1993, the High Court judge sitting in the cases of *Reay* and *Hope v. British Nuclear Fuels PLC*, having examined a considerable amount of expert evidence, found that "the scales tilt[ed] decisively" in favour of a finding that there was no such causal link (see paragraph 19 above). The Court could not reasonably hold, therefore, that, in the late 1960s, the United Kingdom authorities could or should, on the basis of this unsubstantiated link, have taken action in respect of the applicant.

40. Finally, in the light of the conflicting evidence of Dr Bross and Professor Eden (see paragraphs 29 and 33 above), and as the Commission also found (see paragraph 34 above), it is clearly uncertain whether monitoring of the applicant's health *in utero* and from birth would have led to earlier diagnosis and medical intervention such as to diminish the severity of her disease. It is perhaps arguable that, had there been reason to believe that she was in danger of contracting a life-threatening disease owing to her father's presence on Christmas Island, the State authorities would have been under a duty to have made this known to her parents whether or not they considered that the information would assist the applicant. However, this is not a matter which the Court is required to decide in view of its above findings (see paragraphs 38–39).

41. In conclusion, the Court does not find it established that, given the information available to the State at the relevant time (see paragraph 37 above) concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her.

It follows that there has been no violation of Article 2.

ii. alleged violation of article 3 of the convention

42. The applicant complained that the matters referred to in connection with Article 2 amounted in addition to ill-treatment contrary to Article 3 of the Convention, which provides:

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

43. For the reasons referred to in connection with Article 2 (see paragraph 41 above), the Court does not find it established that there has been a violation by the respondent State of Article 3.

iii. alleged violations of articles 8 and 13 of the convention

44. The applicant complained before the Court that the State's failure to measure her father's individual exposure to radiation and its withholding of contemporaneously produced records of the levels of radiation on Christmas Island constituted violations of Articles 8 and 13 of the Convention, which provide respectively:

Article 8

"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 this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] 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."

45. The Court recalls that these complaints were not raised before the Commission (see paragraph 21 above). It therefore has no jurisdiction to consider them (see paragraph 35 above).

46. The Court observes that, in principle, it would be open to it to consider in relation to Article 8 the applicant's complaint regarding the State's failure of its own motion to advise her parents and monitor her health prior to her diagnosis with leukaemia (see the above-mentioned Guerra and Others judgment, pp. 222–24, §§ 39–46). However, having examined this question from the standpoint of Article 2, it does not consider that any relevant separate issue could arise under Article 8, and it therefore finds it unnecessary to examine further this

complaint.

for these reasons, the court unanimously

1. *Holds* that it has no jurisdiction to consider the applicant's complaint under Article 2 of the Convention concerning the State's failure to monitor the extent of her father's exposure to radiation on Christmas Island;

2. *Holds* that there has been no violation of Article 2 of the Convention in relation to the State's failure to advise the applicant's parents and monitor her health prior to her diagnosis with leukaemia;

3. *Holds* that there has been no violation of Article 3 of the Convention;

4. *Holds* that it has no jurisdiction to consider the applicant's complaints under Articles 8 and 13 of the Convention concerning the State's failure to create individual dose records of her father's exposure to radiation and the withholding of contemporaneous records of levels of radiation on Christmas Island;

5. *Holds* that it is not necessary to consider also from the standpoint of Article 8 of the Convention the complaint concerning the State's failure to advise the applicant's parents and monitor her health prior to her diagnosis with leukaemia.

Done in English[1], and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 June 1998.

Signed: Rudolf Bernhardt

President

Signed: Herbert Petzold

Registrar

1. This summary by the registry does not bind the Court.

1Notes by the Registrar

. The case is numbered 14/1997/798/1001. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

11. *Note by the Registrar*: as a derogation from the usual practice (Rule 27 § 5 of Rules of Court A), the French text was not available until 18 June 1998, but it too is authentic.

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

THIRD SECTION

CASE OF KEENAN v. THE UNITED KINGDOM

(Application no. 27229/95)

JUDGMENT

STRASBOURG

3 April 2001

In the case of Keenan v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr P. KūRIS,

Mrs F. TULKENS,

Mrs H.S. GREVE,

Mr M. UGREKHELIDZE, *judges*,

Sir Stephen SEDLEY, ad hoc *judge*,

and Mrs S. DOLLé, *Section Registrar*,

Having deliberated in private on 4 July 2000 and 13 March 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the European Commission of Human Rights ("the Commission") on 25 October 1999 (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention). It originated in an application (no. 27229/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under former Article 25 of the Convention by a United Kingdom national, Mrs Susan Keenan ("the applicant"), on 28 February 1995.

2. The applicant alleged that her son, Mark Keenan, had died from suicide in prison due to a failure by the prison authorities to protect his life, that he had suffered inhuman and degrading treatment due to the conditions of detention imposed on him and that she had no effective remedy in respect of her complaints. She relied on Articles 2, 3 and 13 of the Convention.

3. The Commission declared the application admissible on 22 May 1998. In its report of 6 September 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry], it expressed the opinion, by fifteen votes to five, that there had been no violation of Article 2, by eleven votes to nine, that there had been no violation of Article 3 and, unanimously, that there had been a violation of Article 13.

4. The applicant was represented by Messrs Toller Beattie, solicitors practising in Braunton, and by Mr T. Owen, a lawyer practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr P. Berman, of the Foreign and Commonwealth Office.

5. On 13 December 1999 a panel of the Grand Chamber determined that the case should be examined by a Chamber constituted within one of the Sections of the Court (Rule 100 § 1 of the Rules of Court). Subsequently the application was allocated to the Third Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1. Sir Nicolas Bratza, the judge elected in respect of the United Kingdom, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Lord Justice Sedley to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 4 July 2000 the Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is the mother of Mark Keenan who, on 15 May 1993, at the age of 28, died from asphyxia caused by self-suspension whilst serving a sentence of four months' imprisonment at HM Prison Exeter.

9. The immediate circumstances surrounding Mark Keenan's death are inevitably obscure, since he took his life while alone. For the rest, the parties have in the main accepted the facts as established by the Commission and these are reproduced below in Section A. The medical reports concerning Mark Keenan's state of health prior to his death are summarised in Section B.

A. The facts of the case

10. From the age of 21, Mark Keenan received intermittent treatment in the form of anti-psychotic medication for a condition which it appears was first diagnosed whilst he was serving a four-year prison sentence for assault. It appears to have been reported by Mark Keenan that he was diagnosed as suffering from paranoid schizophrenia. Following his release from prison in 1988, Mark Keenan's general practitioner continued the prescription of anti-psychotic medication.

11. His medical history included symptoms of paranoia, aggression, violence and deliberate self-harm, and his behaviour was sometimes unpredictable. In November/December 1992, shortly before he was admitted to prison, he

had received treatment at North Devon District Hospital following two incidents in which he had injected himself with overdoses of insulin. Following the first incident, on 9 November 1992, it was noted that he was complaining of paranoia. Diagnoses of borderline personality disorder and paranoid schizophrenia were made and it was noted that he had a history of frequent episodes of deliberate self-harm. He was discharged after ten days on a prescription of anti-psychotic medication. The second incident, on 16 December 1992, was associated with the breakdown in his relationship with his girlfriend. The admission notes recorded as diagnoses “Personality disorder. Paranoid psychosis. Suicide threats”. He discharged himself on 18 December 1992.

12. On the same day he was admitted to HM Prison Exeter, having been remanded in custody following an assault on his girlfriend. On admission, he was received by the prison’s health care centre for observation and assessment, having mentioned a history of suffering from paranoid schizophrenia.

13. On 21 December 1992, when the medical notes recorded that there had been no evidence of schizophrenia that day, an attempt was made to transfer him from the health care centre to ordinary location. Later the same day he was re-admitted to the health care centre because he had been kicking at his cell door and appeared paranoid to prison staff. The explanation provided by Mark Keenan was that he had taken some cannabis which had “tripped him out” and made him paranoid, shaky and tense. Subsequently, on 23 December, he was discharged to ordinary location having been assessed as fine, with no psychiatric symptoms, cheerful and coping. By the evening, he was complaining that he was “cracking up”. He was advised to “calm down and think positively about going to court tomorrow”. In the event, on 24 December 1992, he was released on bail.

14. Mark Keenan was re-admitted to HM Prison Exeter on 1 April 1993, having been convicted of the assault on his girlfriend and sentenced to four months’ imprisonment. He was again received by the prison’s health care centre for observation and assessment. On 5 April 1993 Dr Keith, the prison’s senior medical officer, consulted Dr Roberts, the consultant psychiatrist who had been treating Mark Keenan before his admission to prison. Dr Roberts advised that Mark Keenan had a personality disorder with anti-social traits and that under stress he disclosed some fleeting paranoid symptoms. Dr Roberts concurred with the medication which

Dr Keith had prescribed (thioridazine) and suggested a clopixol injection with chlorpromazine. He also advised that Mark Keenan should be treated symptomatically.

15. On 14 April 1993 Mark Keenan barricaded himself inside the ward room of the health care centre in protest against his proposed transfer to ordinary location. On 15 April 1993, following an adjudication concerning the incident, the governor imposed a suspended punishment of fourteen days’ extra imprisonment. On 16 April 1993 he was discharged to ordinary location but re-admitted to the health care centre the following evening after his cell-mate reported that he was uptight and had fashioned a noose from a bed sheet which he was keeping under his bed. On his return to the health care centre, he was placed in an unfurnished cell and put on a fifteen-minute watch. The entry in his medical notes for 17 April 1993 records:

“Brought to Health Care Unit at 21.30 hours ... states he will hang himself. A noose has been made out of strips of sheets. In conversation with Keenan, [says] he is under pressure from kitchen workers who have stated they will contaminate his food etc. The look of relief on his face was great when I told him he will have to stay here.”

16. A subsequent entry, on 18 April 1993, records “owes on wing hence can’t cope [with ordinary location]”.

17. On 23 April 1993 it was decided that Mark Keenan should be assessed by the prison’s visiting psychiatrist, Dr Rowe. On 26 April 1993, before he had been assessed, a further attempt was made to transfer him to ordinary location. He was re-admitted to the health care centre the following day. The entry in his medical notes for 27 April 1993 records:

“Brought to treatment room shaking and hyperventilating. Declined any further medication. Unable to cope. Admitted to health care centre for observation and assessment. Seen at 17.45 hours. He says he felt panicky and paranoid in main prison. He felt he was going to be attacked. He felt he might have to defend himself. Located in single cell on lower landing.”

18. On 29 April 1993 Mark Keenan was assessed by Dr Rowe, who did not consider that it was currently necessary to transfer him to a hospital for psychiatric treatment, but prescribed a change in his medication, and recorded in his medical notes:

"He is an old patient of mine who suffers from a mild, chronic psychosis. He is not usually violent, although he is easily stressed and then can be unpredictable."

He also recommended that Mark Keenan should have no association until the panic/paranoia subsided.

19. On 30 April 1993 the question of moving Mark Keenan to ordinary location was again raised with him. The entry in his medical notes for 30 April 1993 records:

"He does not feel fit for [ordinary location] as he is afraid he might be injured, further mention of paranoia by him. To remain in a single cell."

20. In the course of the day his mental state was noted to deteriorate, with evidence of aggression and paranoia. Dr Seale, who had no psychiatric training, considered that the change in medication might be responsible and therefore prescribed a return to his previous medication. At 6 p.m. Mark Keenan assaulted two hospital officers, one seriously. Following the assault, he was placed in an unfurnished cell within the health care centre and put on a fifteen-minute watch. It is not known how long the watch was kept in place.

21. On 1 May 1993 Dr Bickerton, who had six months' training in psychiatry as a senior house officer, certified Mark Keenan fit for adjudication in respect of the assault and fit for placement in the segregation unit within the prison's punishment block. He recorded in Mark Keenan's medical notes for 1 May 1993:

"Calm and rational. No sign of mental illness. Slept well, feels relaxed. Claims he was frustrated yesterday and this is why he attacked the officer. Fit for normal cellular confinement in punishment block."

22. The same day, Mr McCombe, the prison's deputy governor, ordered Mark Keenan to be placed in segregation in the punishment block under Prison Rule 43. Mr McCombe considered segregation appropriate, as Mark Keenan's behaviour was unpredictable and he posed a threat to staff. No date appears to have been given for his release from segregation.

23. Whilst in segregation, Mark Keenan would have been locked up about twenty-three hours each day. Although the segregation unit was visited each day by a doctor, the prison chaplain and the prison governor, Mark Keenan would, in contrast to location within the health care centre or the main prison, have had minimal contact with staff, and none with fellow prisoners.

24. On 1 May 1993, following his transfer to the segregation unit, Mark Keenan requested a "listener" (a prisoner trained by the Samaritans in the counselling of inmates who may be suicidal). At 6.05 p.m. Mr Gill, one of the prison's hospital officers, was contacted after Mark Keenan had indicated to prison officers on the segregation unit that he was feeling suicidal. The medical notes record:

"Went to see [Keenan]. 1997 raised [(a form completed for the referral of an inmate, perceived to be a suicide risk, to the medical officer)]. Listener in cell with inmate. Reassurances given that he is not suicidal but tense, agitated [and] needs to talk it over. Will get [medical officer] to see when he attends later."

25. At 6.45 p.m., however, Mark Keenan was threatening to harm himself and was therefore transferred to an unfurnished cell in the hospital wing and put on a fifteen-minute watch. It remains unclear how long this watch was maintained.

26. At 7.45 p.m. Dr Bickerton attempted to speak to Mark Keenan through his cell door. Whilst noting that he appeared very agitated and distressed, and claimed to be hearing voices and thinking he was Jesus Christ, Dr Bickerton doubted that he was suffering from any psychotic illness. Mark Keenan's medical notes record that he spent the greater part of the night banging on and kicking his cell door, shouting obscenities and making threats to prison staff. On 2

May 1993 Dr Simkins recorded in Mark Keenan's medical notes:

"This morning denying he is suicidal. Verbally abusive to staff. Some bruises from hitting door. This man is a considerable hazard to staff and has become obnoxious to other hospital inmates due to his behaviour. He is unpredictable and has made threats to his life. He has been placed on Rule 43. I have explained to him that his remaining in the [unfurnished] cell is in order to assess his attitude in the next 24 hours. I will increase chlorpromazine to 400mg qds and resume Kemadrin and chloral nocte. He says he will not take medication."

27. The medical notes for 3 May 1993 record:

"a.m. – very much better in attitude. Slept well. Requests to return to [the segregation unit in the punishment] block. Agreed."

28. Mark Keenan was duly returned to the segregation unit. A note in the segregation unit's occurrence book for 3 May 1993 records:

"Keenan [was] brought in from the hospital. Seems slightly more lucid than before, however still needs watching. At tea time Keenan asked to [talk to a listener] as he stated he felt he was 'going into one', which I took to mean kicking off ... staff beware."

29. The medical notes record at 9 p.m.:

"Troublesome in block. Given extra chlorpromazine. Seemed to calm down after a chat. If he is talking suicidally overnight then unfurnish his block cell and review 'mane' [query, in the morning]."

30. Save for a short note on 4 May 1993 that at "11.00 hours clopixol 500 mg given", no further entry was made in Mark Keenan's medical notes from the 3 May 1993 until his suicide on 15 May 1993. Dr Bradley, who had no psychiatric training, saw Mark Keenan in the course of routine morning visits to the segregation unit on 4 to 7 and 10 to 14 May 1993. She recalled:

" ... We had the cell door open on the majority of occasions. I recall there may have been one time when I spoke through his glass window ... but that was because they were short of staff. He had the opportunity to talk to me.

We discussed his medication. He never mentioned any feelings of depression to me or not coping. On the whole Keenan appeared calm and with it with me. He appeared clear and not disturbed. I also checked with the staff as to his behaviour through the day, and they replied that there was nothing that concerned them."

31. The occurrence book of the segregation unit records, however, on 4 May 1993:

"Keenan abusive, aggressive and offering violence to staff. Relocated to [cell] A1-4 for a quietening down period. Keenan phone call to solicitor at 10.00 hours re assault on H/O Dent. On return [from phone call] to A1 [landing] states he will behave himself. Relocated to [cell] A1-5."

32. The entry for 6 May 1993 records:

"Keenan refused cup of tea. Said there was something out in it. When told that there was nothing out in it he decided to drink it. He is starting to act very strange. Staff to be aware."

33. The entry for 7 May 1993 records:

"Keenan seen by doctor. Refused medication. Staff to still offer medication. To be logged if taken or refused."

34. Following the entry on 7 May 1993 there is reference to the fact that on 8, 9 and 10 May 1993 he accepted his medication. Thereafter there is no reference to Mark Keenan in the occurrence book until his suicide on 15 May 1993.

35. In a letter to his mother, dated 13 May 1993, he complained that his state of mind was not very good.

36. On 14 May 1993 Dr Bradley assessed Mark Keenan to be fit for adjudication in respect of his assault on the two prison officers on 30 April 1993. The record of the adjudication contains the certification by the doctor that he was fit for adjudication and for cellular confinement. The doctor added the following observations:

"At the time of the alleged offence Mr Keenan was receiving medication for a chronic psychiatric problem and he had had a recent change in medication."

37. The adjudication took place on 14 May 1993, some two weeks after the events concerned. Mark Keenan was found guilty of assault. In mitigation, he told the deputy governor, Mr McCombe:

"I suffer from a split personality disorder. I have been in and out of institutions all my life. I now have a chance to make good. My mum has booked a holiday in Cornwall. I have behaved myself."

The deputy governor said that he noted what the applicant said but that he was facing extremely serious charges. He awarded twenty-eight additional days in prison together with seven days' loss of association and exclusion from work in segregation in the punishment block. At that point, Mark Keenan had only nine days to go before his expected release. The sentence had the effect of delaying his release from 23 May until 20 June 1993 – pursuant to the applicable provisions, he had been entitled to release after half of his four-month sentence, with account also being taken of time spent in detention on remand.

38. Shortly after the adjudication, Mark Keenan was seen by the chaplain, who recalled in his evidence at the inquest that Mark Keenan had been unhappy about the decision and had said: "I was thinking of kicking off, but I don't think I will." The chaplain stated that at no stage did Mark Keenan indicate that he might take his own life.

39. At 9.45 the following morning, on 15 May 1993, Mark Keenan was seen by Dr Bickerton who recalled that he seemed calm, polite and relaxed. He was then seen by the deputy governor, Mr McCombe, who later described him as having been in a highly agitated state, but relaxing when he was informed that his right to buy tobacco had not been suspended.

40. In the afternoon Mark Keenan was visited by a friend, M.T., whom he had known for about five years. M.T., who saw Mark Keenan for some twenty minutes, found him to be disappointed that he had an additional twenty-eight days to serve in prison, but otherwise in good spirits and, when M.T. left, as looking forward to his next visit the following Saturday. Prison officer Haley, who returned Mark Keenan to his cell following the visit, recalled that Mark Keenan was very talkative and appeared to be in high spirits.

41. Prison officer Milne, who saw Mark Keenan at or about 5.15 p.m., recalled that he seemed all right and asked if he could use the telephone at 6 p.m. Mr Milne agreed, but in the event it does not appear that Mark Keenan was allowed out of his cell to make the call. According to the evidence given later at the inquest, Mr Milne, who was on duty on landing A1 – the segregation block –, was absent in the toilet for ten minutes from about 6.25-6.30 p.m. On his way from the toilet to assist on landing A3, he noticed that the cell call indicator for landing A1 was depressed. The call buttons in each cell lit up indicators on each landing to ensure that if an officer was not present on one landing, the light could be seen by officers on other landings. There was no noise issuing from the indicator as it seemed that someone, a prisoner or prison officer, had de-activated the buzzer, access being possible to the system from each landing. Mr Milne called to another officer to accompany him and immediately went to Mark Keenan's cell and proceeded to open it. He estimated that a minute went by between seeing that the light was on and opening the cell door.

42. At 6.35 p.m. on 15 May 1993, Mark Keenan was discovered by the two prison officers hanging from the bars of his cell by a ligature fashioned out of a bed sheet. At 7.05 p.m. he was pronounced dead.

43. At some point before he committed suicide, Mark Keenan had depressed the call button in his cell. It would not have been possible for him to depress the call button whilst suspended. It was Mr Milne's evidence at the inquest that Mark Keenan must have depressed the call button during the ten minutes when he was using the staff toilets since the light on the landing, which would have indicated that the call button had been depressed, was not on when he left.

44. In an undated letter, received by Dr Roberts after 15 May 1993, Mark Keenan wrote:

"As you will well know I am in prison for assault on [G.S.], which I received 4 months. I cannot take much more. I have seen Dr Rowe in here he wrote me up for some new tablets fenzodine white tablets like white smarties. I just went mad on them, and ended up on assault on two staff. I am asking you if you can give me treatment when I get out and get me better. I was using drugs in Bmth as well, I feel very unstable but the doctor will not help me at all. I need help please could you send the Governor a report on me, I can't take much more."

45. On 25 August 1993, at the inquest before a coroner, the jury recorded a verdict of death by misadventure and that the cause of death was asphyxiation by hanging. Evidence was submitted in public proceedings by fourteen witnesses, six of whom gave oral testimony. The witnesses included the applicant, the prison officers on duty who had discovered Mark Keenan's body, the police inspector who had investigated the death, the deputy governor of the prison, a number of prison hospital officers and the senior prison doctor, the prison chaplain and M.T., who had visited Mark Keenan on the day he died. Statements were submitted by these persons, as well as by Dr Bickerton and Dr Bradley.

46. On 17 November 1993 the applicant was granted legal aid limited to obtaining further evidence and counsel's opinion on the merits and quantum of damages in a potential action against the Home Office in respect of the treatment of her son and the conditions of his detention.

47. In a report dated 17 August 1994, Dr Maden, the consultant forensic psychiatrist instructed by the applicant's solicitors, expressed his opinion that Mark Keenan, as a prisoner suffering from paranoid schizophrenia, was unfit to be placed in segregation in the punishment block and that the failure of the prison authorities to accommodate him in the hospital wing was an important contributory factor to his death (see paragraph 50 below).

48. In an opinion dated 14 October 1994, counsel advised in the light of the psychiatrist's report that, notwithstanding the grave breach of duty by the Prison Service in keeping Mark Keenan, a mentally ill prisoner, in a punishment cell without any proper medical monitoring, an action in negligence under the Law Reform (Miscellaneous Provisions) Act 1934 would not succeed since there was no evidence that Mark Keenan had suffered any injury of a kind in respect of which a cause of action could be maintained. He was already mentally ill and there was no indication that he suffered any worsening in his condition, or developed any new condition as a result of his confinement. Mere distress was insufficient, and the fact of his death was not such as to constitute in English law an injury in respect of which a cause of action lay. In respect of proceedings under the Fatal Accidents Act 1976, counsel advised that, since Mark Keenan was over 18 when he died, the applicant did not qualify for bereavement damages and there were no dependants who might be able to pursue a claim. To the extent that the applicant might have incurred any funeral expenses, these were not sufficient to justify the support of legal aid. The effect of this advice was to prevent the applicant from pursuing any contemplated litigation since, in the light of the advice, legal aid would be withdrawn.

49. By a letter of 12 December 1994, the applicant was informed by the Legal Aid Board that they were considering whether to discharge her legal aid certificate given counsel's opinion that she had no reasonable prospect of success. By a decision of 8 March 1995, the Legal Aid Board discharged her legal aid certificate since it was unreasonable in the circumstances that she continue to receive assistance.

B. Medical reports concerning Mark Keenan's state of health

1. Dr Maden's report of 17 August 1994

50. Dr Maden, MD, MRCPsych, a consultant forensic psychiatrist at the Bethlem Royal Hospital, prepared a report at the request of the applicant's solicitors, on the basis of materials from the inquest, Mark Keenan's prison medical record, his medical notes from North Devon District Hospital and his general practice medical record. He had had no contact with Mark Keenan before his death. His report included the following:

"*Family and personal history*

There is a family history of psychiatric disorder, in that his maternal grandmother is said to have died in a mental

hospital, his mother suffered a severe depressive illness after the cot death of Mark's younger brother and his father is described as an alcoholic who was occasionally violent.

Mark Keenan['s] childhood was disturbed and unhappy. His parents separated when he was about a year old. His mother suffered from severe, intermittent depression throughout his childhood. His behaviour at school was disruptive, including fighting and truancy. He is said to have been in care at various times from the age of 12 years, and spent time in foster homes, detention centres and approved schools. His work record was poor, consisting of occasional short-term manual work. A report by Dr Adam (dated 23.3.93) states that he tended to stop jobs because of paranoid thoughts.

His disturbed behaviour continued after leaving school. He is said to have spent times in London at the age of 15 years as a rent boy and convictions included breach of the peace (age 15 y.), car theft and breaking into a jewellers (age 16 y.), convictions relating to fighting at the ages of 17 and 20 years and a conviction for G.B.H. at the age of 21 years after stabbing his sister's boyfriend.

Psychiatric history

He is said to have been diagnosed as suffering from paranoid schizophrenia when he was aged 21 years (in 1985), whilst he was serving a prison sentence for the offence of G.B.H. He had paranoid thoughts and was started on treatment with cloxipol (anti-psychotic medication).

Whilst serving his prison sentence, he is said to have spent a brief spell in Grendon Underwood prison, where he was told that his paranoid schizophrenia was too severe for him to get involved in group therapy.

In 1988, he was discharged from prison and continued clopixol until it was changed to depixol (a similar, injectable, anti-psychotic medicine) by his G.P. ...

His first admission to a psychiatric hospital was to St Annes, Poole, ... in December 1988.

From 9.11.92 until 19.11.92, he was admitted to North Devon District Hospital. He had taken an overdose, injecting himself with insulin. He was also complaining of 'paranoia'. The admission summary lists the diagnoses as 'borderline personality disorder' and 'paranoid schizophrenia'. It also notes his history of 'frequent episodes of DSB (deliberate self-harm)'. The discharge summary also noted that he was 'unable to cope living on his own'... and that he was disruptive on the ward ... It was noted that 'there did not seem to be too much evidence for his paranoia', but he was discharged on three different types of anti-psychotic medication (including a fortnightly injection) and an anti-depressant. ...

From 16.12.92 until 18.12.92, he was admitted to North Devon District Hospital, after taking an overdose following the breakdown of his relationship with his girlfriend. The summary of this admission lists the diagnoses as 'Personality disorder. Paranoid psychosis. Suicidal threats.' Shortly after taking his own discharge, he was arrested for the assault on his former girlfriend which led to his prison sentence. ...

Opinion

1. Mark Keenan suffered from paranoid schizophrenia. He appears to have developed this illness in 1985 ... After his discharge from prison in 1988, he maintained fairly regular contact with psychiatric services and his G.P. and for most of this time, was being given an injectable anti-psychotic medication. Among the psychiatrists who saw him, there appears to be general agreement about the diagnosis of schizophrenia.

2. I note that he was also given diagnoses of personality disorder and substance abuse at various times. There is evidence to support the diagnosis of personality disorder. 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. The significance of the diagnosis of personality disorder is that he would have been a more difficult patient to look after, than the average patient with schizophrenia.

3. Schizophrenia is a serious and long lasting mental illness that may be controlled to a greater or lesser extent by medication but is not cured by that medication. Self-harm, suicide and violence are recognised complications of schizophrenia. Many of the symptoms which Mr Keenan showed in the time leading up to his death are recognised symptoms of schizophrenia, including paranoia, hearing voices, disturbed sleep, aggression, ambivalence and thoughts of self-harm. These symptoms can have other causes but, in the case of a patient known to suffer from schizophrenia, it would be usual to assume that the symptoms were due to the schizophrenic illness. It is impossible to make any reliable distinction between symptoms which are due to schizophrenia and those which are due to an individual's personality.

4. The diagnosis of schizophrenia has important implications. The management of the condition is primarily the responsibility of doctors, as the normal prison rules cannot be expected to cope with persons whose mental state is grossly abnormal, without guidance from doctors. The following comments are therefore made with reference to what would constitute an acceptable standard of care for a person with schizophrenia.

5. From the evidence I have seen, the standard of medical record keeping was inadequate on at least two occasions. Between 19.4.93 and 26.4.93, the management plans changed from continuous observation in the prison Health Care Centre, and a decision to seek the opinion of a visiting psychiatrist (Dr Rowe), to a decision to transfer Mr Keenan to ordinary location. There is no information in the medical notes to explain this decision. On 17.4.93, Mr Keenan was stating to staff that he intended to hang himself and a noose had been found in his cell. Given this evidence of serious suicidal intent, it would be good practice to record in the medical notes the reason for discontinuing the higher level of observation and returning to normal location.

There is no entry in the medical notes for the eleven days leading up to Mr Keenan's death. Given that the entries up to this point record disturbed and unpredictable behaviour and threats to his life and threats of violence to others, there were good reasons for monitoring his mental state regularly and there is no record to show that this was done.

6. Following the visit and assessment by Dr Rowe on 29.4.93 the evidence I have seen suggests that the standard of care received by Mr Keenan fell below that which he was entitled to expect. Dr Rowe confirmed that Mr Keenan suffered from 'mild chronic psychosis' and recommended adding a new form of anti-psychotic medication to his existing regime of anti-psychotic medication. A recommendation was also made on the same day that Mr Keenan not be allowed association until his panic/paranoia had subsided. Dr Rowe (who had previous knowledge of the patient) also noted that the patient was not usually violent.

On the next day (30.4.93), his mental state was noted to deteriorate with evidence of paranoia and aggression. The change in medication recommended by Dr Rowe was then reversed. On 1.5.93, Dr Bickerton concluded that there was no sign of mental illness and pronounced Mr Keenan fit for normal cell location in the punishment block.

With the benefit of hindsight, it is apparent that Mr Keenan was not fit to be located in the punishment block. Two things run throughout his medical notes. One is his fear of being located anywhere other than the hospital, the second is his tendency towards suicidal behaviour. I believe that the failure to accommodate him in the hospital wing was an important contributory factor to his death.

In my opinion, it is not possible to justify the reversal of the change in medication recommended by Dr Rowe, without further reference to Dr Rowe (or another psychiatrist). Dr Rowe's clear opinion was that the patient was suffering from a psychosis and that the correct treatment was a change in anti-psychotic medication. Dr Rowe's advice was not followed consistently. For example, Dr Bickerton concluded on 1.5.93 that there was no sign of mental illness, despite Dr Rowe's opinion of 29.4.93 and the evidence in the medical notes of paranoia and aggression on 30.4.93. It is most unlikely that the type of mental illness documented by Dr Rowe (described as chronic) would have disappeared completely within two days.

On the evidence I have seen, I believe that Dr Bickerton was incorrect in his judgment (that there was no mental illness present on 1.5.93) and that, as a doctor without psychiatric qualification, he should not have taken a different course of action from that recommended by the psychiatrist."

2. Dr Reveley's report of 15 February 1995

51. Dr Reveley, a second consultant psychiatrist instructed by the applicant's solicitors, expressed her opinion on the basis of the inquest proceedings and medical records, including the notes from prison and the North Devon District Hospital. She had never met or treated Mark Keenan. Her report included the following:

"*Opinion*

37. I am of the view that Mark Keenan suffered from paranoid schizophrenia, paranoid type as defined by the ICD-10 classification of Mental and Behavioural Disorders 1992. One of the essential features of this disorder is presence of delusions in the context of a relative preservation of cognitive functioning and affect. The individual suffering from this disorder is therefore generally able to describe the typical examples of hallucinations. Examples of the most common paranoid symptoms included delusions of persecution, grandiose delusions, hallucinatory voices that threaten the patient, hallucinations of taste and smell. There is ample evidence that Mark Keenan suffered from such symptoms during his final prison sentence. Violence and self-harm are often associated with this condition, as indeed they were in the case of Mark Keenan. The Diagnostic and Statistical Manual of Mental Disorders, 4th edition 1994 draws attention to this finding: 'The persecutory themes may predispose the individual to suicidal behaviour, and the combination of persecutory and grandiose delusions with anger may predispose the individual to violence.'

38. Mark Keenan was also variously diagnosed as suffering from substance abuse and personality disorder. Neither of these diagnoses is inconsistent with paranoid schizophrenia and they often coexist with that condition. It is also clear Mark Keenan was consistently treated with anti-psychotic medication, and that the prison medical staff impliedly accepted a diagnosis of psychosis by continuing to treat with anti-psychotic medication. Indeed he specifically received a diagnosis of 'mild chronic psychosis' while in prison. Any diagnosis of psychosis is always of the utmost significance. There are three main psychiatric conditions that lead to psychosis: schizophrenia, manic depressive disorder and substance abuse (e.g. ecstasy, LSD, amphetamines, alcohol, and sometimes cannabis). It may be impossible to distinguish between the individual psychotic disorders when someone is first seen by a psychiatrist, and uncertainty about a patient's diagnosis may remain for years. But having said this, there is almost never any disagreement among psychiatrists about whether a patient is psychotic. Indeed psychotic symptoms can be successfully treated with anti-psychotic drugs even where there is some diagnostic confusion about the classification of the psychotic state. The evidence is that the prison medical staff while accepting that there was no formal diagnosis of his mental disorder, continued to treat his psychotic symptoms with anti-psychotic medication. ...

41. Mark Keenan was treated with anti-psychotic medication while in prison. On account of the medication his condition is, apparently, maintained by this medication with the exception of the isolated flare-ups. These isolated incidents are regarded by the prison doctors as discrete episodes of bad behaviour. When there is no observable episode, Mark Keenan appears to have been regarded as mentally well, or at least sufficiently well to be punished by segregation. This is in my view to adopt a dangerously over-simplified view of mental disorder. The analogy would be with someone with a fever who is given fever reducing drugs, and thereafter put outside on a cold winter's day on the principle that he is showing no signs of a temperature. In such circumstance no-one would be surprised if there were a recrudescence of the fever. In Mark Keenan's case there was a failure by the prison authorities to recognise a fundamental psychiatric truth when they found him fit for the punishment block. They were assessing the mental state of a heavily medicated individual whose underlying problems were being maintained and masked by that medication. (Despite the finding that he was sufficiently normal for the punishment block I note that there was no indication in the notes that his medication should be discontinued).

42. Because Mark is adjudged to be well, he received no nursing care on the punishment block. Nursing care is not just about the administering of medication. It is vital to the successful management of mental illness, not least because the nurse is a trained observer and can react quickly and effectively where there are indications that an individual's mental state is a cause for concern. Nursing is primarily the process of looking after physical or emotional needs of patients with the aim or restoring, improving, maintaining, or promoting well-being. The notion of punishment is incompatible with the goals of nursing – and indeed with all medical care.

43. 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.

44. This is particularly surprising in the context of his earlier problems which included self-harm and violent outbursts and given that there had been a number of changes in the medication prescribed during the time he spent in Exeter Prison.

45. The nature of schizophrenia is such that there are remissions or periods of less florid symptomatology where the positive symptoms, i.e. those associated with a distortion of normal functioning, are not exhibited. During such periods the so-called negative symptoms may continue to be in evidence. Negative symptoms are symptoms that reflect a diminution or loss of normal functioning. They include affective flattening (immobility of feature, unresponsiveness, poor eye contact and reduced body language), alogia (poverty of speech which is often manifested by brief, laconic, empty replies, often accompanied by a diminution in the number of thoughts which is reflected in decreased fluency and productivity of speech), avolition (an inability to initiate and persist in goal-directed activities) and anhedonia (loss of interest and loss of pleasure in life). These negative symptoms account for a substantial degree of morbidity associated with the disorder. They are particularly common in the prodromal (before episode) and residual (after episode) phases of the disorder, and can often be very severe in their own right. ...

47. It is my view that Mark Keenan was recognisably at a very high risk of deliberate self-harm or suicide. This risk would have been evident even if he had not been placed on the punishment block during the last days of his life. It has been shown that, compared with the general population, people who deliberately harm themselves experience four times as many stressful life problems in the six months before the act. The events are various but a recent quarrel with a spouse, girlfriend, or boyfriend is particularly common and other events include separation from or rejection by a sexual partner, and a Court appearance. About a third to a half of all people who harm themselves are suffering from a Personality disorder. Several studies agree that there are a number of factors that seem to distinguish patients who go on to repeat deliberate self-harm. These include previous psychosis, personality disorder of the anti-social type, criminal record, alcohol or drug abuse, lower social class, and a history of unemployment. It is also significant that among patients who have been involved in an earlier episode of deliberate self-harm, the suicide rate in the subsequent 12 months is about 100 times greater than in the general population.

48. As regards the risk of completed suicide, studies show that prisoners have a higher suicide risk than the general population, and that one in ten of all those suffering from schizophrenia end their own lives, and that four fifths of all those who take their own lives are being treated with psychotropic drugs. (The above statistics are taken from the *Oxford Textbook of Psychiatry*, OUP, 1983, and are widely accepted.)

49. It is not possible to quantify precisely what the degree of risk as regards self-harm or suicide was for Mark Keenan, It is my opinion that he was recognisably in one of the very highest risk groups and that following his removal to the punishment block it was more likely than not that there would be some episode of self-harm during the period of his seclusion. This being the case, I am of the view that the failure to recognise this risk meant that his treatment during the last eleven days of his life fell substantially below acceptable standards of care. ...

51. Individuals with paranoid delusions can often be helped by psychological support, encouragement and assurance. During treatment best results are achieved if doctor/nurse maintains a good relationship with the individual, and is dependable and avoids letting the patient down. He should show compassionate interest in the individual’s delusions, but without colluding in them, or condemning them, and most importantly without ignoring them. The treatment Mark Keenan received in the punishment block fell far short of this model.

52. In my view the way in which Mark Keenan, an individual suffering from paranoid schizophrenia, was treated, was likely to arouse in him feelings of hopelessness, fear, anguish, and inferiority. The circumstances of his imprisonment on the punishment block were humiliating, debasing and degrading, and had the effect of undermining his will to cope with, and battle against, his psychotic illness. His will to resist the illness was cumulatively undermined and resulted in the taking of his own life. The prison regime to which he was subjected disregarded his basic right as an ill person to be medically treated and properly cared for and thereby broke his will to endure imprisonment. The International Code of Medical Ethics declares that ‘Any act or advice which could weaken physical or mental resistance of a human being

may be used only in his interest'. The acts performed and the advice given by medical staff in respect of Mark Keenan's treatment were manifestly not in his interest. What he suffered during the last days of his life was likely to have been terrifying, and I use that word advisedly, in its original sense of instilling terror. I have treated many paranoid schizophrenics and I have never doubted their capacity to believe absolutely in the apparent threats created by their delusions. A punishment that requires a psychotic individual to face those threats alone and without proper medical support is wholly unacceptable, and in my view constitutes an inhuman and degrading punishment."

3. Dr Keith's report of 2 August 1996

52. In a report dated 2 August 1996, Dr Keith, the prison's senior medical officer, in response to the psychiatric reports obtained on behalf of the applicant, stated as follows:

"These reports were compiled upon the documentary evidence available to the doctors and to my knowledge neither of them had the opportunity to see or examine Mr Keenan. The medical weight of their reports must therefore be significantly diminished. These reports were prepared over a year (Dr Maden) and nearly two years (Dr Reveley) after the death of Mr Keenan.

The historical data given in both reports was compiled from other documents and originally probably would have come from Mr Keenan himself or his mother – the basis of most medical histories comes directly from the patient without ascertaining their veracity. On reception Mr Keenan gave a history of schizophrenia – no specific symptoms of schizophrenia were observed from his reception onwards during his time in custody on remand or when convicted.

From comments by Drs Maden and Reveley upon entries in the Inmate Medical Record (IMR) – I prescribed Clopixol because Mr Keenan was so adamant that he wanted it and was helped by it, and because Dr Roberts had suggested it be tried, 'if he doesn't do so well'. It was prescribed not as an anti-psychotic but as a tranquilliser on the basis of the above. My conversation with Dr Roberts and my prescribing Clopixol are in fact separate entries in the IMR and it is important to refer to the original IMR entries rather than my witness statement. I recall I was reluctant to prescribe Clopixol because of the paucity of symptoms and signs of psychosis. As far as I can recall, Keenan gave no reason why he did not want to continue his Thioridazine except that he received no benefit from it and he was adamant that he felt better on Clopixol and Chlorpromazine. It is important to note that I do not recall that he had experienced any side effects due to Thioridazine which might have limited my prescribing Chlorpromazine. Both Drs Maden and Reveley put great weight upon his medication indicating a diagnosis – this was not the case. The dosage of Clopixol commented upon in Dr Reveley's report was indicated to me by Dr Roberts.

The symptoms noted on 3.4.93 were quite reasonably thought possibly to be due to the change in medication and Dr. Simkins indicated that he return to his previous medication. Dr Rowe attended the prison for two half-day sessions weekly at that time and was our only visiting psychiatric resource. Dr Reveley implied that because Mr Keenan was unwilling to go to the main prison on 14.4.93 he should have been kept in the hospital. Were unwillingness to leave an indication of continuing location in the hospital we would have a totally static population.

In the IMR for 17.4.93 the entry was made by a Hospital Officer not a Doctor. The Hospital Officer, SEN Gill, has no formal psychiatric training. We did not have, at that time, any psychiatrically qualified nurses. Please see my entry for 18.4.93, 'owes on the wing hence can't cope'. The reports do not refer to this. If he owed on the wing it is highly likely that he would be threatened with food contamination, this would represent reality rather than paranoia, and there is always the possibility that the noose was made so that he could return to the sanctuary of the hospital. A prepared noose is enough indication in itself for hospitalisation and 15 minute watch irrespective of mental state rather than implying a disturbed mental state in itself as described by Dr Reveley.

The entry for 23.4.93 in the IMR, "to assess next week", was cancelled by my hand probably fairly soon after it was written (most likely on 26.4.93 – same pen). The interpretation of this was that there was no indication that he needed to see Dr Rowe and that he was well and symptom-free. He was noted fit for work and gym. No contemporaneous record was made because there was nothing of import to note.

It is appropriate here to observe that while there is an agreed paucity of notes at some (and only some) stages of the IMR ... nil entries may be taken as indication that no abnormality or overt disorder was present.

On the segregation wing all prisoners are medically screened before adjudication and the range of punishments known to the doctor. The duty doctor does the round in the segregation unit before the Governor attends there so that any new inmates located there can be medically checked prior to the Governor's adjudications. *All* inmates in the segregation unit are seen *every* day by the duty doctor. If an inmate in the segregation unit becomes ill so that hospital care is indicated he is promptly transferred to the hospital. A diagnosis of a mild chronic psychosis is not a contra-indication *per se* for transferring to the segregation unit – indeed the daily visits by the Governor, Doctor and Chaplain provide a greater degree of observation and care than possible on the main wings. I do not think that Mr Keenan would have been continuously an in-patient in a psychiatric hospital were he in the community. I must agree that the segregation unit generally is not conducive to mental well-being but all prison medical staff are trained in and are highly aware of the effects of imprisonment and segregation and review each inmate on the segregation unit each day with this in mind. The duty doctor's daily visits to the segregation unit to assess Mr Keenan's medical state included judging whether his medication level was appropriate and whether he was a suicidal risk. Dr Reverley's implication that medical staff connive with the 'authorities' to punish is totally untrue. We provide medical care and our ethical stance is concerned with this and this alone. We hold doctors' meetings regularly at which our ethical stance is clearly outlined. This is something I know we all care about passionately and is the cornerstone of the medicine all of us practise here.

I am not of the opinion that Mark Keenan suffered from paranoid schizophrenia. This is based on my own observations and Dr Roberts' doubt about his diagnosis (and he was the Psychiatrist who had observed him as an in-patient the most recently prior to his reception). We did not have a patient, 'known to suffer from schizophrenia', (Dr Maden). He was known to us via Dr Roberts' information as a patient suffering from, 'personality disorder, anti-social, under stress, some fleeting paranoid symptoms'. Keenan appeared quite normal most of the time during his periods of custody and observation.

Self-harm, suicide and violence are recognised complications of personality disorder. Only the self reported paranoia and hearing voices are symptoms of schizophrenia. There is ample evidence that Keenan's episodes of paranoia were intermittent and transitory. (Dr Roberts described, 'episodic paranoia', and Dr Reverley, 'isolated flare-ups'), linked to the taking of illicit substances. From the IMR, "says he has had cannabis which tripped him out and made him paranoid'. ...

Mr Keenan was afraid of being on ordinary location but not of being in the segregation unit. This supports a theory that he had real and not imaginary fears for his safety on the wing, especially in the light of him telling me 'he owed'. Nevertheless Mr Keenan was always admitted to the hospital when he had a 'flare-up'. Dr Reverley's analogy of mental illness and a fever is neither appropriate nor convincing.

There is no clear description of delusions, in fact their description is vague except, 'thinking he is Jesus'. I did not find any continuity of a strongly held delusional system.

It is clear from the IMR that Mr Keenan had long periods when he did not display any symptoms or signs of mental illness and he was therefore at these times mentally well. Being well there were no contra-indications to being located in the main prison or segregation unit.

It was notable that Mr Keenan did not display the signs that Dr Reveley describes for us, i.e. immobility of features, unresponsiveness, poor eye contact, reduced body language, alogia. This was further evidence to us that he did not suffer from a florid psychosis.

Overall, from the two reports prepared, I find the evidence for a florid psychosis to be slim. Dr Reveley is not a forensic psychiatrist and appears unfamiliar with prison medical care. Her comments are emotive rather than objective.

Mark Keenan was known to us as an impulsive, self-harming and aggressive man who periodically had episodes when he described paranoid feelings and vague delusional symptoms. There is no evidence to support the diagnosis of schizophrenia with which he strongly self-labelled himself. His disturbed episodes and death may well have been the sequel to drug taking in the main wing, consequent upon which were threats of reprisal."

4. Dr Faulk's report of 17 March 1996

53. Dr Faulk, instructed on behalf of the Government, stated, *inter alia*, as follows:

"*Opinion*

36. It has been asserted that by the complainant and the 2 psychiatrists (Drs Maden and Reveley) that have reviewed the case that Keenan was wrongly diagnosed, his symptoms overlooked and that he was placed in situations which would inflame his condition. Both doctors concluded that Keenan suffered from schizophrenia and that much of his behaviour could be explained by this. Having made this diagnosis they say his fears and anxieties must have been due to an underlying delusional state. This is an assumption based on the belief that Keenan was schizophrenic. On the basis of their assumption that Keenan was seriously mentally ill it is also asserted that the prison should have anticipated his suicidal tendencies and taken better precautions and not subjected him to the privation of the punishment block.

37. The prison was not staffed by consultant psychiatrists. The doctors there would very properly rely on the opinion of the NHS specialists who had been caring for their inmates before imprisonment. The diagnosis given to them by Keenan's latest psychiatric specialist (Dr Roberts) was of 'personality disorder, antisocial in type', and that Keenan was liable to 'fleeting paranoid symptoms' when under stress.

38. It is true that Dr Rowe had also treated Keenan in the past and had described him as suffering from 'a mild chronic psychosis'. This is not a specific diagnosis but a general description. In any case Dr Rowe did not consider Keenan so ill as to require treatment in psychiatric hospital. He indicated, like Dr Roberts, that Keenan would have short lived periods of psychosis (and panics) at which time he would need special care and treatment. He recommended that Keenan not be given association until recovered from his 'panic and paranoia'. This recommendation seems to have been met.

39. The staff in Exeter proceeded along the lines outlined by Dr Roberts giving the medication he recommended in the hope of reducing Keenan's symptoms e.g. his volatility, his poor response to stress and his tendency to transient psychotic periods. They also admitted Keenan to the HCC when his condition appeared to deteriorate.

40. Much of Keenan's behaviour can be understood as manipulative to escape the pressures of the ordinary wings into the relative peace of the HCC. There is no evidence that the fears he expressed about being attacked on the wings were not understandable or even reasonable ones. There is no reason, given Dr Roberts' diagnosis, not to accept Keenan's account at face value. Where there were episodes which might have been psychotic ones (e.g. when he claimed to be Jesus and hearing voices) he was taken into the HCC and appeared to recover quickly as Dr Roberts indicated he would.

41. In the end Keenan seemed to accept the regime of the punishment wing and settle down. The observations we have all support that this was so. Keenan obviously was initially angered by the punishment given out on 14.5.93 though he seemed to have overcome his anger. There was no evidence that he had become psychotic. His worries (15.5.93) about his access to the shop being stopped by the governor were perfectly understandable. It is not necessary to postulate mental illness to explain them. I conclude that the medical management of Keenan during his stay in Exeter prison was perfectly reasonable particularly given the opinion of Dr Roberts. We do not know what Keenan intended on the night of 15.5.93. The pattern was very similar to previous life threatening attempts with a warning to others so he might be saved. Perhaps he had decided that he could not or would not face a further period on the punishment block and that he would demonstrate this by the attempt during which he would be saved and returned to the HCC. I do not think anyone could have anticipated what he did or when he did it. My only criticism would be that at the very end scissors to cut the ligature were not available on the punishment wing."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Prison regulations

1. Health and welfare

54. Section 7 of the Prison Act 1952 required each prison to have a medical officer who, according to Rule 17 of the Prison Rules 1964 promulgated by the Secretary of State, was responsible for "the care of the health, mental and physical, of the prisoners in that prison".

55. Rule 18 provided:

"(1) The medical officer shall report to the governor on the case of any prisoner whose health is likely to be injuriously affected by continued imprisonment or any conditions of imprisonment. ...

(2) The medical officer shall pay special attention to any prisoner whose mental condition appears to require it, and make any special arrangements which appear necessary for his supervision and care.

(3) 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."

56. Health care within prisons was also governed by Standing Order 13, which defined the responsibilities and duties of the members of a prison health care team. Paragraph 31 provided:

"The initial medical assessment of all prisoners to the health care centre on or shortly after reception into prison, or as a result of concern about their mental state, should include consideration of special arrangements needed for their supervision to prevent attempts to harm themselves or commit suicide. Where it is considered that special supervision is medically indicated the medical officer will order supervision in one of the following forms:

(a) continuous supervision, in which the prisoner is observed by a designated officer who remains constantly in his or her presence; or

(b) intermittent supervision in which the prisoner is observed by a designated officer at intervals of not more than 15 minutes."

57. The Prison Service also issued its own guidelines. At the relevant time, these were in the form of Circular Instruction 20/89 providing guidance, *inter alia*, relating to staff responsibilities, action on reception, referral and assessment during custody and preventative measures in respect of prison suicides. Circular Instruction 20/89 defined the task of the Prison Service as being

"to take all reasonable steps to identify prisoners who are developing suicidal feelings; to treat and manage them in ways that are humane and most likely to prevent suicide; and to promote recovery from suicidal crisis".

The central element of this system was the suicide referral form (F1997). Wing managers (senior prison officers) transmitted referrals to the prison medical officer who decided whether any suicide prevention measures should be taken. Following criticism by the Chief Inspector of Prisons in his report "Suicide and Self-Harm in Prison Service Establishments in England and Wales", new guidelines were issued in 1994 – Instruction to Governors 1/1994. This required, *inter alia*, a specific Self-Harm/At Risk form (F2052SH) to be used where a prisoner was identified by any member of staff as needing special care due to the risk of suicide or self-harm. This enabled the observations of all personnel in contact with the prisoner to be recorded and was intended to provide a comprehensive and ongoing record of the prisoner's state of mind. A case review by the key personnel involved in the prisoner's care (for example, the senior medical officer, a governor grade and the senior wing officer) was to take place before the prisoner was taken off the Self-Harm/At Risk form.

58. Under sections 47 and 48 of the Mental Health Act 1983, any prisoner suffering from a serious mental illness might be transferred to a hospital for detention and treatment.

59. Rule 43 of the Prison Rules 1964, pursuant to which Mark Keenan was placed in segregation, required the prison governor to remove a prisoner from segregation in the event that a medical officer so advised on medical grounds. Rule 53(2) provided that no punishment in cellular confinement was to be imposed unless a medical officer had

certified that the prisoner was in a sufficiently fit state of health.

60. There was no requirement under statute or the Rules for a prison to be staffed by a medical officer with psychiatric qualifications. The medical officer did have discretion to request a psychiatric opinion when considered appropriate (Rule 17).

61. In an article published in the *British Medical Journal* (April 2000, vol. 320, "Inpatient care of mentally ill people in prison: results of a year's programme of semistructured inspections"), the medical and nursing inspectors of Her Majesty's Inspectorate of Prisons stated, *inter alia*:

"The quality of services for mentally ill prisoners [fall] far below the standards in the National Health Service. Patients' lives [are] unacceptably restricted and therapy limited. The present policy dividing inpatient care of mentally disordered persons between the prison service and the NHS needs reconsideration."

2. Discipline and confinement

62. Under the Prison Rules 1964, a prisoner could be confined in a prison's segregation unit or punishment block under two provisions.

63. Under Rule 43, a governor had the power to segregate a prisoner where this appeared desirable for the maintenance of good order or discipline or in his own interests. This was limited to three days, after which any extension had to be authorised by a member of the Board of Visitors or the Secretary of State.

64. Under Rule 50(1)e, the governor had the power to punish a prisoner convicted of a disciplinary offence by ordering up to fourteen days' cellular confinement in the punishment block.

65. The conditions of prisoners segregated in a prison's punishment block have been considered by the Chief Inspector of Prisons and Lord Justice Woolf, who carried out an inquiry into the prison system.

In his 1985 report "A Review of the Segregation of Prisoners under Rule 43", the Chief Inspector of Prisons commented:

" 'Good order' inmates were held in very restricted conditions ... They were usually located in the area of the prison called the segregation unit or punishment block, alongside inmates who were there under punishment ...They were generally subjected to much the same sort of regime as the prisoners under punishment, except that they were allowed a few extra privileges. They were locked up on their own in a cell for nearly the whole day; only coming out to have an hour's exercise walking round a yard, to collect their meals, to empty their chamber pots and to have an occasional shower. These excursions perhaps helped to break the monotony but usually did not provide them with much social contact. Opportunities to talk with fellow inmates were very limited and their relationships with staff were often antagonistic or distant ... [paragraph 2.29]

... removal from association can involve the loss of various opportunities and advantages in addition to the obvious deprivation of human contact. The decision to segregate should therefore always be taken with care but especially so when the inmate concerned has not directly requested segregation. Accordingly, decisions to impose segregation on unwilling prisoners should be subject to particularly strong and effective safeguards." (paragraph 3.4)

He added that segregation "can entail living under an impoverished and monotonous regime which may even be psychologically harmful".

66. Lord Woolf, in his report "Prison Disturbances", April 1990, Cm 1456, stated:

"While segregation under Rule 43 is not intended to be a punishment, the use of the Rule will almost invariably adversely affect the inmate who is made subject to it. In most establishments anyone segregated under Rule 43 will be subjected to regime restrictions very similar to those undergoing punishment." (paragraph 12.267)

67. Although there is no obligation on the governor or Board of Visitors to consult a doctor before initiating segregation, the governor is obliged to discontinue it if so advised by a medical officer on medical grounds (Rules 17 and 18 of the 1964 Rules).

3. Remedies available to prisoners

(a) Requests and complaints procedure

68. If a prisoner has a complaint in relation to the conditions of his imprisonment or an adjudication, he may use the "remedies and complaints" system.

69. If the complaint relates to conditions of detention and cannot be resolved informally, the prisoner may make a formal application which will be recorded and a senior member of staff will discuss the matter with the prisoner usually within two days. If the prisoner remains dissatisfied, he then completes a request/complaint form to be considered by the governor, who usually replies within seven days. The prisoner may then appeal to the Area Manager of the Prison Service.

70. A complaint about an adjudication is submitted immediately to the Area Manager.

71. In either case, if the prisoner is dissatisfied with the decision of the Area Manager he may make an application for judicial review or make a complaint to the Prison Ombudsman.

(b) Prison Ombudsman

72. Since 1994, prisoners who have exhausted the internal complaints system appeal to the Prison Ombudsman, who may make recommendations to the Prison Service if he upholds a complaint. He cannot quash or overrule a Prison Service decision.

In his annual report for 1996, the Prison Ombudsman stated, in respect of the complaints system:

"3.6. ... the Ombudsman's service – and indeed the Prison Service's internal requests/complaints system – is working well with regard to complaints about relatively formal and non-urgent topics. Prisoners generally know the well-established procedures for dealing with grievances about disciplinary adjudications and property loss and are willing to wait while the somewhat lengthy complaint processes are worked through.

3.7. The situation is very different for most other categories of complaint. Assaults, refusal of temporary release, the imposition of closed visits ... all these are matters which prisoners want resolved immediately. They are also issues for which the request/complaints procedures may superficially appear to be inappropriate or issues which prisoners are afraid to raise with staff within the prison. Certainly, the relatively lengthy and formalised process of complaint to the governor (taking a week plus), an appeal to Headquarters (taking at least six months) and an Ombudsman's investigation (taking up to three months and sometimes more) will not commend itself to a disaffected prisoner wanting immediate redress."

(c) Judicial review

73. Case-law establishes that the High Court enjoys jurisdiction to grant judicial review of a decision either to segregate a prisoner pursuant to Rule 43 of the Prison Rules 1964 or to punish him pursuant to Rule 50 (*R. v. Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 Appeal Cases 58). The court would review the matter in accordance with the well-established principles of administrative law, namely, whether the decision was perverse or irrational, whether the decision was made by reference to irrelevant factors or without regard to relevant factors, or made for an improper purpose, in a procedurally unfair manner or in a manner which breached any governing legislation or statutory instrument. However, the court of review cannot substitute its own decision on the merits of the case for that of the decision-making authority.

(d) Action for negligence, assault and misfeasance in public office

74. A prisoner able to prove that his conditions of confinement have caused him injury, physical or psychiatric, resulting from the negligence of the prison authorities may claim an award of damages. If a prisoner is assaulted, he may maintain an action for assault, even in the absence of proof of physical injury. Damages may be awarded for any indignity or humiliation suffered, while exemplary damages may be awarded where the court concludes that there has been "oppressive, arbitrary or unconstitutional action by the servants of the government" (*Rookes v. Barnard* [1964] Appeal Cases 1226).

75. An action for the tort of misfeasance in public office may also be maintained if there has been a deliberate or dishonest abuse by a public officer through the purported exercise of a power otherwise than in an honest attempt to perform the relevant function. It includes performance of an act which the official has no power to perform with the object of injuring the claimant or where he knew he had no authority to perform it and actually foresaw that it could cause harm to the claimant or an identifiable class to whom the claimant belonged. "Harm" is not limited to physical or psychiatric damage.

B. Inquest proceedings

76. Following the death of a prisoner and regardless of the cause, an inquest must be held pursuant to section 8(1)c of the Coroners Act 1988. Such inquests must be held with a jury (section 8(3)a). The coroner is the independent judicial officer charged with inquiring into deaths of various categories. His duties have been judicially defined:

"It is the duty of the coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity." (*R. v. North Humberside Coroner, ex parte Jamieson* [1995] Queen's Bench 1 (Court of Appeal) 26C)

77. Rule 20 of the Coroner's Rules allows the parent of a deceased person to examine witnesses at an inquest either in person or through counsel or a solicitor. There is, however, no legal aid for representation at inquests. Nor at the time of the inquest in this case was there any right to disclosure of documents.

78. Under section 11(5)b of the Coroner's Act 1988 and Rule 36 of the Coroner's Rules, proceedings and evidence at an inquest must be directed solely to ascertaining

– who the deceased was;

– where the deceased came by his death;

– when the deceased came by his death;

– how the deceased came by his death.

No verdict may, however, be framed in such a way as to appear to determine any question of the criminal liability of a named person or civil liability.

79. The scope of an inquest has been described judicially as follows:

"... It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how ... the deceased came by his death', a far more limited question directed to the means by which the deceased came by his death.

... I further consider that [previous judgments] make it clear that when the Broderick Committee stated that one of the purposes of an inquest is 'to allay rumours or suspicions' this purpose should be confined to allaying rumours and suspicions of how the deceased came by his death and not to allaying rumours or suspicions about the broad circumstances in which the deceased came by his death." (Sir Thomas Bingham, MR, Court of Appeal, *R. v. the Coroner for North Humberside and Scunthorpe, ex parte Roy Jamieson*, April 1994, unreported)

"The cases establish that although the word 'how' is to be widely interpreted, it means 'by what means' rather than in what broad circumstances ... In short, the inquiry must focus on matters directly causative of death and must, indeed, be confined to those matters alone ..." (Simon Brown LJ, Court of Appeal, *R. v. Coroner for Western District of East Sussex, ex parte Homberg and Others* (1994) 158 Justice of the Peace 357)

"... it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial ...

It is well recognised that a purpose of an inquest is that rumour may be allayed; But that does not mean it is the duty of the Coroner to investigate at an inquest every rumour or allegation that may be brought to his attention. It is ... his duty to discharge his statutory role – the scope of his enquiry must not be allowed to drift into the uncharted seas of rumour and allegation. He will proceed safely and properly if he investigates the *facts* which it appears are relevant to the statutory issues before him." (Lord Lane, Court of Appeal, *R. v. South London Coroner, ex parte Thompson* (1982) 126 Solicitors' Journal 625)

C. Proceedings for injury and death caused by negligence

80. A person who suffers injury, physical or psychiatric, in consequence of the negligence of another may bring an action for damages for that injury. An exacerbation of an existing condition constitutes such injury. Upset and injury to feelings resulting from negligence in the absence of physical or psychiatric damage or exacerbation do not entitle a plaintiff to damages. Any personal-injury action maintainable by a living person survives for the benefit of his estate and may be pursued after his death.

81. Claims arising from the death of an individual caused by negligence are brought under the Fatal Accidents Act 1976 or the Law Reform (Miscellaneous Provisions) Act 1934. The former enables those who were financially dependent on the deceased to recover damages for the loss of support; the scheme is compensatory and, save for the sum of 7,500 pounds sterling for bereavement awarded to the spouse of a deceased or parent of a deceased child under 18 at the time of death, damages are awarded to reflect the loss of support. The latter enables damages to be recovered on behalf of the deceased's estate and may include any right of action vested in the deceased at the time of his death together with funeral expenses.

82. According to the case-law, the common law imposes a duty of care on prison authorities in respect of those in their custody. The prison authorities have a duty to exercise reasonable care in the prevention of injury and harm and a duty to provide medical care. This duty extends to the protection of a mentally ill prisoner against committing suicide. In *Kirkham v. the Chief Constable of Greater Manchester* [1989] 3 All England Law Reports 882, the custodial authority was held liable for failing to prevent a suicide.

In *Commissioner for the Police for the Metropolis v. Reeves* [1999] 3 Weekly Law Reports 283, concerning the claims of the deceased's spouse under the Fatal Accidents Act, the House of Lords confirmed that even in the case of a prisoner of apparently sound mind the authorities remain liable for a negligent failure to prevent his suicide, although in such a case the liability is shared with the deceased because of his voluntary act. Respect for personal autonomy did not preclude that steps be taken to "control a prisoner's environment in non-invasive ways calculated to make suicide more difficult" (p. 369A-B).

As regards the standard of care, in *Knight v. Home Office* [1990] 3 All England Law Reports 243, which concerned, *inter alia*, whether a continuous as opposed to a fifteen-minute watch should have been in place on a mentally ill prisoner at the relevant time, Pill J held that the duty to take reasonable care of such a prisoner

"should not and does not expect the same standard across the entire spectrum of situations, including the possibility of suicide, as it would in a psychiatric hospital outside prison. The duty is tailored to the act and functions performed."

However, more recently, in *Brooks v. Home Office* (*The Times*, 18 February 1999), the High Court held in relation to

the provision of ante-natal care to a pregnant woman:

"We are concerned with a remand prisoner, a high risk pregnancy. I cannot regard *Knight* as authority for the proposition that the plaintiff should not, while detained in Holloway, be entitled to expect the same level of ante-natal care, both for herself and her unborn infants, as if she was at liberty, subject of course to the constraints of having to be escorted and, to some extent, movement being retarded by those requirements."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

83. 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 of the Convention. This Article provides in its first paragraph:

"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."

84. The Government rejected this assertion, while the Commission found, by fifteen votes to five, that there had been no violation of this provision.

A. The parties' submissions

85. The applicant submitted that Article 2 of the Convention required a Contracting State to take steps to safeguard the lives of those within its jurisdiction. Such protection to persons in custody should be practical and effective, involving the appropriate training and instructions to State agents who are faced with situations where the deprivation of life – including deliberate acts of self-destruction by a prisoner – may take place under their auspices and control. These authorities were under a specific duty to take reasonable care to protect prisoners from self-destructive acts and there was a heightened standard of vigilance where vulnerable persons, such as children or mentally disturbed individuals, were concerned.

86. Applying a strict scrutiny to the facts of this case, the applicant submitted that the prison authorities placed her son in a segregated environment in circumstances that involved a significant deprivation of therapeutic care, while they knew he was subject to a real and immediate risk of self-harm. This segregation was not ordered for medical or therapeutic reasons, the prison's view of her son as a "discipline problem" prevailing over his need for appropriate care. The prison authorities were on notice that the applicant's son was mentally ill and that he had a history of self-harm and a suicidal disposition. They ought to have realised that in imposing a disciplinary punishment on him and segregating him without specialist care, observation or treatment there was at all times a real and immediate risk that he might kill himself intentionally or unintentionally. The omission to seek the available expertise of Dr Rowe before determining her son's fitness for adjudication put him at risk unreasonably and there was wholly insufficient psychiatric observation and therapeutic care after 4 May 1993.

87. The Government submitted that although Article 2 could in certain circumstances impose a positive obligation to protect a person's life from third parties, wholly different considerations apply when the risk to the person is from the individual himself. To require the State to protect a person against himself would be an approach inconsistent with the principles of individual dignity and autonomy underlying the Convention. To the extent that the prison authorities were under a domestic-law duty to take reasonable care to prevent suicide by prisoners suffering from mental illness, they stated that the obligation had been fully discharged in Mark Keenan's case.

88. The Government argued that the evidence available to the prison authorities when viewed objectively showed that there was no real and immediate risk to his life of which they knew or ought to have known. The authorities had been particularly vigilant in monitoring his condition for indications of risk and had placed him in the health care centre, or on special watch, when necessary. The doctors, experienced in dealing with disturbed inmates, saw no indication however in the final days of his life that he posed any risk at that time. Furthermore, there was no step which the prison authorities could reasonably have taken on the information available to them at the time which would have saved Mark Keenan's life. Nothing short of a continuous watch, the need for which was not apparent, would have

made any difference in the circumstances.

B. The Court's assessment

89. The Court recalls that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports of judgments and decisions* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3159, § 115).

90. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *Osman*, cited above, pp. 3159-60, § 116). In this case, the Court has to consider to what extent this applies where the risk to a person derives from self-harm.

91. In the context of prisoners, the Court has already emphasised in previous cases that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII). It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on the prison authorities in respect of those in their custody.

92. The Government have argued that special considerations arise where a person takes his own life, due to the principles of dignity and autonomy which should prohibit any oppressive removal of a person's freedom of choice and action. The Court has recognised that restraints will inevitably be placed on the preventive measures taken by the authorities, for example in the context of police action, by the guarantees of Articles 5 and 8 of the Convention (see *Osman*, cited above, pp. 3159-60, § 116, and pp. 3162-63, § 121). The prison authorities, similarly, must discharge their duties in a manner compatible with the rights and freedoms of the individual concerned. There are general measures and precautions which will be available to diminish the opportunities for self-harm, without infringing on personal autonomy. Whether any more stringent measures are necessary in respect of a prisoner and whether it is reasonable to apply them will depend on the circumstances of the case.

93. In the light of the above, the Court has examined whether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk.

94. It is common ground that Mark Keenan was mentally ill. The Government, relying on the reports of Dr Keith and Dr Faulk, disputed that he was schizophrenic. The applicant, referring to the reports of Dr Maden and Dr Reveley, submitted that his history and the treatment which he was receiving plainly show that he was schizophrenic. The relevance of this difference of opinion appears to be that, as a diagnosed schizophrenic, Mark Keenan would have suffered from a condition in which the risk of committing suicide was well known and high. The Court observes that, in the material before it, there is no formal diagnosis of schizophrenia provided by a psychiatric doctor who treated Mark Keenan. The description given to the prison authorities by Dr Roberts, who had been Mark Keenan's psychiatrist

in the period before his death, was that Mark Keenan suffered from a personality disorder with anti-social traits and that under stress he exhibited fleeting paranoid symptoms. Dr Rowe, who had previously treated Mark Keenan, told the prison authorities that he suffered from a mild, chronic psychosis.

95. The Court finds that the prison authorities were aware, however, that Mark Keenan's problem was chronic and involved psychosis, with intermittently recurring flare-ups. His behaviour after admittance at Exeter Prison put the authorities expressly on notice that he exhibited suicidal tendencies. This is shown by the remarks he made on 17 April and 1 May 1993 and is a significant, although not the only possible interpretation of his conduct in making the noose which was found in his cell on 16 April 1993. The Court is satisfied, therefore, that the prison authorities knew that Mark Keenan's mental state was such that he posed a potential risk to his own life.

96. Dr Keith expressed some doubt as to how genuine Mark Keenan's threats were, his opinion being that he was manipulative and possibly trying to secure his return to the hospital wing for personal reasons, namely, to avoid normal location, as he "owed" other prisoners. The Court, however, sees force in the applicant's submission that the risk posed by Mark Keenan was not only that of intentionally killing himself, but of unintentionally killing himself in an attempt to manipulate the prison authorities. The Court considers that his mental state was such that his threats had to be taken seriously and were therefore to that extent real. The immediacy of the risk varied, however. Mark Keenan's behaviour showed periods of apparent normalcy or at least of ability to cope with the stresses facing him. It cannot be concluded that he was at immediate risk throughout the period of detention. However, the variations in his condition required that he be monitored carefully in case of sudden deterioration.

97. The question accordingly arises as to whether the prison authorities did all that could reasonably be expected of them, having regard to the nature of the risk posed by Mark Keenan.

98. The Court recalls that on 1 April 1993, on arrival at Exeter Prison, Mark Keenan was admitted to the health care centre for observation and assessment. The senior prison medical officer consulted Mark Keenan's psychiatrist about the medication to be given to treat his mental disorder. No incidents occurred until it was proposed to transfer him to normal location, when a noose was found in his cell. After one night on normal location, Mark Keenan was returned to the health care centre and was put under a fifteen-minute watch as a precaution. On 26 April 1993, after a brief attempt to place him on normal location again, he was brought back to the health care centre. Shortly afterwards, on 29 April, it was arranged for Dr Rowe to examine Mark Keenan. His medication was changed. When shortly afterwards his behaviour became aggressive, a prison doctor prescribed a return to his previous medication. When he then assaulted two prison officers on 30 April 1993, he was placed in segregation. After he made threats of suicide, he was taken back to the health care centre and put under a fifteen-minute watch. On 3 May, following an improvement in his conduct and at his own request, he returned to segregation. It is to be noted that a doctor visited him daily while he was in segregation. Between 3 and 7 May, Mark Keenan showed some disturbed conduct, refusing medication and having an episode of aggressiveness. Between that time and 15 May when he killed himself, no further incidents were recorded. After the adjudication on 14 May 1993, when he received a punishment of seven days' segregation, he showed some anxiety about access to the prison shop, but otherwise appeared to be coping. A friend who visited and a prison officer on duty that day even considered that he seemed to be in good spirits shortly before he died.

99. The Court finds that, on the whole, the authorities responded in a reasonable way to Mark Keenan's conduct, placing him in hospital care and under watch when he evinced suicidal tendencies. He was under daily medical supervision by the prison doctors, who on two occasions consulted external psychiatrists with knowledge of Mark Keenan. 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 1993 that he was in a disturbed state of mind rendering an attempt at suicide likely. In these circumstances, it is not apparent that the authorities omitted any step which should reasonably have been taken, such as, for example, a fifteen-minute watch. There was the unfortunate circumstance that the alarm buzzer had been de-activated. It is regrettable that it was possible for a prisoner or prison officer to interfere with this warning mechanism. However, the visual alarm was functioning and was spotted by staff, although not immediately. It has not been suggested by the applicant that this played any material role in Mark Keenan's death.

100. The applicant argued, however, that the background events must be regarded as increasing the likelihood of her

son committing suicide and that the authorities failed in their responsibilities by not properly assessing his unfitness for segregation and by imposing punishment on him. The applicant has criticised in particular the prison doctors' abilities, pointing out that none were psychiatrists and, in particular, that Dr Seale, who changed the medication ordered by Dr Rowe, had no psychiatric training at all. She also emphasised that the infliction of disciplinary punishment on Mark Keenan should have been foreseen as likely to increase the stresses on his fragile mental state and informed psychiatric opinion should have been sought.

101. The Court considers that these arguments are to some extent speculative. It is not known what made Mark Keenan commit suicide. The issues raised regarding the standard of care with which Mark Keenan was treated in the days before his death fall rather to be examined under Article 3 of the Convention.

102. The Court concludes that there has been no violation of Article 2 of the Convention in this case.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

103. 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."

104. The Government contested this complaint and, in its report, the Commission held, by eleven votes to nine, that there had been no violation of Article 3 of the Convention.

A. The parties' submissions

105. The applicant submitted that, while segregation of persons in detention did not in itself breach Article 3 of the Convention, the State had to examine carefully whether the personality of a prisoner and his mental vulnerability might cause otherwise justifiable treatment to bring about suffering and a breakdown of physical and mental resistance. She referred to the Court's case-law which emphasised the position of inferiority and powerlessness of mental patients (see, for example, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, pp. 25-26, § 82). While some coercive measures may be justified on grounds of medical necessity, the punishment inflicted on Mark Keenan was not based on any medical decision as to the therapeutic methods necessary to preserve his physical or mental health; there were insufficient medical notes to justify it and the measure itself brought about the suicidal/self-harming behaviour. In this case, Mark Keenan was known to be responding to his unsatisfactory environment by, for example, experiencing suicidal thoughts and refusing his medication.

106. Bearing in mind the acute concern caused by the high rate of suicide in the European prison population, the applicant submitted that the provision of medical evaluations of Mark Keenan by prison doctors untrained in psychiatry did not amount to a practical and effective protection of his rights under Article 3. Furthermore, there had been wholly insufficient psychiatric observation and therapeutic care after 4 May 1993. He had been punished for behaviour occasioned by, or closely connected with, a change in medication, and the inquest did not deal sufficiently with the circumstances in which he died or the justification for his treatment by the prison authorities in the period preceding his death.

107. The Government pointed out that the applicant's claims concerning the alleged effect on Mark Keenan of the segregation was based on Dr Reveley's report. Her conclusions, however, were not supported by the evidence and were based on hindsight and a degree of speculation. While Mark Keenan was in the segregation unit, he received his medication, daily medical visits and other visits, and his condition did not deteriorate. The medical officer could have terminated segregation at any time if it had been necessary. He was declared fit by doctors for segregation on 1 and 3 May and, on 14 May, for adjudication and punishment. Even if he did suffer some feelings of hopelessness, fear, etc., it did not reach the level of severity required by Article 3; nor did it involve anything other than the usual element of humiliation inherent in any punishment. The application proceeded before the Commission on the basis that the detention caused him no injury even in the sense of exacerbating his pre-existing condition.

108. The Government emphasised that there was no contemporaneous evidence that Mark Keenan was suffering from

a significant level of anguish or distress prior to his death attributable to his conditions of detention, it being impossible to distinguish the suffering resulting from his mental illness from any additional strain which might have been imposed on him due to the segregation. He was reported as being cheerful on the day of his death, there only being a moment of brief agitation which had subsided after reassurance about his right to buy tobacco. While the Government accepted that there was an obligation to provide adequate medical treatment to persons in detention, they argued that he was in receipt of such treatment throughout his period of detention. In conclusion, Mark Keenan was not subjected to inhuman or degrading treatment contrary to Article 3 of the Convention.

B. The Court's assessment

109. The Court recalls 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: it 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 (see, among other authorities, *Tekin v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1517, § 52).

110. In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will also have regard to 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 (see, for example, *Raninen v. Finland*, judgment of 16 December 1997, *Reports* 1997-VIII,

pp. 2821-22, § 55). 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 (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, p. 66, § 167), or as driving the victim to act against his will or conscience (see, for example, the Commission's opinion in the Greek Case, Chapter IV, Yearbook 12, p. 186).

111. It is relevant in the context of the present application to recall also that the authorities are under an obligation to protect the health of persons deprived of liberty (see *Hurtado v. Switzerland*, judgment of 28 January 1994, Series A no. 280-A, opinion of the Commission, pp. 15-16, § 79). The lack of appropriate medical care may amount to treatment contrary to Article 3 (see *İlhan v. Turkey* [GC], no. 22277/93, § 87, ECHR 2000-VII). 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 (see, for example, *Herczegfalvy*, cited above, pp. 25-26, § 82, and *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, p. 1966, § 66).

112. The Court recalls that Mark Keenan was suffering from a chronic mental disorder, which involved psychotic episodes and feelings of paranoia. He was also diagnosed as suffering from a personality disorder. The history of his detention in Exeter Prison from 14 April 1993 disclosed episodes of disturbed behaviour when he was removed from the hospital wing to normal location. This involved the demonstration of suicidal tendencies, possible paranoid-type fears and aggressive and violent outbursts. That he was suffering from anguish and distress during this period and up until his death cannot be disputed. His letter to his doctor, received after his death, shows a high level of desperation (see paragraph 44 above). However, as the Commission stated in its majority opinion, it is not possible to distinguish with any certainty to what extent his symptoms during this time, or indeed his death, resulted from the conditions of his detention imposed by the authorities.

113. The Court considers, however, that this difficulty is not determinative of the issue as to whether the authorities fulfilled their obligation under Article 3 to protect Mark Keenan from treatment or punishment contrary to this provision. While it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor. For example, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 38, and *Tekin*, cited above, pp. 1517-18, § 53). Similarly, 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.

114. In this case, the Court is struck by the lack of medical notes concerning Mark Keenan, who was an identifiable suicide risk and undergoing the additional stresses that could be foreseen from segregation and, later, disciplinary punishment. From 5 May to 15 May 1993, when he died, there were no entries in his medical notes. Given that there were a number of prison doctors who were involved in caring for Mark Keenan, this shows an inadequate concern to maintain full and detailed records of his mental state and undermines the effectiveness of any monitoring or supervision process. The Court does not find the explanation of Dr Keith – that an absence of notes indicates that there was nothing to record – a satisfactory answer in the light of the occurrence book entries for the same period.

115. Further, while the prison senior medical officer consulted Mark Keenan's doctor on admission and the visiting psychiatrist, who also knew Mark Keenan, had been called to see him on 29 April 1993, the Court notes that there was no subsequent reference to a psychiatrist. Even though Dr Rowe had warned on 29 April 1993 that Mark Keenan should be kept from association until his paranoid feelings had died down, the question of returning to normal location was raised with him the next day. When his condition proceeded to deteriorate, a prison doctor, unqualified in psychiatry, reverted to Mark Keenan's previous medication without reference to the psychiatrist who had originally recommended a change. The assault on the two prison officers followed. Although Mark Keenan asked the prison doctor to point out to the governor at the adjudication that the assault occurred after a change in medication, there was no reference to a psychiatrist for advice either as to his future treatment or his fitness for adjudication and punishment.

116. 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 a serious disciplinary punishment – seven days' segregation in the punishment block and an additional twenty-eight 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 finds a violation of this provision.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

117. The applicant claimed that there had been no effective remedies in respect of her complaints. She relied on Article 13 of the Convention, which reads:

"Everyone whose rights and freedoms as set forth in [the] 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 Government rejected the claim, while the Commission, unanimously, found a violation of this provision on the ground that the applicant had no remedy at his disposal by which to have examined the liability of the authorities in respect of her son's death and be afforded the possibility of compensation.

A. The parties' submissions

118. The applicant submitted that Article 13 required that there be a remedy which determined whether the prison authorities' positive obligation to protect her son's right to life had been complied with. There was no remedy available, however, which was effective in practice as well as law. An action by the estate of her son against the prison authorities for negligence required proof that the deceased had suffered an injury (other than the fact of his death) or that some financial loss to the estate was caused (such as funeral expenses) or that, while he was alive, he was victim of a deliberate or malicious abuse of power. Even if it had been in theory possible for the applicant to bring an action to reclaim the funeral expenses, it was inconceivable that legal aid would be granted for that purpose.

119. She pointed out that an action in negligence for the death could only be brought by a spouse, the parent of a

deceased minor (under 18) or a dependant who had suffered loss as a result of the death. No actions, therefore, could ever be brought when an unmarried person, over 18, unemployed or otherwise impecunious with no financial dependants, died in custody as a result of a breach of the State's duty of care to prisoners.

120. As regarded remedies available to Mark Keenan prior to his death, she submitted that judicial review would not have been effective as it only provided a review of issues of lawfulness, not issues of disputed fact or medical opinion. It was also inconceivable that any application would be heard within the short time frame necessary. The internal complaints procedure was also inadequate, complaint lying in the first place to the governor (53% of complaints being dealt with within seven days) and then to the Prison Headquarters, which had a time-limit of six weeks for replying. It was unreasonable and unrealistic, therefore, to suggest that Mark Keenan could have availed himself of the available procedures prior to his death, due to the ineffectiveness of the procedural safeguards concerned and his own mental state.

121. The Government contended that during his detention Mark Keenan had available to him the remedies of judicial review and the right of redress through the prison complaints procedure. Judicial review had been found by the Court previously to furnish an effective remedy, cases alleging the infringement of human rights being approached by the domestic courts with "anxious scrutiny". The Court had also found that the right to petition the Home Secretary was an effective remedy in *Silver and Others v. the United Kingdom* (judgment of 25 March 1983, Series A no. 61, p. 43, § 116). The request/complaints procedure was a more sophisticated mode of redress, which was also effective for the purposes of Article 13, which covered procedures other than judicial ones. Mark Keenan also had available to him the possibility of an action in tort for damages for negligence where prison conditions caused him to suffer physical or psychiatric injury, or the exacerbation of an existing condition (which cause of action vested in his estate after his death), and an action for assault or misfeasance in the exercise of a public office.

122. As regarded the remedies available to the applicant, the Government agreed that the inquest, which did not permit the determination of issues of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities or obtaining damages. However, the estate could commence actions relating to any injury or aggravation of Mark Keenan's mental illness suffered by him prior to his death. They disputed the Commission's conclusion that the applicant did not have a remedy which would have effectively examined the failure to prevent her son committing suicide. If the prison authorities had culpably failed to prevent his death or if his conditions of detention had caused his death, an action would have lain in negligence. With regard to the Commission's conclusion that there was no remedy to examine liability for causing her son suffering before his death, they disputed that there was any suffering caused by the conditions of his detention. Mark Keenan was in good spirits prior to his suicide. They acknowledged that the law of negligence did not award damages for distress which did not result from a physical injury or did not amount to psychiatric damage.

B. The Court's assessment

123. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, pp. 329-30, § 106).

Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure (see *Kaya*, cited above, pp. 330-31, § 107).

124. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 3 of the Convention for inflicting inhuman and degrading treatment and punishment on Mark Keenan, who was mentally ill, prior to his death in custody. The applicant's complaints in this regard are therefore "arguable" for the purposes of Article 13 in connection with both Articles 2 and 3 of the Convention (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; *Kaya*, cited above, pp. 330-31, § 107; and *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, p. 2442, § 113).

125. The Court observes that two issues arise under Article 13 of the Convention: whether Mark Keenan himself had available to him a remedy in respect of the punishment inflicted on him and whether, after his suicide, the applicant, either on her own behalf or as the representative of her son's estate, had a remedy available to her.

126. Concerning Mark Keenan himself, the Court observes that the punishment of further imprisonment and segregation was imposed on him on 14 May 1993 and that he committed suicide on the evening of 15 May 1993. The Commission found that the respondent State could not be liable for failing to provide a remedy which would have been available to him within a period of twenty-four hours. It is, however, the case that no remedy at all was available to Mark Keenan which would have offered him the prospect of challenging the punishment imposed within the seven-day segregation period or even within the period of twenty-eight days' additional imprisonment. Even assuming judicial review would have provided a means of challenging the governor's adjudication, it would not have been possible for Mark Keenan to obtain legal aid, legal representation and lodge an application within such a short time. Similarly, the internal avenue of complaint against adjudication to the Prison Headquarters took an estimated six weeks. The Court notes the Prison Ombudsman's finding that there was no expeditious avenue of complaint for prisoners who required speedy redress (see paragraph 72 above).

127. If it was the case, as has 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. The Court, moreover, is not persuaded that effective recourse against the adjudication would not have influenced the course of events. Mark Keenan had been punished in circumstances disclosing a breach of Article 3 of the Convention and he had the right, under Article 13 of the Convention, to a remedy which would have quashed that punishment before it had either been executed or come to an end. There has therefore been a breach of Article 13 in this respect.

128. Turning to the remedies available after Mark Keenan's death, it is common ground that the inquest, however useful a forum for establishing the facts surrounding Mark Keenan's death, did not provide a remedy for determining the liability of the authorities for any alleged ill-treatment or for providing compensation.

129. The Government have submitted that the applicant could have pursued an action in negligence, either on behalf of her son's estate, claiming that he had suffered injury before his death or (if he had left dependants) in respect of his death under the Fatal Accidents Act provisions. These would, they stated, have provided a determination of liability and damages. The Court is not persuaded, however, that a finding of negligence by the courts by itself would be capable of furnishing effective redress for the applicant's complaints. To the extent that Mark Keenan inflicted harm on himself before the moment of his death, he can be said to have suffered physical damage. Although the Court accepts the Government's submission to this effect, it does not accept (and the Government do not assert) that adequate damages would have been recoverable or that legal aid would have been available to pursue them. Nor is it established that Mark Keenan suffered any psychiatric injury from his treatment before his death. The medical reports referred to anguish, fear and hopelessness, even terror. There is no evidence that this would be regarded as "injury" in the sense recognised by domestic law and the Government accepted that anguish and fear are not covered. Furthermore, the applicant, as the mother of an adult child and a non-dependant, is unable to claim damages under the Fatal Accidents Act on her own behalf.

130. The question arises whether Article 13 in this context requires that compensation be made available. The Court itself will in appropriate cases award just satisfaction, recognising pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage. The Court considers 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.

131. In this case, the Court concludes that the applicant should have been able to apply for compensation for her non-pecuniary damage and that suffered by her son before his death.

132. Moreover, despite the aggregate of remedies referred to by the Government, 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 is an essential element of a remedy under Article 13 for a bereaved parent.

133. Accordingly, there has been a breach of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

134. Article 41 of the Convention provides:

"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."

A. Damage

135. The applicant claimed compensation for non-pecuniary damage in respect of her son's inhuman and degrading treatment in prison, relying on Dr Reveley's opinion (see paragraph 51 above). She also claimed an appropriate award for her own grief, emotional loss, distress and bereavement, referring to the shattering effect of losing her only son.

136. The Government submitted that a finding of a violation would in itself constitute just satisfaction for a breach of all or any of the Articles under which complaint is made. However, if the Court was minded to award compensation, they considered that a sum of around 10,000 pounds sterling (GBP) would be appropriate.

137. The Court recalls that it has found above that the infliction of punishment on Mark Keenan in the circumstances of the case was inhuman and degrading, contrary to Article 3. It found that the prison authorities' conduct did not infringe Article 2 of the Convention, that is to say, that the respondent State could not be held responsible for Mark Keenan's death. It also found a violation of Article 13 in respect of the lack of remedies available to Mark Keenan to challenge the adjudication or to the applicant in respect of proceedings after his death.

138. The Court finds 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 awards for non-pecuniary damage the sum of GBP 7,000 in respect of Mark Keenan to be held by the applicant for his estate, and GBP 3,000 to the applicant in her personal capacity.

B. Costs and expenses

139. The applicant claimed costs of GBP 4,929.59 for the proceedings in the domestic courts and GBP 32,566.84 for the proceedings before the Convention organs, both sums inclusive of value-added tax (VAT).

140. The Government submitted that the sums claimed were excessive, in particular the disbursements of GBP 19,000 in respect of counsel's fees. Whatever award made should also be apportioned to reflect any findings of non-violation. They proposed that the sum of GBP 15,000, inclusive of VAT, would be a reasonable figure.

141. The Court observes that the applicant has been successful in establishing a breach of Articles 3 and 13 of the Convention. It finds force in the Government's criticisms of the amounts claimed by way of counsel's fees, which included a sum of GBP 8,250 for the submission of the memorial to the Court. Making an assessment on an equitable basis and having regard to awards made in other cases, the Court awards the sum of GBP 21,000, inclusive of VAT.

C. Default interest

142. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 2 of the Convention;

2. *Holds* by five votes to two that there has been a violation of Article 3 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

4. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

(i) in respect of non-pecuniary damage, GBP 10,000 (ten thousand pounds sterling);

(ii) for costs and expenses, GBP 21,000 (twenty-one thousand pounds sterling), inclusive of VAT;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 3 April 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLé J.-P. COSTA

Registrar President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Costa;

(b) concurring opinion of Sir Stephen Sedley;

(c) joint partly dissenting opinion of Mr Fuhrmann and Mr Kūris.

J.-P.C.

S.D.

CONCURRING OPINION OF JUDGE COSTA

(Translation)

I voted with the majority of the Court in favour of finding that the respondent State had not violated Article 2 of the Convention, but had violated Article 3.

I would like to clarify how, in my mind and in the present case, these two Articles fit together and why I do not perceive any contradiction between the two findings.

One seemingly paradoxical, but – to my mind – simple and logical, way of arriving at the conclusions of the judgment

would be to reverse the order of the points in the operative provisions and the paragraphs of the judgment which provide the supporting reasons.

Admittedly, it may seem natural to begin, as does the judgment, with the right to life and to continue with the inhuman and degrading punishment and treatment. In the circumstances of the present case, however, I find it more appropriate to do the opposite. I have scarcely any doubt as far as Article 3 is concerned. Five days before being imprisoned, Mark Keenan, who had been treated in hospital, had been diagnosed as presenting a personality disorder, paranoid psychosis and suicide threats. After being released on bail, then re-imprisoned some four months later to serve a four-month prison sentence, the young man, whose state of health was known to the prison's senior medical officer (who had consulted the psychiatrist who had been treating him), manifested very serious disorders. Fifteen days after he had been imprisoned, he threatened to hang himself and a noose fashioned from a bed sheet was found in his cell. Two weeks later he attacked two hospital officers. A prison doctor, who had had only six months' training in psychiatry, certified him fit for adjudication in respect of the assault and, in the meantime, fit for placement in the segregation unit within the prison's punishment block, a measure which was taken the same day by the prison's deputy governor. Mark Keenan then threatened to commit suicide, claimed to be hearing voices and to think he was Jesus Christ. He nonetheless remained in the segregation unit from 3 to 15 May. On 14 May the deputy governor ordered him to serve twenty-eight additional days in prison for having attacked the hospital officers (it should be noted that, on that date, he had only nine days left before his expected release date). It was on the following day that he hanged himself with a ligature fashioned from a bed sheet.

In my opinion, and however delicate the assessment which the prison authorities had to make, the confinement of the applicant and the sentence to a further four weeks in prison when he had only days left before the expected date of his release constituted treatment and punishment contrary

to Article 3, having regard to Keenan's personality. In that connection, I find a comparison with *Kudła v. Poland* ([GC], no. 30210/96, ECHR 2000-XI), in which the Court did not find a violation of Article 3, very illuminating.

However, I would, personally, have reached the same conclusion if the young man had attempted to kill himself without success or if he had manifested his desperation in other ways, such as injuring himself, as – alas – sometimes happens. In other words, it is not, in my view, Keenan's death which revealed the inhuman nature of what he had endured. The two things are distinct.

It is precisely for that reason that I have no difficulty, even though a death occurred, in concluding that there has not been a violation of Article 2. The positive obligation on the States to take appropriate steps to protect life, particularly in respect of someone placed under the supervision of the prison authorities, does not appear to me to have been violated in the present case. Mark Keenan was regularly monitored and was given medical treatment in prison. He was also put on "fifteen-minute watches" (16 April, 30 April, 1 May). The risk that he might commit suicide was known and was taken seriously. His severely deranged and fragile personality made him a suicide risk, but also meant that he was unpredictable, and it was impossible to keep him under observation twenty-four hours a day. In short, I do not think that his right to life was violated by the respondent State, even negligently.

In sum, I do not therefore disagree with the operative provisions of the judgment, but I do think that the reasoning which was followed has the disadvantage of suggesting that Article 3 is in some way a substitute for Article 2 and that it is because the Court did not find that there had been a violation of that Article that it fell back on Article 3. I think, on the contrary, that the two Articles are autonomous and that, in other scenarios, the opposite finding could be arrived at, that is, a violation of Article 2 but not of Article 3. There is thus no logical hierarchy between them. Admittedly, the practice is to follow the order of the Convention itself and to examine first the complaint based on Article 2. That approach is not obligatory, however, and the present case seems to me to illustrate that.

CONCURRING OPINION OF JUDGE Sir Stephen SEDLEY

Article 2

1. With some hesitation I have joined with the other members of the Court in finding no breach of Article 2. The essential basis of the majority's finding of a breach of Article 3 and of the unanimous finding of a breach of Article 13

is, after all, that a disturbed prisoner, known to be a suicide risk but now approaching the end of his short sentence, was administratively sentenced for a violent breach of discipline to a further substantial spell of imprisonment, the first part in punitive isolation, without the possibility of appeal or review. It is understandable that these facts were regarded by the dissenting members of the Commission as indicative of a breach of Article 2. Mr Rozakis, for example, wrote:

"... the authorities, while they knew about the suicidal tendencies of Mark Keenan, and [while] they had in their hands reasonable means to avert the fatal incident, opted for a policy which contributed to rather than avoided his taking of his life."

2. Article 2 contains not a general assertion of the right to life but a specific obligation of Signatory States to protect that right by law. This is why the facts which have led the Court to find a breach of Article 3 might no less aptly have been regarded as demonstrating a breach of Article 2. Nevertheless, in the light of the view of the other members of the Court that a causal link is not sufficiently made out, I have not dissented.

Article 3

3. For the same reasons, I have had doubts about the finding of a violation of Article 3. At the date of the present judgment the Court is still considering in other proceedings the compatibility with Articles 5 and 6 of a system which allows a State official to impose an unappealable penalty of loss of liberty upon a prisoner. Taking the disciplinary system, therefore, to be proper, I can see force in the view that so long as disturbed offenders remain in the general prison population they cannot be exempted from its provisions, provided the prison doctor certifies them fit for punishment.

4. Moreover, unlike most breaches of Article 2, a breach of Article 3 requires no fatality. Yet, if Mark Keenan had not killed himself, it is not easy to see what his case would have been under Article 3. As the Court has more than once said, all punishment is to an extent degrading. Moreover, as is confirmed by the pattern of voting in the present case, violation of Article 13 does not require an established, but only an arguable, breach of a substantive Convention right. In the end, however, I have cast my vote in favour of a finding of a breach of Article 3 because it is evident from the

fatal outcome that the stress of the punishment on this disturbed offender was greater than it ought to have been made to bear. In the light of the inadequate monitoring of his condition, the combination of the infliction and the timing of this punishment can properly be characterised as inhuman.

5. This conclusion, it should be noted, is not dependent on a consequential death. That the same or not very different findings might have answered the question of causation under Article 2 and have been characterised as a failure of the law to protect Mark Keenan's right to life needs perhaps to be borne in mind by those with responsibility in this area of public administration.

Article 13

6. Although money is sometimes the only form in which redress for an injustice can be given, it does not follow that the requirement of Article 13 for an effective remedy will necessarily be satisfied by a payment of damages. The present case, in my opinion, demonstrates in at least two important respects that an effective remedy may lie elsewhere.

Mark Keenan

7. It is because of the want of recourse for a mentally disturbed prisoner against a punitive award of extra days that there was a breach of Article 13 in relation to the deceased. He had no effective remedy against a punishment which arguably violated his rights under Articles 2 and 3 (we do not yet know whether Articles 5 or 6 were also violated). It is plain from the report of the senior prison medical officer at HMP Exeter, Dr Keith, (on which most of my own conclusions in this case are based) that Mark Keenan's condition and behaviour are by no means exceptional. Other cases will differ in degree but not necessarily in kind. It will be for the United Kingdom government to decide to what extent the logic of the Court's decision calls either for automatic review or for a right of immediate appeal in relation to awards of additional days to prisoners of particular kinds or prisoners generally.

Susan Keenan

8. As to the question of a remedy – the word is hardly appropriate – for Mark Keenan's death, I do not believe that a claim in domestic law by his mother for a sum of money could be regarded without more as an effective remedy, and I do not suppose that she so regards it. What is necessary in such a case as this, as the Court has several times stressed, is a proper and effective inquiry into responsibility for the death. This can, it is true, take the form of an action for damages if the allocation of liability is a prerequisite of an award. Here, however, the Court has concluded (and the amount of the Government's own contingent offer of just satisfaction confirms) that the paucity of the damages available to a non-dependent parent such as the applicant in her capacity as administratrix of her son's estate makes her cause of action an ineffective remedy – not in the sense that more money would make it an effective remedy but in the sense that it is too little to be worth pursuing. Indeed the decisions of the Court of Appeal and the House of Lords in *Hicks v. Chief Constable of South Yorkshire* [1992] 1 All England Law Reports 690, 2 All England Law Reports 65, that crush injuries leading to death within moments do not sound in damages, makes it extremely unlikely that any damages at all would be awarded for a brief period of suffering before a violent death; and if any damages were awarded, they would be at most a few hundred pounds.

9. What could, however, afford an effective remedy for death of the present kind is an inquest with procedures which assure the rights and interests of persons such as the applicant and with power to determine responsibility where this is possible. It is common ground that the English inquest in its modern form does not afford these things. This is not because the Coroners' Act 1988 forbids it: on the contrary, by section 11(5)(b)(ii) it requires a finding to be made as to how the deceased came by his death, a provision plainly capable of including an allocation of responsibility in a proper case. It is because Rule 42 of the Coroners' Rules 1984, made in the exercise of delegated powers by the Lord Chancellor, forbids the framing of the verdict in such a way as to appear to determine civil liability or a named person's criminal responsibility.

10. It is not for this Court to determine how the United Kingdom is to secure compliance with Article 13 following a prison suicide. But it may be observed that the patriation of the Convention by the Human Rights Act 1998 has not brought the issue, as it brings other issues, within the processes now available to the national courts for securing compliance with the Convention, because Article 13 has not been included in the Convention rights scheduled to the Act. As a result, the requirement of section 3 of the Act that all legislation is so far as possible to be read and given effect in a way which is compatible with the scheduled Convention rights does not give the courts any mandate to interpret the word "how" in section 11 of the Coroners' Act 1988 in a way compatible with Article 13. It must therefore be for the Government rather than the courts in this instance to decide how to make good the applicant's lack of an effective remedy for the suicide in custody of her son.

JOINT PARTLY DISSENTING OPINION

OF JUDGES FUHRMANN AND KŪRIS

The majority of the Chamber has concluded that there has been a violation of Article 3 of the Convention as regards the allegations of the applicant that her son was subjected to inhuman and/or degrading treatment by the prison authorities in May 1993. We regret that we are unable to share this opinion.

1. It is considered by the majority of the Chamber that the imposition of a serious disciplinary punishment on Mark Keenan by the prison authorities was not compatible with the standard of treatment required in respect of a mentally ill person and must therefore be regarded as constituting inhuman and degrading treatment and punishment within the meaning of Article 3 of the Convention. In the opinion of the majority, there had been a defective monitoring of his condition and a lack of informed psychiatric input into his assessment and treatment which disclosed significant defects in the medical care provided to a mentally ill person known to be a suicide risk.

2. As correctly recalled in paragraph 109 of the judgment, 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: it 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.

The State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance (see *Kudła v. Poland* [GC], no. 30210/96, §§ 94 et seq., ECHR 2000-XI).

The decisive point is whether there were physical or mental indications which rendered or should have rendered the prison authorities aware that there was a risk of any acute or severe suffering as a result of the measure (see *Bollan v. the United Kingdom* (dec.), no. 42117/98, ECHR 2000-V).

3. We share the opinion of the majority of the Commission that there is no contemporaneous evidence that prior to his death Mark Keenan was suffering from a significant level of anguish or distress attributable to his conditions of detention.

It has to be noted that on the same day on which he committed suicide, at about 6.25 p.m., he was visited in the morning by Dr Bickerton, who found him calm, polite and relaxed, then by the deputy governor, Mr McCombe, with whom he only had a discussion about the right to buy tobacco and who

left him relaxed. Last but not least, in the afternoon of the same day he was visited by an old friend who saw him for some twenty minutes and found him in good spirits, save for a disappointment concerning the fact that he had an additional twenty-eight days to serve in prison. This visitor left him looking forward to his next visit the following Saturday and, in the recollection of the prison officer who returned Mark Keenan to his cell after the visit, Mark Keenan appeared to be in high spirits and was very talkative.

Under these circumstances, we cannot but conclude that the prison authorities had no realistic prospect of perceiving that Mark Keenan was at risk of committing suicide and that the prison authorities did all that could reasonably be expected of them. This finding led by the way to the reasoning, also used by the Chamber in its unanimous conclusion, that there had been no violation of Article 2 of the Convention in this case.

The same arguments militate in our opinion also in favour of finding that there has been no violation of Article 3 and, like the majority of the Commission, we cannot find a sufficient basis for drawing conclusions, to the requisite standard of proof beyond reasonable doubt, that the segregation of Mark Keenan constituted treatment of the severity prohibited by Article 3 of the Convention.

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

THIRD SECTION

CASE OF PAUL AND AUDREY EDWARDS

v. THE UNITED KINGDOM

(Application no. 46477/99)

JUDGMENT

STRASBOURG

14 March 2002

FINAL

14/06/2002

In the case of Paul and Audrey Edwards v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr I. CABRAL BARRETO, *President*,

Sir Nicolas BRATZA,

Mr L. CAFLISCH,

Mr P. KūRIS,

Mr R. TüRMEN,

Mrs H.S. GREVE,

Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 21 February 2002,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 46477/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Paul and Audrey Edwards ("the applicants"), on 14 December 1998.

2. The applicants were represented before the Court by Ms N. Collins, a solicitor working for Liberty, London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicants alleged in particular that the authorities had failed to protect the life of their son, Christopher Edwards, who had been killed by another detainee while held in prison on remand. They relied on Articles 2, 6, 8 and 13 of the Convention.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 7 June 2001 the Chamber declared the application admissible [*Note by the Registry.* The Court's decision is obtainable from the Registry].

6. The applicants and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations. The Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 2 *in fine*).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). The above application remained with the newly composed Third Section (Rule 52 § 1).

THE FACTS

8. The facts of this case were subject to investigation before a private, non-statutory inquiry, which issued a report on 15 June 1998, setting out extensive findings of fact. As these were not contested by the parties, the Court has relied on the report in its own assessment of the facts below.

I. THE CIRCUMSTANCES OF THE CASE

9. Prior to his death, Christopher Edwards had shown signs of developing a serious mental illness. In 1991 a psychiatric assessment expressed the tentative diagnosis of schizophrenia. In July 1994 he stopped living at home with the applicants, his parents. At this time he stopped taking his medication.

10. On 27 November 1994 Christopher Edwards, then 30 years old, was arrested in Colchester by the police and taken to Colchester police station. He had been approaching young women in the street and making inappropriate suggestions. His behaviour before arrest, and at the police station where he attempted to assault a policewoman, led police officers to suspect that he might be mentally ill. He was assessed at the police station by an approved social worker, who discussed the matter on the telephone with a consultant psychiatrist. They agreed that, while there was some evidence of possible developing schizophrenia, he did not need urgent medical attention and that he was fit to be detained at the police station. Any psychiatric assessment could take place as part of a pre-sentencing exercise. Christopher Edwards was held in a cell on his own. The police officer responsible did not fill in a CID2 form identifying Christopher Edwards as an exceptional risk on ground of mental illness due to the opinion expressed by the social worker. The police officer did, however, note in the confidential information form (MG6A) her belief that if Christopher Edwards was not treated or seen by the mental health team he might seriously harm a female. She was not aware that her own suspicion of his mental state was sufficient to warrant categorising Christopher Edwards as an exceptional risk.

11. On 28 November 1994 Christopher Edwards was brought to Colchester Magistrates' Court. Immediately his handcuffs were removed, he pushed through the other prisoners and confronted a female prison officer. He was restrained, but struggled and tried to approach her again. He was placed in a cell on his own. During the morning, he continually banged on the cell door and shouted: “I want a woman.” He shouted obscenities about women. The applicants met the duty solicitor at about 9.45 a.m. and explained that their son was mentally unwell and that they wanted him to receive medical care and not to be remanded in custody. When the duty solicitor attempted to talk to Christopher Edwards in his cell, he received no assistance from his client who continued to make obscene suggestions about women. The duty solicitor discussed the problem with the Clerk to the Justices.

12. On his way to court and in the courtroom, Christopher Edwards repeated his earlier comments about women. The prosecutor had in her possession the MG6A form and had been requested by the police to obtain his remand in custody as there was a risk that he would reoffend and there was a real question mark about his mental state. The prosecutor informed the court that he was perceived as a risk to women, although it is unclear how much detail was given. She relied on the fact that an assessment by a psychiatrist had not yet been carried out in support of her application. Consideration was given by the Bench, together with the prosecutor, duty solicitor and Justice's Clerk as to whether he could be remanded to hospital. It was concluded that there was no power to do so under section 30 of the Magistrates' Courts Act 1980. No consideration was given, *inter alia*, to the application of civil provisions (sections 2, 3 or 4 of the Mental Health Act 1983) or to section 35 of the 1983 Act, which provided for remand to a hospital for assessment.

13. The magistrates decided to remand Christopher Edwards in custody for three days, which was a shorter period than usual, bringing forward the date to 1 December so that instructions could be taken and legal aid forms completed. Further consideration would then be given, *inter alia*, to the obtaining of a psychiatric report. After the hearing, the first applicant telephoned the probation service in Colchester and expressed concern about his son's mental health. He was advised to contact Chelmsford Prison. He rang the probation officer at the prison and informed her of his son's medical history. Her telephone note indicated that she had been told that he had been prescribed stelazine, though he had been refusing to take it or accept that he was mentally ill. The probation officer visited the health care centre and spoke to the senior medical officer, Dr F. Although there was later dispute as to how much detail she passed on to the doctor, he recalled being informed that Christopher Edwards was considered to be a risk to women. However, having regard to the psychiatric social worker's comments that Christopher Edwards was fit for detention in a police station and the fact that the court had not ordered any psychiatric reports, he stated that he would not interfere with the usual admissions procedure which meant that Christopher Edwards would be screened on arrival in the usual way and his location in the prison would depend on the result of that process. Neither he nor the probation officer passed on any of this information to the reception staff.

14. A prison officer returning to Chelmsford Prison from the Magistrates' Court informed the officer in charge of reception staff that a female prison officer had been assaulted by a prisoner who was due to arrive later that day. The police officers at the Magistrates' Court custody area suspected from his behaviour that Christopher Edwards was mentally abnormal and might be a threat to women and decided to warn the prison staff. A police officer rang and spoke to the senior officer at the prison reception and told him, *inter alia*, that the magistrates had wanted to remand Christopher Edwards to a mental hospital and that he had assaulted a female prison officer. The senior officer was concerned at this information and contacted the Magistrates' Court to verify whether he was being remanded under a normal warrant. He also spoke to the duty governor about the allocation of Christopher Edwards and it was decided, subject to the health care screening, that he should be located on wing D-1 where no female officers worked.

15. In the late afternoon, Christopher Edwards was taken to Chelmsford Prison. The reception staff were aware of the information passed on from the police at the Magistrates' Court and that he was a potential danger to women. He was placed in a holding area while the other prison arrivals were processed. His behaviour was noted as “strange” and “odd” and when being placed in the holding cell he was aggressive and tried to punch a prison officer. After two hours he was screened by Mr N., a member of the prison health care staff, who saw no reason to admit him to the health care centre. Mr N. knew nothing about previous discussions in the court or the concerns passed on to the prison about Christopher Edwards's mental health. He was only aware that Christopher Edwards was alleged to have assaulted a female police constable. Mr N. followed the standard questionnaire. To question 5 (Have you ever been seen by a psychiatrist?), the answer was “three years ago”. Christopher Edwards did not disclose that he had been taking stelazine. There was no evidence of active mental disturbance or bizarre behaviour during the interview, which was

unlikely to have lasted more than ten minutes. No medical officer was on duty at the centre at this time, or was present in the prison. Christopher Edwards was admitted to the main prison and placed in cell D1-6.

16. He was detained in a cell on his own during this period.

17. Meanwhile, Richard Linford was arrested in Maldon on 26 November 1994 for assaulting his friend and her neighbour. At Maldon police station, he was seen by a police surgeon as it was suspected that he was mentally ill. The police surgeon certified that Richard Linford was not fit to be detained. Richard Linford was assessed by a psychiatric registrar who consulted on the telephone with a consultant psychiatrist, who decided that he did not need to be admitted to hospital and that he was fit to be detained. Richard Linford was transferred to Chelmsford police station, where the police surgeon also found him fit to be detained. While his conduct before and after arrest was bizarre, it was attributed by the doctors to the effects of alcohol abuse, amphetamine withdrawal and to a deliberate attempt to manipulate the criminal justice system. The registrar, who had previously treated Richard Linford, knew that he had been diagnosed at various times as suffering from schizophrenia or as having a personality disorder, but also knew him as someone who became ill when abusing alcohol and drugs. Over the weekend, Richard Linford showed further bizarre behaviour and was violent towards police officers. He was not reassessed by a doctor. No CID2 form was filled in, although police officers remained of the opinion that he was mentally ill. On 28 November 1994 Richard Linford was remanded in custody by Chelmsford Magistrates' Court. The magistrates were presented with a “sane but dangerous” description of him. Richard Linford arrived at Chelmsford Prison shortly after Christopher Edwards, where he was screened by the same member of the prison health care service who had seen Christopher Edwards and who saw no reason to admit him to the health care centre. Richard Linford did not behave in a bizarre fashion during the screening. Mr N. did not have knowledge of Richard Linford's previous convictions, which would have alerted him to his admittance to hospital in 1988.

18. Initially, Richard Linford was placed in cell D1-11 on his own. He was then moved into cell D1-6 with Christopher Edwards. This was due to shortage of space, as all the other cells on the landing were doubly occupied.

19. Each cell had a green emergency light situated on the wall outside the cell next to the door which came on when the call button was depressed inside the cell. Additionally, once the button was pressed, a buzzer sounded on the landing and a red light lit up on a control panel in the office on the landing concerned, indicating the cell. The red light remained on and the buzzer continued to sound even if the prisoner ceased to press the button. At 9 p.m., either Christopher Edwards or Richard Linford pressed the call button. A prison officer saw the green light outside the cell and was told that they wished one of the cell lights, operated from the exterior, to be switched off. He agreed to do so. He saw that the two men appeared to be “getting on all right”. He noticed that while the green light had gone on the buzzer which should have been sounding continuously had not done so. He did not report the apparent defect.

20. Shortly before 1 a.m. on 29 November 1994, a prison officer heard a buzzer sound. He saw no red light on the D-landing control panel and saw a prison officer go to check the other landings. Some time later, he heard continuous banging on a cell door on his landing. On going to investigate he saw the green light on outside cell D1-6. Looking through the spy hole, he saw Richard Linford holding a bloodstained plastic fork and noticed blood on the floor and on Linford's feet. There was a delay of five minutes while officers donned protective clothing. They entered the cell to find that Christopher Edwards had been stamped and kicked to death. Richard Linford was making continual reference to being possessed by evil spirits and devils. D-landing had previously been patrolled at 12.43 a.m., which indicated that up to seventeen minutes could have elapsed since the pressing of the cell's call button.

21. At the time of the attack, Richard Linford was acutely mentally ill. He was transferred later on 29 November 1994 to Rampton Special Hospital.

22. On 21 April 1995 Richard Linford pleaded guilty at Chelmsford Crown Court to the manslaughter of Christopher Edwards by reason of diminished responsibility. The trial was therefore brief. The judge imposed a hospital order under section 37 of the Mental Health Act 1983 (“the 1983 Act”), together with a restriction order under section 41. Richard Linford is currently still at Rampton Special Hospital, diagnosed as suffering from paranoid schizophrenia.

23. A coroner's inquest had been opened but adjourned pending the criminal proceedings against Richard Linford. After Richard Linford's conviction, the coroner closed the inquest, as there was no obligation to continue in those

circumstances.

24. On 16 October 1995 the applicants were advised by the Assistant Chief Constable that it was considered that there was insufficient evidence to establish the offence of manslaughter by gross negligence on the part of anyone involved in the case but that the matter would be probably reviewed at the conclusion of the inquiry which had been commenced by the statutory agencies concerned in the case.

25. In July 1995 a private, non-statutory inquiry was commissioned by three State agencies with statutory responsibilities towards Christopher Edwards – the Prison Service, Essex County Council and North Essex Health Authority. Its terms of reference were:

"To investigate the death of Mr Edwards in Chelmsford Prison, including factors in his and Mr Linford's detention which are relevant to that, and in particular: the extent to which their reception, detention, management and care corresponded to statutory obligations, Prison Service Standing Orders and Health Care Standards and local operational policies.

1. To examine the adequacy, both in fact and of relevant procedures, of collaboration and communication between the agencies (HM Prison Service, the Essex Police, the courts, MidEssex Community and Mental Health NHS Trust and its predecessor, and Essex County Council Social Services Department) involved in the care, custody and control of Mr Edwards and Mr Linford, or in the provision of services to them.

2. To examine the circumstances surrounding the arrest, detention and custody of Mr Linford and Mr Edwards by Essex Police, including whether all relevant information was effectively and efficiently passed between Essex Police, the prison service, the courts, and any other relevant agencies ...;

3. To examine all the relevant circumstances surrounding the treatment and care of Mr Edwards and Mr Linford, by the health service and social services, and in particular: the extent to which Mr Edwards and Mr Linford's care corresponded to relevant statutory obligations, relevant guidance from the Department of Health ... and local operational policies.

4. To prepare a report and make recommendations to North Essex Health Authority, Essex County Council Social Services Department and HM Prison Service, and other such agencies as are identified as appropriate ..."

26. In February 1996 the applicants were advised by their solicitors that they had a claim for funeral costs and a potential claim for compensation and any pain and suffering between Christopher Edwards's injury and death, but that taking into account legal costs it would not be economic to bring such a claim.

27. In April 1996, the Criminal Injuries Compensation Board awarded the applicants 4,550 pounds sterling (GBP) for funeral expenses but decided that there should be no dependency or bereavement award.

28. The inquiry opened in May 1996. It was chaired by Mr Kieran Coonan QC, Recorder of the Crown Court, the other members of the panel consisting of Professor Bluglass (Emeritus Professor of Forensic Psychiatry at the University of Birmingham), Mr Gordon Halliday (former Director of Social Services, Devon County Council and member of the Mental Health Commission), Mr Michael Jenkins (former Governor of Oxford Prison and Long Lartin Prison and HM Deputy Chief Inspector of Prisons 1987-92) and Mr Owen Kelly (Commissioner of the City of London Police 1985-93). They were assisted by a firm of solicitors appointed by the commissioning agencies to provide secretarial and administrative support and to arrange for the attendance of witnesses. Two solicitors from this firm were appointed as advocates to the inquiry.

29. The inquiry received evidence on fifty-six days over a period of ten months. It sat in private. It had no powers of compulsion of witnesses or production of documents. Two prison officers refused to give evidence. The inquiry report later noted that one of these had potentially significant evidence and his refusal was said to be "all the more regrettable since he had passed by Christopher Edwards's cell shortly before he met his death". The inquiry panel conducted visits to the police stations, Magistrates' Court building and prison concerned. Professor Bluglass, a member of the panel, interviewed Richard Linford in hospital. About 150 witnesses attended the inquiry to give evidence, while a

considerable number of others submitted written evidence.

30. In November 1997 the applicants issued a summons in the County Court for negligence against the Chief Constable of Essex and Essex County Council. They did not, however, serve it due to legal advice from their solicitors.

31. Draft extracts of the inquiry's preliminary findings were circulated to those subjected to criticism to allow them the opportunity to comment. A number of witnesses were recalled to give evidence on 27 April 1998.

32. The inquiry report was published on 15 June 1998. It concluded that ideally Christopher Edwards and Richard Linford should not have been in prison and in practice they should not have been sharing the same cell. It found “a systemic collapse of the protective mechanisms that ought to have operated to protect this vulnerable prisoner”. It identified a series of shortcomings, including poor record-keeping, inadequate communication and limited inter-agency cooperation, and a number of missed opportunities to prevent the death of Christopher Edwards.

33. The findings included the following:

(a) Ideally, if suitable beds had been available, Christopher Edwards should have been admitted to hospital for assessment under section 2 of the Mental Health Act 1983.

(b) It was a serious omission, and breach of Code C of the Code of Practice under the Police and Criminal Evidence Act 1984 (“PACE”), that no doctor had been asked by the custody officer to see Christopher Edwards.

(c) It was a serious failure by Essex Police that a CID2 form was not completed describing Christopher Edwards as a prisoner reasonably suspected of being an exceptional risk on the grounds of mental disturbance, though it was noted that even if he had been so described by the police this would not have been enough, by itself, to ensure that he was admitted to the health care centre at Chelmsford Prison.

(d) At the Magistrates' Court hearing on 28 November 1994 no consideration was given to section 35 of the 1983 Act which provided for a remand to hospital for assessment.

(e) No attempt was made by the court to notify the prison authorities, in particular the senior medical officer, that Christopher Edwards was suspected of suffering from a mental illness.

(f) Information provided to the prison by the applicants about Christopher Edwards's psychiatric background was not recorded or passed on to the person carrying out the screening.

(g) When Christopher Edwards arrived at Chelmsford Prison there was no medical officer on duty, in breach of the Prison Service Health Care Standards.

(h) The prison health care worker, Mr N., who assessed Christopher Edwards was inadequately trained in the recognition of mental disorder and had been given insufficient guidance. The screening was rushed and superficial and did not take place in adequate conditions of privacy.

(i) Mr N. had not been provided with any information about the concerns as to Christopher Edwards's mental condition by the police or the court. If he had received a CID2 form identifying mental disturbance or the court had expressed some concern, this might have prompted sufficient residual doubts to cause him to err on the side of caution and have him admitted to the health centre for the first night.

(j) The cell's call system was defective; it had been pressed up to seventeen minutes before the alarm was raised by Richard Linford banging on the door and the warning buzzer had not sounded, or if it did it only sounded briefly. If it had functioned, a prompt response might have saved Christopher Edwards's life. The system could be disabled simply by wedging a matchstick behind the re-set button on the control panel and it could not be ruled out that it might have been tampered with by a prison officer or prisoner who wanted a “quiet night”. The fact that it could so easily be disabled rendered the system inadequate and unsafe. It was also noted that according to good practice, where the cell's

call system was defective, either the occupants should be moved to another cell or effective visual monitoring should be provided, as a cell could not be certified fit for occupation without a method of communication in working condition.

(k) Richard Linford had a history of violent outbursts and assaults, including a previous assault on a cell-mate in prison. He had been admitted to mental hospital in 1988, and subsequently had been diagnosed as suffering from schizophrenia. Despite psychotic episodes and further assessments, he was not admitted to hospital after September 1994, as he was not considered to be suffering from acute mental illness. A case conference was held on 24 October 1994, where one of Richard Linford's general practitioners and a police officer expressed the view that he was capable of serious violence or murder. However, no formal risk assessment was carried out. The consultant psychiatrist did not accept that the risk to public safety was serious and it was decided to make one last attempt to induce Richard Linford to take depot medication before detaining him under section 3 of the 1983 Act. On 7 November 1994, it was reported to the consultant that Richard Linford was refusing depot medication.

(l) After Richard Linford's arrest on 26 November, no attempt was made to locate his medical notes before being assessed. The psychiatric registrar was unaware of the case conference or the outline plan to detain him.

(m) No CID2 form was filled in by the police for Richard Linford despite his attacks on two officers, as the officer concerned did not know that such a form existed.

(n) The police, prosecution and magistrates were aware that Richard Linford was described as dangerous but no formal warning was given to the prison authorities.

(o) At Chelmsford Prison, Richard Linford was screened by Mr N., who knew nothing about him except that he had been “difficult” in the police station; although the provision of a CID2 form would not have been conclusive, information about his previous convictions (and admittance to hospital) might have prompted a closer appraisal and he might have had sufficient doubts to have him admitted to the health care centre despite the absence of really bizarre symptoms.

34. Following the publication of the report, the applicants sought advice as to whether there were any civil remedies available to them in the light of the findings of the inquiry. At a conference on 2 October 1998, they were advised by counsel that there were still no available civil remedies. The inquiry had made no relevant findings in relation to whether any time elapsed between their son being injured and his death, which would have determined whether they had any action in respect of pain and suffering experienced by their son before he died.

35. By letter of 25 November 1998, the Crown Prosecution Service maintained their previous decision that there was insufficient evidence to proceed with criminal charges. The applicants' counsel advised on 10 December 1998 that, notwithstanding the numerous shortcomings, there was insufficient material to found a criminal charge of gross negligence against any individual or agency.

36. By letter dated 15 December 2000, the Police Complaints Authority (PCA) provided the applicants with a report on their complaints about police conduct in dealing with Christopher Edwards and on the subsequent investigation into his death. The report upheld fifteen of the complaints and made a number of recommendations to Essex Police in relation to practice and procedure. It found, *inter alia*, a breach of the Code of Practice under PACE in that the police failed to summon a doctor to the police station when Christopher Edwards's behaviour led them to believe that he might be suffering from a mental illness and that, as regarded the failure of the officers to fill in a CID2 form identifying Christopher Edwards and Richard Linford as exceptional risks on grounds of mental disturbance, the officers concerned had been insufficiently informed as to the existence and purposes of the form. It also upheld complaints about the police investigation after the death, including a failure by the police investigators to test the cell buzzer properly to establish its effectiveness, the loss of the list of prisoners held on the relevant landing on the night of the incident and a failure to interview relevant persons in the prison, for example, Mr N., the health care worker, the prison doctor and the prison probation officer concerning the allegation of criminal negligence raised by the applicants.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Proceedings for death caused by negligence

37. Under the common law, no one can recover damages in tort for the death of another.

38. The Fatal Accidents Act 1976 confers a right of action for a wrongful act causing death. Section 1(1) provides:

"If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

39. However, the statutory right of action is reserved to the deceased's dependants (section 1(2) which allows the recovery of their pecuniary loss). If there are no dependants, there is no pecuniary loss to recover as damages. Bereavement damages (fixed at GBP 7,500) are only available to the parents of a child under the age of 18 (section 1A(2)). Funeral expenses are recoverable (section 3(5)).

40. The Law Reform (Miscellaneous) Provisions Act 1934 provides for the survival of causes of action for the benefit of the deceased's personal estate. The relevant part of section 1(1) provides:

"Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

41. This enables recovery on behalf of the estate of damages for losses suffered by the deceased before he died, including any non-pecuniary loss such as damages for pain and suffering experienced between the infliction of injury and death. Where death is instantaneous, or where it cannot be proved that the deceased experienced pain and suffering before death, damages are not recoverable under the 1934 Act and the only recoverable amount would be funeral expenses.

B. Cases under the Human Rights Act 1998

42. Two cases have arisen since the entry into force on 2 October 2000 of the Human Rights Act 1998 concerning deaths in custody in which the domestic courts have examined the requirements of Articles 2 and 3 of the Convention.

43. In *R. on the application of Wright v. the Secretary of State for the Home Department* ([2001] High Court, Administrative Court (England and Wales) 520, 20 June 2001), proceedings were brought by the mother and aunt of a man who died in custody as a result of a severe asthma attack in which it was alleged that his treatment prior to his death did not comply with Articles 2 or 3 of the Convention and that there had been a failure to provide a proper investigation into his death. The High Court found that it was arguable that the Prison Service had breached Articles 2 and 3 in its treatment of this prisoner and that, as the inquest and civil proceedings did not constitute an effective official investigation for the purpose of the procedural obligations under these provisions, the claimants were entitled to an order that the Secretary of State set up an independent investigation into the circumstances of the death. Although the death had occurred prior to 2 October 2000, the court held that there was a continuing obligation after that date to provide an effective investigation in the special circumstances of that case where the death was still the subject of active debate and controversy.

44. In *R. on the application of Amin v. the Secretary of State for the Home Department* ([2001] High Court, Administrative Court (England and Wales) 719, 5 October 2001), where 19-year-old Zahid Mubarek was bludgeoned to death by a violent and racist prisoner, there was a claim that the Secretary of State had failed to hold an open and public investigation into the circumstances of the death. The High Court found that internal inquiry by the Prison Service and the criminal trial of the assailant did not constitute an effective investigation for the purposes of the procedural obligation under Article 2, principally as it did not establish why on that night Zahid Mubarek was sharing a cell with his assailant. The claimants were accordingly entitled to a declaration that an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the Convention.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

45. Article 2 of the Convention provides, in its first sentence:

"1. Everyone's right to life shall be protected by law. ..."

46. The applicants complain that the authorities failed to protect the life of their son and were responsible for his death. They also complain that the investigation into their son's death was not adequate or effective as required by the procedural obligation imposed by Article 2 of the Convention.

A. Concerning the positive obligation to protect life

1. Submissions of the parties

(a) The applicants

47. The applicants submit that there was a breach of the positive obligation imposed on the authorities to protect the life of their son. Although the scope of such a positive obligation might vary, it was particularly stringent where an individual died in custody. The test was whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to his life from the criminal acts of a third party and whether the authorities failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. It was incorrect therefore to focus on what the authorities knew, as proposed by the Government, – a subjective approach – rather than the objective approach of considering what the authorities ought to have known. It is clear that the prison authorities knew, or least ought to have known, that there was a real and immediate danger to Christopher Edwards's life when they placed Richard Linford in his cell. They were aware or ought to have been aware of Richard Linford's dangerous condition and of Christopher Edwards's vulnerability. That the authorities actually knew is indicated, *inter alia*, by evidence given at the inquiry which showed that prison officers knew that Christopher Edwards needed to be isolated from other prisoners for his own safety and that they knew Richard Linford, who had been continuously involved in fighting, was not fit to be with other prisoners. The only reason given for placing both men together was to free a cell for other detainees. The Government's assertion that the procedures applied to the reception of prisoners was adequate is at odds with the changes made to the system following this case and others which raised public concern about mental-health screening of prisoners on their arrival at a prison.

48. The applicants refer to the inquiry report's findings of various failures of one public authority to pass on to another information about the risks Richard Linford presented. In particular, although the police, the Crown Prosecution Service and the magistrates were all aware that he was dangerous and prone to violence, no formal warning was passed on to the prison, nor was any information made available about his past criminal or medical records. In addition, the positive obligation imposed by Article 2 rests on all public authorities, not only the prison authorities. The test should not be construed narrowly to focus on the particular agency or officer dealing with the victim at the time of the incident, but should take into account systemic failure involving a number of different authorities.

49. Having regard to the knowledge available, or which should have been available to them, the authorities should reasonably have placed Christopher Edwards and Richard Linford in separate cells or, alternatively, they could have repaired the cell buzzer which was known to be defective or arranged for effective visual monitoring of the cell in which they were held. This case could be distinguished from *Osman v. the United Kingdom* (judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII), which concerned a series of missed opportunities in an investigation which might possibly have led to the detention of the individual who committed the killing, as in this case Christopher Edwards was actively exposed to the risk of harm by another by the very authorities in whose care he had been placed. Each of the identified failures were significant contributory factors in a chain of omissions which culminated in a fatal decision to place Richard Linford in a cell with Christopher Edwards.

(b) The Government

50. The Government submit that there was no failure in any positive obligation imposed by Article 2 to protect the right to life of Christopher Edwards. The information available to the prison authorities in the period leading up to his death, when viewed objectively and without the benefit of hindsight, demonstrated that there was no real or immediate risk about which the prison authorities knew or ought to have known. Regard had to be paid to the medical evidence available and the consideration that the authorities had to act in a way which respected the other rights and freedoms of individuals.

51. In this case, an experienced social worker and a consultant psychiatrist found that Christopher Edwards was fit to be detained in a police station and did not require urgent medical attention. Even if a doctor had been called to the police station, it is unlikely that this would have had any material impact on what happened. The inquiry found that the advice given by the consultant psychiatrist that Christopher Edwards was fit to be detained was reasonable. It is also a matter of speculation to claim that if the police had filled in a CID2 form, this would have led to his placement in the health care centre of Chelmsford Prison. When Christopher Edwards was admitted to prison and examined for admission to the health care centre, there was no evidence of bizarre behaviour. Nor do the Government accept that there was any failure to pass on information to the prison about his illness. A police officer had telephoned from the court to inform the prison reception that the court had wanted to commit him under the Mental Health Act 1983; a probation officer left a message that Christopher Edwards might be a risk to women, while the first applicant informed the prison probation officer of his son's mental illness. They emphasise that it was only necessary for a prisoner to be examined on reception in prison if the health care worker assessed him to be in need of urgent medical attention, the purpose of the screening being principally to identify quickly those prisoners in need of urgent treatment. The current policy is that new prisoners should be seen by a medical officer within twenty-four hours of admission, it being impossible to conduct thorough examinations of all newcomers on arrival in a busy prison.

52. The Government also submit that it was normal policy in the prison for prisoners to share a cell and there was no evidence that the prison authorities knew that Christopher Edwards's cell's call system was defective. Further, after his arrest, Richard Linford was found by two doctors to disclose no signs of psychosis and was afterwards noted to be acting rationally and without aggressive behaviour. Even if the doctors who saw him at this stage had seen his medical notes and contacted his consultant psychiatrist, the inquiry noted that the consultant would have been content for Linford to remain in custody. Linford was also found not to be acting in such a way as to justify admission to the prison health care centre. It was his injuries and uncooperative attitude which initially led him to be placed in a cell by himself, not any suspected mental illness. Therefore, even if a CID2 form had been completed, it would be speculative to claim that this would have made any difference, as it would be to draw conclusions from the omissions made in the transmission of information about Linford. When the two prisoners were last seen together, there was no suspicion that Richard Linford would act violently towards his cell-mate.

53. The Government accept that the inquiry's conclusion was critical of the “systemic” collapse of a number of mechanisms which, taken together, contributed to the death of Christopher Edwards. That, however, did not establish that the authorities had failed to comply with the positive obligation. The Government regretted this state of affairs and, in particular, the operational failure of the cell's call system, which had proved to be easily disabled. However, no system could rule out the possibility of mechanical defects. They argued that these matters were insufficient to lead to the conclusion that the authorities failed to do what they reasonably could, given their state of knowledge at the time.

2. The Court's assessment

(a) General principles

54. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by a law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman*, cited above, p. 3159, § 115).

55. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (ibid., pp. 3159-60, § 116).

56. In the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them. It is incumbent on the State to account for any injuries suffered in custody, which obligation is particularly stringent where that individual dies (see, for example, *Salman v. Turkey* [GC], no. 21986/93, § 99, ECHR 2000-VII). It may be noted that this need for scrutiny is acknowledged in the domestic law of England and Wales, where inquests are automatically held concerning the deaths of persons in prison and where the domestic courts have imposed a duty of care on prison authorities in respect of detainees in their custody.

(b) Application in the present case

57. Christopher Edwards was killed while detained on remand by a dangerous, mentally ill prisoner, Richard Linford, who was placed in his cell. As a prisoner he fell under the responsibility of the authorities who were under a domestic-law and Convention obligation to protect his life. The Court has examined, firstly, whether the authorities knew or ought to have known of the existence of a real and immediate risk to the life of Christopher Edwards from the acts of Richard Linford and, secondly, whether they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

58. As regards the state of knowledge of the authorities, the Court notes that it was considered in the inquiry report that any prisoner sharing a cell with Richard Linford that night would have been at risk to his life. It seems therefore to the Court that the essential question is whether the prison authorities knew or ought to have known of his extreme dangerousness at the time the decision was taken to place him in the same cell as Christopher Edwards.

59. That Richard Linford was mentally ill was known to the doctors who were treating him – he had been admitted to hospital in 1988 and been diagnosed as suffering from schizophrenia. He also had a history of violent outbursts and assaults. However, some weeks prior to his arrest on 26 November 1994, while fears had arisen that he was capable of serious violence, the consultant psychiatrist considered that one more effort to manage his behaviour through depot medication was required before steps were taken to detain him under the Mental Health Act 1983. At the police station, after his arrest, his bizarre behaviour led the police to suspect that he was mentally ill and the police surgeon considered that his mental state was such that he was not fit to be detained. This view was overruled, somewhat to the surprise of the police, by the psychiatric registrar who examined him and concluded that his behaviour could be a result of substance abuse and a deliberate attempt at manipulation. The registrar did not consult Richard Linford's notes which would have shown him that he was under consideration for compulsory committal. While in the police station, Richard Linford's behaviour continued to fluctuate with violent and bizarre episodes. When he arrived at the prison after being remanded in custody by the court, he bore visible signs of injury and was known to the screening health worker to have been “difficult”. The screening health worker was not, however, made aware of his prison record or his previous committal to hospital and the police, prosecution and court did not pass on any detailed information relating to his conduct and his known history of mental disturbance.

60. The Court is satisfied that information was available which identified Richard Linford as suffering from a mental illness with a record of violence which was serious enough to merit proposals for compulsory detention and that this, in combination with his bizarre and violent behaviour on and following arrest, demonstrated that he was a real and serious risk to others and, in the circumstances of this case, to Christopher Edwards, when placed in his cell.

61. As regards the measures which they might reasonably have been expected to take to avoid that risk, the Court observes that the information concerning Richard Linford's medical history and perceived dangerousness ought to have

been brought to the attention of the prison authorities, and in particular those responsible for deciding whether to place him in the health care centre or in ordinary location with other prisoners. It was not. There was a series of shortcomings in the transmission of information, from the failure of the registrar to consult Richard Linford's notes in order to obtain the full picture, the failure of the police to fill in a CID2 form (exceptional risk) and the failure of the police, prosecution or Magistrates' Court to take steps to inform the prison authorities in any other way of Richard Linford's suspected dangerousness and instability.

62. The Government have pointed out that even if a CID2 form had been filled in by the police, this would not have conclusively led the prison to place Richard Linford in the health care centre rather than a cell with another prisoner. They submit that the screening process concentrated on the behaviour of the prisoner on admission and was not expected to be a full medical or psychiatric examination, a doctor generally visiting each prisoner within a day of arrival. However, the inquiry report considered that if the screening health worker had been properly informed of Richard Linford's background, he would have perhaps paid closer attention, noticing that Linford had lied in his answers in the questionnaire and he might in those circumstances have erred on the side of caution and not placed him on ordinary location. It is true that this is speculation to some extent. However, the Court considers that it is self-evident that the screening process of the new arrivals in a prison should serve to identify effectively those prisoners who require for their own welfare or the welfare of other prisoners to be placed under medical supervision. The defects in the information provided to the prison admissions staff were combined in this case with the brief and cursory nature of the examination carried out by a screening health worker who was found by the inquiry to be inadequately trained and acting in the absence of a doctor to whom recourse could be had in case of difficulty or doubt.

63. It is apparent from the inquiry report that in addition there were numerous failings in the way in which Christopher Edwards was treated from his arrest to his allocation to a shared cell. In particular, despite his disturbed mental state, no doctor was called to examine him in the police station, no CID2 form was filled in by the police and there was a failure to pass on to the prison screening officer information provided informally by the applicants, the probation service at the court and an individual police officer. However, although it would obviously have been desirable for Christopher Edwards to be detained either in a hospital or the health care centre of the prison, his life was placed at risk by the introduction into his cell of a dangerously unstable prisoner and it is the shortcomings in that regard which are most relevant to the issues in this case. On the same basis, while the Court deplores the fact that the cell's call button, which should have been a safeguard, was defective, it considers that on the information available to the authorities, Richard Linford should not have been placed in Christopher Edwards's cell in the first place.

64. The Court concludes that the failure of the agencies involved in this case (medical profession, police, prosecution and court) to pass information about Richard Linford on to the prison authorities and the inadequate nature of the screening process on Richard Linford's arrival in prison disclose a breach of the State's obligation to protect the life of Christopher Edwards. There has therefore been a breach of Article 2 of the Convention in this regard.

B. The procedural obligation to carry out effective investigations

1. Submissions of the parties

(a) The applicants

65. The applicants consider that the procedural obligation under Article 2 required the authorities to carry out an effective investigation into the circumstances of their son's death. Any distinction between acts or omissions by State agents was irrelevant, the purpose being to ensure accountability for deaths occurring under potential State responsibility. While there was no particular form of inquiry imposed, they argue that a more rigorous scrutiny was required in this case due to the fact that the circumstances in which Christopher Edwards died were unclear, there was no criminal trial, as Richard Linford pleaded guilty to manslaughter on grounds of diminished responsibility and there was no coroner's inquest. Nor was the police investigation effective having regard to the complaints upheld by the PCA.

66. The non-statutory inquiry did not, in their view, provide a thorough and effective investigation either. They refer to the fact that the inquiry was privately commissioned by the agencies which were themselves the subject of investigation and which themselves fixed the terms of reference and appointed the inquiry chairman, panel and

counsel. The proceedings were held in private and the applicants were only able to attend to give evidence. Nor were the applicants legally represented or able to have witnesses cross-examined. Furthermore, the inquiry had no power to compel witnesses. A number of witnesses failed to appear, including a crucial witness, a prison officer who had passed by the cell shortly before Christopher Edwards died. Therefore, the inquiry was deprived of "potentially significant evidence". It was in addition neither prompt nor reasonably expeditious, commencing only in May 1996 and the final report being published some three and a half years later in June 1998, time being taken to give witnesses an opportunity to comment on draft findings in proceedings which the applicants themselves were not entitled to attend.

(b) The Government

67. As regards the procedural obligation under Article 2, the Government point out that its requirements would inevitably vary with the circumstances and did not invariably require a particular form of investigation or that the family of the victim should enjoy rights to legal representation, for example. The primary obligation under Article 2 was for the State to refrain from the unlawful taking of life. In other cases, where the allegation was negligence, less formal investigations would be required, if at all, and the availability of civil proceedings might suffice. The focus of Article 2 was on the effectiveness of the investigation and not the right to a fair and public hearing for particular individuals. They submit that the non-statutory inquiry in this case was an effective investigation: it was chaired by senior counsel; its members were senior and experienced professionals; its terms of reference were broad and designed to enable the fullest possible investigation; it was the longest and most expensive inquiry of its kind (lasting three years and costing about GBP 1,000,000) and it was serviced by an independent firm of solicitors. The fact that the inquiry was commissioned by agencies that were in part the subject of the investigation and appointed the chairman did not remove its independence. It was precisely such agencies that had the best reason to set up the inquiry so that they might learn lessons for the future.

68. The fact that the inquiry sat in private, as in many inquisitorial inquiries, did not detract from its effectiveness. Nor was its inability to compel witnesses an issue since this did not prevent the inquiry from being able to conduct a thorough investigation and reach findings many of which were critical of the authorities. There was no indication that the missing prison officer who had given two witness statements would have had anything different or additional to say at the inquiry. Sufficient public accountability was secured by the publication of the report and the applicants were able to participate in the inquiry to the extent necessary to safeguard their own legitimate interests, namely, by giving evidence to it.

2. The Court's assessment

(a) General principles

69. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC], no. 22277/93, § 63, ECHR 2000-VII).

70. For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see, for example, *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21954/93, §§ 91-92, ECHR 1999-III). This means not only a lack of hierarchical or

institutional connection but also a practical independence (see, for example, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84, and the recent Northern Irish judgments, for example, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, and *Kelly and Others v. the United Kingdom*, no. 30054/96, § 114, both of 4 May 2001.

71. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances (see, for example, *Kaya*, cited above, p. 324, § 87) and to the identification and punishment of those responsible (see *Oğur*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see, for example, *Salman*, cited above, § 106; *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 109, ECHR 1999-IV; and *Gül v. Turkey*, no. 22676/93, § 89, 14 December 2000). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see the recent Northern Irish judgments concerning the inability of inquests to compel the security-force witnesses directly involved in the use of lethal force, for example, *Hugh Jordan*, cited above, § 127).

72. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-40, §§ 102-04; *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80, 87 and 106, ECHR 1999-IV; *Tanrıkulu*, cited above, § 109; and *Mahmut Kaya v. Turkey*, no. 22535/93, §§ 106-07, ECHR 2000-III). While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see, for example, *Hugh Jordan*, cited above, §§ 108 and 136-40).

73. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82; *Oğur*, cited above, § 92; *Gül*, cited above, § 93; and recent Northern Irish judgments, for example, *McKerr v. the United Kingdom*, no. 28883/95 , § 148, ECHR 2001-III).

(b) Application in the present case

74. The Court finds, first of all, that a procedural obligation arose to investigate the circumstances of the death of Christopher Edwards. He was a prisoner under the care and responsibility of the authorities when he died from acts of violence of another prisoner and in this situation it is irrelevant whether State agents were involved by acts or omissions in the events leading to his death. The State was under an obligation to initiate and carry out an investigation which fulfilled the requirements set out above. Civil proceedings, assuming that such were available to the applicants (see below, concerning the applicants' complaints under Article 13 of the Convention) which lie at the initiative of the victim's relatives would not satisfy the State's obligation in this regard.

75. The Court observes that no inquest was held in this case and that the criminal proceedings in which Richard Linford was convicted did not involve a trial at which witnesses were examined, as he pleaded guilty to manslaughter and was subject to a hospital order. The point of dispute between the parties is whether the inquiry into the care and treatment of Christopher Edwards and Richard Linford provided an effective investigative procedure, fulfilling the requirements identified above (see paragraphs 69-73).

76. The Court notes that this inquiry heard a large number of witnesses and reviewed in detail the way in which the two men were treated by the various medical, police, judicial and prison authorities. The report of the inquiry, which ran to 388 pages, reached numerous findings of defects and made recommendations for future practice. It is a meticulous document, on which the Court has had no hesitation in relying on assessing the facts and issues in this case. Nonetheless, the applicants have impugned the inquiry proceedings on a number of grounds.

(i) Alleged shortcomings in the investigation

77. The applicants have complained that the police omitted certain significant steps in their investigation, for example, they failed properly to test the defective call buzzer, to interview certain prison witnesses and lost a list of prisoners detained on the landing, therefore rendering it impossible to call anyone but prison officers. As pointed out by the Government, however, the prison witnesses in question were called before the inquiry and there is no indication that the police omission prevented their testimony from being accurate or helpful. As regards the loss of the list of prisoners and the incomplete testing of the call buzzer, the Court is not persuaded that this prevented the inquiry from establishing the principal facts of the case.

(ii) Lack of power to compel witnesses

78. The inquiry had no power to compel witnesses and as a result two prison officers declined to attend. One of the prison officers had walked past the cell shortly before the death was discovered and the inquiry considered that his evidence would have had potential significance. The Government have drawn attention to the fact that this witness had, in any event, submitted two statements and that there is no indication that he had anything different or additional to add. However, the Court notes that he was not available for questions to be put to him on matters which might have required further detail or clarification or enabled any inconsistency or omissions in that account to be tested. The applicants had argued in their observations on admissibility that the evidence of the witnesses on the scene at the prison had been of particular importance since it potentially concerned the timing and duration of the attack (see the decision of admissibility in this case of 7 June 2001) and therefore might disclose matters relevant to their claims for damages.

79. The Court finds that the lack of compulsion of witnesses who are either eyewitnesses or have material evidence related to the circumstances of a death must be regarded as diminishing the effectiveness of the inquiry as an investigative mechanism. In this case, as in the Northern Irish judgments referred to above, it detracted from its capacity to establish the facts relevant to the death, and thereby to achieve one of the purposes required by Article 2 of the Convention.

(iii) Alleged lack of independence

80. The inquiry was set up by the Prison Service, Essex County Council and North Essex Health Authority, who were agencies with statutory responsibilities towards both Christopher Edwards and Richard Linford. They established the terms of reference, appointed the chairman and members of the panel as well as the solicitors who assisted the inquiry. It is not however apparent to the Court from the submissions of the applicants that this connection between the agencies and the inquiry deprived it of independence. The chairman was, as is often the case in public inquiries, a senior member of the bar, with judicial experience, while the other members were eminent or experienced in the prison, police or medical fields. None had any hierarchical link to the agencies in question. It is not asserted that they failed to act with independence or that they were constrained in any way. They acted, as far as the Court can see, in an independent capacity and not as the employees or agents of the bodies whose fulfilment of their statutory duties was under consideration. Nor is it shown that the solicitors appointed to assist the inquiry were present in any representative capacity of those bodies.

81. The Court finds no lack of independence in the inquiry.

(iv) Alleged lack of public scrutiny

82. The inquiry sat in private during its hearing of evidence and witnesses. Its report was made public, containing detailed findings of fact, criticisms of failures in the various agencies concerned and recommendations.

83. The Government argued that the publication of the report secured the requisite degree of public scrutiny. The Court has indicated that publicity of proceedings or the results may satisfy the requirements of Article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as in theory of the State agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the Court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible. No reason has been put forward for holding the inquiry in private, any possible

considerations of medical privacy not preventing the publication of details of the medical histories of Richard Linford and Christopher Edwards.

84. The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to the witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject matter of the inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.

(v) Alleged lack of promptness and reasonable expedition

85. Christopher Edwards died on 29 November 1994. The decision to hold an inquiry was taken in July 1995 and the proceedings opened in May 1996, approximately eighteen months after the death had occurred. The bulk of the witnesses and evidence were heard over the following ten-month period. After some witnesses were recalled in April 1998, the report was finally released on 15 June 1998, some two years after the inquiry opened and three and a half years after Christopher Edwards's death.

86. The Court reiterates that it is crucial in cases of deaths in contentious situations for the investigation to be prompt. The passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the members of the family. In this case, it notes the considerable amount of preparation required for an inquiry of this complexity, the number of witnesses involved in the proceedings (about 150 attended the inquiry while others submitted written evidence) and the wide scope of the investigation which covered the involvement of numerous public services. The panel also carried out visits to the places involved in the events and interviewed Richard Linford in hospital. The compilation of the report, whose thoroughness the Court has already remarked upon, was a sensitive and complex endeavour. It was also reasonable to invite the witnesses to comment on the draft findings, given that these involved censure of official practices and individual professional performances. While the time which elapsed before holding the inquiry may perhaps attract some criticism, it is not comparable to the delays found in previous cases (see, for example, *Kelly and Others*, cited above, where eight years elapsed before the opening of the inquest, or *Hugh Jordan*, cited above, where there was a delay of twenty-five months in holding the inquest). In the circumstances of this case, the Court finds that the authorities may be regarded as having acted with sufficient promptness and proceeded with reasonable expedition.

(vi) Conclusion

87. The Court finds that the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded, save when they were giving evidence, failed to comply with the requirements of Article 2 of the Convention to hold an effective investigation into Christopher Edwards's death. There has accordingly been a violation of the procedural obligation of Article 2 of the Convention in those respects.

II. ALLEGED VIOLATIONS OF ARTICLES 6 AND 8 OF THE CONVENTION

88. The relevant part of Article 6 § 1 of the Convention provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...”

The relevant parts of Article 8 of the Convention provide:

“1. Everyone has the right to respect for his private and family life ...

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

for the protection of the rights and freedoms of others."

89. In their original application, the applicants complained, under the above provisions, that they had been deprived of effective access to a court to bring civil proceedings in connection with the deprivation of their son's life and that the lack of an independent investigative mechanism and the lack of access to a court, as the parents of a deceased son, disclosed a failure to respect family life. No further submissions have been made by the applicants pursuing these complaints.

90. In so far as any issues arise separate from the complaints made under the procedural aspect of Article 2 of the Convention, such issues fall to be considered under Article 13 of the Convention below.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

91. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in [the] 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."

1. Submissions of the parties

(a) The applicants

92. The applicants argue that Article 13 required both the payment of compensation where appropriate and a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life. It was not enough for the Government to refer to a range of remedies which might in principle be available. An action for negligence was not available in the absence of sufficient evidence as to the responsibility of any particular individual or authority or any findings as to the time between injury and death which determined whether the applicants had any action for the pain and suffering experienced by their son before his death. Adequate damages would not have been available for the harm suffered. Nor could they make any dependency claim under the Fatal Accidents Act 1976. The inquiry was not thorough or effective as an investigation for the reasons set out above (see paragraphs 65-66) and, in any event, did not have the power to award any compensation for non-pecuniary damage.

93. The applicants dispute that a remedy could still be regarded as effective where it would not be economic to bring the claim. Article 13 should be interpreted so as to make its guarantee practical and effective and genuine practical obstacles to bringing a claim undermined the effectiveness of the procedure. The Human Rights Act 1998 was of no assistance either, since it only covered events which took place after the Act came into force on 2 October 2000. While the *Wright* case (see paragraph 43 above) indicated that the courts could apply the Act even though the death had occurred before that date, where the circumstances were still the subject of active and ongoing controversy, this was not so in the present case. Damages would only have been available for the failure to provide an effective investigation after that date and not in relation to the death itself. Finally, the Health and Safety Executive investigation, which was still ongoing, was a mere administrative procedure which could not be an effective remedy for the purpose of Article 13.

(b) The Government

94. The Government submit that the proper approach is for the Court to examine the full range of remedies which were available. The applicants had a combination of mechanisms by which the responsibility of any public authority for the death of their son could be established, in particular the independent inquiry, which provided a thorough and effective investigation into the circumstances surrounding his death. The applicants could have brought a claim for negligence against the prison or other authorities on behalf of his estate. The applicants also had a remedy available for any loss of dependency. They argue that the fact that a person could not bring a case because of legal advice that it was not economic did not mean that an effective remedy was not available or that the Contracting State had failed to comply with its obligation under Article 13. Nor, in their view, was there any right to a particular form of remedy or

any particular amount of compensation. Article 13 left a certain discretion to the Contracting States as to how they complied with its requirements.

95. Furthermore, they point out that other remedies were possible: criminal proceedings could have been brought and an inquest procedure was available. In addition the Health and Safety Executive were conducting an investigation into the incident, focusing on the management of the two prisoners in prison, which could in principle lead to the criminal prosecution of individuals. From October 2000, the Human Rights Act 1998 enabled courts to consider complaints under Article 2 of the Convention and to grant appropriate relief. In *Wright* (cited above), the High Court held that there was a continuing obligation on the Home Office after 2 October 2000 to investigate a death in custody which had occurred before that date. Although the claim for damages was dismissed in that case, it was in principle available, although only in respect of any continuing breach of rights since the date of entry into force of the Act.

2. The Court's assessment

96. As the Court has stated on many occasions, Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95; *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and *Kaya*, cited above, pp. 329-30, § 106).

97. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should, however, be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, 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 redress (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 109, ECHR 2001-V, and *Keenan v. the United Kingdom*, no. 27229/95, § 129, ECHR 2001-III).

98. On the basis of the evidence adduced in the present case, the Court has found that the Government are responsible under Article 2 for failing adequately to protect the life of Christopher Edwards while he was in the care of the prison authorities. The applicants' complaints in this regard are therefore "arguable" for the purposes of Article 13 (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, p. 23, § 52; *Kaya*, cited above, pp. 330-31, § 107; and *Yaşa*, cited above, p. 2442, § 113).

99. The Court observes that, in general, actions for damages in the domestic courts may provide an effective remedy in cases of alleged unlawfulness or negligence by public authorities (see, for example, *Hugh Jordan*, cited above, §§ 162-63). While in this case a civil action in negligence or under the Fatal Accidents Act before the domestic courts might have furnished a fact-finding forum with the power to attribute responsibility for Christopher Edwards's death, this redress was not pursued by the applicants. It is not apparent (and the Government have not argued) that damages (for the suffering and injuries of Christopher Edwards before his death or the distress and anguish of the applicants at his death) would have been recoverable or that legal aid would have been available to pursue them. The Court does not find that this avenue of redress was in the circumstances of the case of practical use. Similarly, while it does not appear inconceivable that a case might be brought under the Human Rights Act 1998, this would relate only to any continuing breach of the procedural obligation under Article 2 of the Convention after 2 October 2000 and would not provide damages related to the death of Christopher Edwards, which preceded the entry into force of the Act.

100. The Government have not referred to any other procedure whereby the liability of the authorities can be

established in an independent, public and effective manner. While they laid weight on the inquiry, the Court has found above that, although it provided, in many respects, a thorough and useful investigation, it failed for reasons of procedural defects to comply with the procedural obligation imposed by Article 2 of the Convention. And as pointed out by the applicants, it did not provide any possibility of obtaining damages.

101. Notwithstanding the aggregate of remedies referred to by the Government, the Court finds that in this case the applicants did not have available to them an appropriate means of obtaining a determination of their allegations that the authorities failed to protect their son's right to life and the possibility of obtaining an enforceable award of compensation for the damage suffered thereby. In the Court's view, this is an essential element of a remedy under Article 13 for a bereaved parent.

102. Accordingly, there has been a breach of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

103. Article 41 of the Convention provides:

“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.”

A. Damage

104. The applicants claim compensation for non-pecuniary damage in respect of the anxiety, fear, pain and injury suffered by their son Christopher immediately before his death, their own anguish, severe distress and grief suffered at the loss of their son and the ongoing stress and associated ill-health suffered by the second applicant as a result of the traumatic loss and ongoing frustration at the inability to pursue an effective avenue of redress. They do not specify a sum.

105. The Government have not commented on these claims.

106. The Court observes that it has found above that the authorities failed to protect the life of Christopher Edwards or to provide a public investigation meeting the requirements of Article 2 of the Convention. In addition to the pain and suffering which Christopher Edwards must have experienced, it finds that the applicants, his parents, must be regarded as having suffered anguish and distress from the circumstances of his death and their inability to obtain an effective investigation or remedy. Making an assessment on an equitable basis and bearing in mind the amounts awarded in other cases, the Court awards the sum of 20,000 pounds sterling (GBP) for non-pecuniary damage.

B. Costs and expenses

107. The applicants claim costs and expenses incurred, domestically and before the Court, in respect of themselves, their solicitors and counsel. These include a sum of GBP 2,616 for the applicants' own costs of postage and travel together with estimated costs of GBP 1,500 for attendance at any hearing and GBP 1,000 for expenses incurred in pursuing domestic remedies; the sum of GBP 14,702.30 for solicitors' costs and expenses, including estimated costs of attendance at an oral hearing; and the sums of GBP 17,654.38 for junior counsel and GBP 1,175 for leading counsel. This amounts to a total of GBP 33,531.68, inclusive of value-added tax (VAT).

108. The Government considered that the costs claimed were excessive, in particular for the drafting of observations in October 2001 (GBP 5,000 for junior counsel and GBP 1,000 for leading counsel). They pointed out that the costs included those estimated for an oral hearing which did not take place.

109. The Court observes that this case has involved several rounds of written submissions and may be regarded as factually and legally complex. Nonetheless, it finds the fees claimed to be on the high side when compared with the awards made in other cases from the United Kingdom and is not persuaded that they are reasonable as to quantum. It has discounted the sums estimated for an oral hearing which did not take place. Having regard to equitable

considerations, it awards the global sum of GBP 20,000, plus any VAT which may be payable.

C. Default interest

110. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 2 of the Convention as regards the circumstances of Christopher Edwards's death;

2. *Holds* that there has been a violation of Article 2 of the Convention as regards the failure to provide an effective investigation;

3. *Holds* that no separate issue arises under Articles 6 or 8 of the Convention;

4. *Holds* that there has been a violation of Article 13 of the Convention;

5. *Holds*

(a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) GBP 20,000 (twenty thousand pounds sterling) in respect of non-pecuniary damage;

(ii) GBP 20,000 (twenty thousand pounds sterling) in respect of costs and expenses, plus any value-added tax that may be payable;

(b) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 March 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER Ireneu CABRAL BARRETO

Registrar President

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

COURT (GRAND CHAMBER)

CASE OF McCANN AND OTHERS v. THE UNITED KINGDOM

(Application no. 18984/91)

JUDGMENT

STRASBOURG

27 September 1995

In the case of McCann and Others v. the United Kingdom [1],

The European Court of Human Rights, sitting, pursuant to Rule 51 of Rules of Court A [2], as a Grand Chamber composed of the following judges: Mr R. RYSSDAL, *President*,

Mr R. BERNHARDT,

Mr Thór VILHJÁLMSSON,

Mr F. GÖLCÜKLÜ,

Mr C. RUSSO,

Mr A. SPIELMANN,

Mr N. VALTICOS,

Mrs E. PALM,

Mr R. PEKKANEN,

Mr J.M. MORENILLA,

Sir John FREELAND,

Mr A.B. BAKA,

Mr M.A. LOPES ROCHA,

Mr G. Mifsud BONNICI,

Mr J. MAKARCZYK,

Mr B. REPIK,

Mr P. JAMBREK,

Mr P. KURIS,

Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*,

Having deliberated in private on 20 February and 5 September 1995,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 20 May 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 18984/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) on 14 August 1991 by Ms Margaret McCann, Mr Daniel Farrell and Mr John Savage, who are all Irish and United Kingdom citizens. They are representatives of the estates of Mr Daniel McCann, Ms Mairead Farrell and Mr Sean Savage (see paragraph 23 below).

   The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 2 (art. 2) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 May 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr A. Spielmann, Mrs E. Palm, Mr A.N. Loizou, Mr M.A. Lopes Rocha and Mr P. Jambrek (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Government's memorial was lodged at the registry on 3 and 4 November 1994, the applicants' memorial on 22 November and their claims for just satisfaction under Article 50 (art. 50) of the Convention on 18 and 25 January 1995. The Secretary to the Commission subsequently informed the Registrar that the Delegate did not wish to comment in writing on the memorials filed.

5. On 21 September 1994, the President had granted, under Rule 37 para. 2, leave to Amnesty International to submit written comments on specific aspects of the case. Leave was also granted on the same date, subject to certain conditions, to Liberty, the Committee on the Administration of Justice, Inquest and British-Irish Rights Watch to submit joint written comments. The respective comments were received on 16 November and 2 December 1994.

6. On 21 September 1994, the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of a Grand Chamber. By virtue of Rule 51 para. 2 (a) and (b), the President and the Vice-President of the Court (Mr Ryssdal and Mr R. Bernhardt) as well as the other members of the original Chamber are members of the Grand Chamber. However, at his request, Mr Loizou was exempted from sitting in the case (Rule 24 para. 3). On 24 September 1994 the names of the additional judges were drawn by lot by the President, in the presence of the Registrar, namely Mr C. Russo, Mr N. Valticos, Mr R. Pekkanen, Mr J.M. Morenilla, Mr A.B. Baka, Mr G. Mifsud Bonnici, Mr J. Makarczyk, Mr B. Repik, Mr P. Kuris and Mr U. Lohmus.

7. On 15 February 1995, the Government submitted a brief concerning various issues raised by the applicants and the intervenors in their memorials.

8. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 February 1995. The Grand Chamber had held a preparatory meeting beforehand and decided to consent to the filing of the Government's brief.

9. There appeared before the Court:

(a) for the Government

Mr M.R. EATON, Deputy Legal Adviser,

Foreign and Commonwealth Office, *Agent*,

Mr S. RICHARDS, Barrister-at-Law,

Mr J. EADIE, Barrister-at-Law,

Mr N. LAVENDER, Barrister-at-Law, *Counsel*,

Mr D. SEYMOUR, Home Office,

Ms S. Ambler-EDWARDS, Ministry of Defence,

Mr D. PICKUP, Ministry of Defence, *Advisers*;

(b) for the Commission

Sir Basil HALL, *Delegate*;

(c) for the applicants

Mr D. KORFF, *Counsel*,

Mr B. MCGRORY, *Solicitor*.

The Court heard addresses by Sir Basil Hall, Mr Korff, Mr McGrory and Mr Richards.

10. At the request of the Court the Government submitted, on 9 March 1995, various judgments of the English and Northern Ireland courts concerning the use of lethal force by members of the security forces.

11. On 23 March 1995 the applicants submitted their reply to the Government's brief.

AS TO THE FACTS

12. The facts set out below, established by the Commission in its report of 4 March 1994 (see paragraphs 132 and 142 below), are drawn mainly from the transcript of evidence given at the Gibraltar inquest (see paragraph 103 below).

I. PARTICULAR CIRCUMSTANCES OF THE CASE

13. Before 4 March 1988, and probably from at least the beginning of the year, the United Kingdom, Spanish and Gibraltar authorities were aware that the Provisional IRA (Irish Republican Army - "IRA") were planning a terrorist attack on Gibraltar. It appeared from the intelligence received and from observations made by the Gibraltar police that the target was to be the assembly area south of Ince's Hall where the Royal Anglian Regiment usually assembled to carry out the changing of the guard every Tuesday at 11.00 hours.

14. Prior to 4 March 1988, an advisory group was formed to advise and assist Mr Joseph Canepa, the Gibraltar Commissioner of Police ("the Commissioner"). It consisted of Soldier F (senior military adviser and officer in the Special Air Service or "SAS"), Soldier E (SAS attack commander), Soldier G (bomb-disposal adviser), Mr Colombo (Acting Deputy Commissioner of Police), Detective Chief Inspector Ullger, attached to Special Branch, and Security Service officers. The Commissioner issued instructions for an operational order to be prepared to deal with the situation.

A. Military rules of engagement

15. Soldier F and his group, including Soldier E and a number of other SAS soldiers, had arrived in Gibraltar prior to 4 March 1988. Preliminary briefings had been conducted by the Ministry of Defence in London. According to the military rules of engagement (entitled "Rules of Engagement for the Military Commander in Operation Flavius") issued to Soldier F by the Ministry of Defence, the purpose of the military forces being in Gibraltar was to assist the Gibraltar police to arrest the IRA active service unit ("ASU") should the police request such military intervention. The rules also instructed F to operate as directed by the Commissioner.

16. The rules also specified the circumstances in which the use of force by the soldiers would be permissible as follows:

> "Use of force
>
> 4. You and your men will not use force unless requested to do so by the senior police officer(s) designated by the Gibraltar Police Commissioner; or unless it is necessary to do so in order to protect life. You and your men are not then to use more force than is necessary in order to protect life ... Opening fire
>
> 5. You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this.
>
> Firing without warning
>
> 6. You and your men may fire without warning if the giving of a warning or any delay in firing could lead to death or injury to you or them or any other person, or if the giving of a warning is clearly impracticable.
>
> Warning before firing
>
> 7. If the circumstances in paragraph 6 do not apply, a warning is necessary before firing. The warning is to be as clear as possible and is to include a direction to surrender and a clear warning that fire will be opened if the direction is not obeyed."

B. Operational order of the Commissioner

17. The operational order of the Commissioner, which was drawn up on 5 March 1988, stated that it was suspected that a terrorist attack was planned in Gibraltar and that the target was highly probably the band and guard of the First Battalion of the Royal Anglian Regiment during a ceremonial changing of the guard at Ince's Hall on 8 March 1988. It stated that there were "indications that the method to be used is by means of explosives, probably

using a car bomb". The intention of the operation was then stated to be

> "(a) to protect life;
>
> (b) to foil the attempt;
>
> (c) to arrest the offenders;
>
> (d) the securing and safe custody of the prisoners".

18. The methods to be employed were listed as police surveillance and having sufficient personnel suitably equipped to deal with any contingency. It was also stated that the suspects were to be arrested by using minimum force, that they were to be disarmed and that evidence was to be gathered for a court trial. Annexed to the order were, inter alia, lists of attribution of police personnel, firearms rules of engagement and a guide to firearms use by police (see paragraphs 136 and 137 below).

C. Evacuation plan

19. A plan for evacuation of the expected area of attack was drawn up on 5 March 1988 by Chief Inspector Lopez. It was to be put into effect on Monday or Tuesday (7-8 March). It included arrangements to evacuate and cordon off the area around Ince's Hall to a radius of 200 m, identified the approach roads to be closed, detailed the necessary traffic diversions and listed the personnel to implement the plan. The plan was not, however, distributed to other officers.

D. Joint operations room

20. The operation in Gibraltar to counter the expected terrorist attack was run from a joint operations room in the centre of Gibraltar. In the operations room there were three distinct groups - the army or military group (comprising the SAS and bomb-disposal personnel), a police group and the surveillance or security service group. Each had its own means of communication with personnel on the ground operated from a separate control station. The two principal means of communication in use were, however, the two radio-communication networks known as the surveillance net and the tactical or military net. There was a bomb-disposal net which was not busy and, while the police had a net, it was not considered secure and a telephone appears to have been used for necessary communications with the central police station.

E. First sighting of the suspects in Spain on 4 March 1988

21. On 4 March 1988, there was a reported sighting of the ASU in Malaga in Spain. As the Commissioner was not sure how or when they would come to Gibraltar surveillance was mounted.

F. Operational briefing on 5 March 1988

22. At midnight between 5 and 6 March 1988, the Commissioner held a briefing which was attended by officers from the Security Services (including from the surveillance team Witnesses H, I, J, K, L, M and N), military personnel (including Soldiers A, B, C, D, E, F and G) and members of the Gibraltar police (Officers P, Q and R and Detective Chief Inspector Ullger, Head of Special Branch, and Detective Constable Viagas).

The Commissioner conducted the police aspect of the briefing, the members of the Security Services briefed on the intelligence aspects of the operation, the head of the surveillance team covered the surveillance operation and Soldier E explained the role of the military if they were called on for assistance. It then appears that the briefing split into smaller groups, E continuing to brief the soldiers under his command but in the same location.

The Commissioner also explained the rules of engagement and firearms procedures and expressed the importance to the police of gathering evidence for a subsequent trial of the terrorists.

23. The briefing by the representative of the Security Services included inter alia the following assessments:

(a) the IRA intended to attack the changing of the guard ceremony in the assembly area outside Ince's Hall on the morning of Tuesday 8 March 1988;

(b) an ASU of three would be sent to carry out the attack, consisting of Daniel McCann, Sean Savage and a third member, later positively identified as Mairead Farrell. McCann had been previously convicted and sentenced to two years' imprisonment for possession of explosives. Farrell had previously been convicted and sentenced to fourteen years' imprisonment for causing explosions. She was known during her time in prison to have been the acknowledged leader of the IRA wing of prisoners. Savage was described as an expert bomb-maker. Photographs were shown of the three suspects;

(c) the three individuals were believed to be dangerous terrorists who would almost certainly be armed and who, if confronted by security forces, would be likely to use their weapons;

(d) the attack would be by way of a car bomb. It was believed that the bomb would be brought across the border in a vehicle and that it would remain hidden inside the vehicle;

(e) the possibility that a "blocking" car - i.e. a car not containing a bomb but parked in the assembly area in order to reserve a space for the car containing the bomb - would be used had been considered, but was thought unlikely.

This possibility was discounted, according to Senior Security Services Officer O in his evidence to the inquest, since (1) it would involve two trips; (2) it would be unnecessary since parking spaces would be available on the night before or on a Tuesday morning; (3) there was the possibility that the blocking car would itself get blocked by careless parking. The assessment was that the ASU would drive in at the last moment on Monday night or on Tuesday morning. On the other hand Chief Inspector Lopez, who was not present at the briefing, stated that he would not have brought in a bomb on Tuesday since it would be busy and difficult to find a parking place.

1. Mode of detonation of bomb

24. Various methods of detonation of the bomb were mentioned at the briefing: by timing device, by RCIED (radio-controlled improvised explosive device) and by command wire. This last option which required placing a bomb connected to a detonator by a wire was discounted as impracticable in the circumstances. The use of a timer was, according to O, considered highly unlikely in light of the recent IRA explosion of a bomb by timer device at Enniskillen which had resulted in a high number of civilian casualties. Use of a remote-control device was considered to be far more likely since it was safer from the point of view of the terrorist who could get away from the bomb before it exploded and was more controllable than a timer which once activated was virtually impossible to stop.

25. The recollection of the others present at the briefing differs on this point. The police witnesses remembered both a timer and a remote-control device being discussed. The Commissioner and his Deputy expected either type of device. Chief Inspector Ullger recalled specific mention of the remote-control device as being more likely. The surveillance officers also thought that an emphasis was placed on the use of a remote-control device.

26. The military witnesses in contrast appear to have been convinced that it would certainly be a remote-control device. Soldier F made no mention of a timer but stated that they were briefed that it was to be a "button job", that is, radio-controlled so that the bomb could be detonated at the press of a button. He believed that there had been an IRA directive not to repeat the carnage of a recent bomb in Enniskillen and to keep to a minimum the loss of life to innocent civilians. It was thought that the terrorists knew that if it rained the parade would be cancelled and in that event, if a timer was used, they would be left with a bomb that would go off indiscriminately.

Soldier E also stated that at the briefing they were informed that the bomb would be initiated by a "button job". In answer to a question by a juror, he stated that there had been discussion with the soldiers that there was more chance that they would have to shoot to kill in view of the very short time factor which a "button job" would impose.

27. Soldiers A, B, C and D stated that they were told at the briefing that the device would be radio-controlled. Soldier C said that E stressed to them that it would be a "button job".

2. Possibility that the terrorists would detonate the bomb if confronted

28. Soldier O stated that it was considered that, if the means of detonation was by radio control, it was possible that the suspects might, if confronted, seek to detonate the device.

Soldier F also recalled that the assessment was that any one of the three could be carrying a device. In answer to a question pointing out the inconsistency of this proposition with the assessment that the IRA wished to minimise civilian casualties, F stated that the terrorists would detonate in order nonetheless to achieve some degree of propaganda success. He stated that the briefing by the intelligence people was that it was likely if the terrorists were cornered they would try to explode the bomb.

Soldier E confirmed that they had been told that the three suspects were ruthless and if confronted would resort to whatever weapons or "button jobs" they carried. He had particularly emphasised to his soldiers that there was a strong likelihood that at least one of the suspects would be carrying a "button job".

29. This was recalled, in substance, by Soldiers C and D. Soldier B did not remember being told that they would attempt to detonate if arrested but was aware of that possibility in his own mind. They were warned that the suspects were highly dangerous, dedicated and fanatical.

30. It does not appear that there was any discussion at the briefing as to the likely size, mode of activation or range of a remote-control device that might be expected. The soldiers appear to have received information at their own briefings. Soldier F did not know the precise size a radio detonator might be, but had been told that the device would be small enough to conceal on the person. Soldier D was told that the device could come in a small size and that it could be detonated by the pressing of just one button.

31. As regards the range of the device, Soldier F said that the military were told that the equipment which the IRA had was capable of detonating a radio-controlled bomb over a distance of a mile and a half.

G. Events on 6 March 1988

1. Deployment of Soldiers A, B, C and D

32. The operations room opened at 8.00 hours. The Commissioner was on duty there from 10.30 to 12.30 hours. When he left, Deputy Commissioner Colombo took his place. Members of the surveillance teams were on duty in the streets of Gibraltar as were Soldiers A, B, C and D and members of the police force involved in the operation. Soldiers A, B, C and D were in civilian clothing and were each armed with a 9mm Browning pistol which was carried in the rear waistband of their trousers. Each also carried a radio concealed on their person. They were working in pairs. In each pair, one was in radio communication on the tactical net and the other on the surveillance net. Police officers P, Q and R, who were on duty to support the soldiers in any arrest, were also in plain clothes and armed.

2. Surveillance at the border

33. On 6 March 1988, at 8.00 hours, Detective Constable Huart went to the frontier to keep observation for the three suspects from the computer room at the Spanish immigration post. He was aware of the real names of the three suspects and had been shown photographs. The Spanish officers had photographs. The computer room was at some distance from the frontier crossing point itself. The Spanish officers at the immigration post showed him passports by means of a visual aid unit. It appears that they only showed him the passports of those cars containing two men and one woman. Several pictures were flashed up for him during the course of the day but he did not recognise them. At the inquest, under cross-examination, he at first did not recall that he had been given any of the aliases that the three suspects might be employing. Then, however, he thought that he remembered the name of Coyne being mentioned in relation to Savage and that at the time he must have known the aliases of all three, as must the Spanish officers. Chief Inspector Ullger, who had briefed Huart however, had no recollection of the name of Coyne being mentioned before 6 March and he only recalled the name of Reilly in respect of McCann. However, if Huart recalled it, he did not doubt that it was so.

34. On the Gibraltar side of the border, the customs officers and police normally on duty were not informed or involved in the surveillance on the basis that this would involve information being provided to an excessive number of people. No steps were taken to slow down the line of cars as they entered or to scrutinise all passports since it was felt that this might put the suspects on guard. There was, however, a separate surveillance team at the border and, in the area of the airfield nearby, an arrest group. Witness M who led a surveillance team at the frontier expressed disappointment at the apparent lack of co-operation between the various groups involved in Gibraltar but he understood that matters were arranged that way as a matter of security.

35. At the inquest, Chief Inspector Ullger stated, when pressed about the failure to take more scrupulous measures on the Gibraltar side,

> "In this particular case, we are talking about dangerous terrorists. We were talking about a very, very major and delicate operation - an operation that had to succeed. I think the only way it could have succeeded is to allow the terrorists to come in and for the terrorists to have been dealt with in the way they were dealt with as far as the surveillance is concerned."

36. While Soldiers E and F made reference to the preferred military option as being to intercept and arrest the suspects in the frontier area, it appears not to have been pursued with any conviction, on the assumption that identification would not be possible in light of the brief time available for identification to be made (10 to 15 seconds per car) and the lack of prior warning from the Spanish side.

3. Arrest options: Advisory Group policy

37. Soldier F stated that the military option had been refined down to the preferred option of arresting the suspects when they were on foot in the assembly area, to disarm them and then to defuse the bomb. He referred also to four key indicators formulated by the Advisory Group with a view to guiding the Commissioner:

1. if a car was driven into Gibraltar and parked in the assembly area by an identified member of the active service unit;
2. if a car was driven into the assembly area by an ASU member without prior warning;
3. the presence in Gibraltar of the other members of the ASU;
4. if there was clear indication that terrorists having parked their car bomb intended to leave Gibraltar, that is to say, they were heading for the border.

The plan was for an arrest to be carried out once all the members of the ASU were present and identified and they had parked a car which they intended to leave. Any earlier action was considered premature as likely to raise suspicion in any unapprehended members of the ASU with possible risk resulting and as leaving no evidence for the police to use in court.

4. Sighting of Mr Savage

38. Detective Constable Viagas was on surveillance duty in a bank which had a view over the area in which the car driven in by the terrorists was expected to be parked. At about 12.30 hours, he heard a report over the surveillance net that a car had parked in a parking space in the assembly area under observation. A member of the Security Service commented that the driver had taken time to get out and fiddled with something between the seats. DC Viagas saw the man lock the car door and walk away towards the Southport Gate. One of the Security Service officers present consulted a colleague as to possible identification but neither was sure. A field officer was requested to confirm the identity. DC Viagas could not himself identify the man from his position.

39. Witness N of the Security Service team on surveillance in the car-park in the assembly area recalled that at 12.45 hours a white Renault car drove up and parked, the driver getting out after two to three minutes and walking away. A young man resembling the suspect was spotted next at about 14.00 hours in the area. Witness H, who was sent to verify his identification, saw the suspect at about that time and recognised him as Savage without difficulty. Witness N also saw the suspect at the rear of John Mackintosh Hall and at 14.10 hours reported over the radio to the operations room that he identified him as Savage and also as the man who had earlier parked the car in the assembly area.

Officer Q who was on duty on the street recalled hearing over the surveillance net at about 14.30 hours that Savage had been identified.

40. The Commissioner however did not recollect being notified about the identification of Savage until he arrived in the operations room at 15.00 hours. Colombo did not recall hearing anything about Savage either until it was reported that he had met up with two other suspects at about 14.50 hours. Soldiers E and F recalled however that a possible sighting of Savage was reported at about 14.30 hours. Soldier G also refers to the later sighting at 14.50 hours as the first identification of Savage.

41. There appears to have been a certain time-lag between information on the ground either being received in the operations room or being passed on. Soldiers E and F may have been more aware than the Commissioner of events since they were monitoring closely the information coming in over the nets, which apparently was not audible to the Commissioner where he sat at a table away from the control stations. 42. The suspect was followed for approximately an hour by Witness H who recalled that the suspect was using anti-surveillance techniques such as employing devious routes through the side streets. Witness N was also following him, for an estimated 45 minutes, and considered that he was alert and taking precautions, for example stopping round the corner at the end of alleyways to see who followed.

5. Sighting of Mr McCann and Ms Farrell

43. Witness M who was leading the surveillance at the border stated that two suspects passed the frontier at about 14.30 hours though apparently they were initially not clearly identified. They were on foot and reportedly taking counter-surveillance measures (Farrell looking back frequently). Their progress into Gibraltar was followed.

44. At 14.30 hours, Soldiers E and F recalled a message being received that there was a possible sighting of McCann and Farrell entering on foot. The Commissioner was immediately informed.

6. Sighting of three suspects in the assembly area

45. At about 14.50 hours, it was reported to the operations room that the suspects McCann and Farrell had met with a second man identified as the suspect Savage and that the three were looking at a white Renault car in the car-

park in the assembly area.

Witness H stated that the three suspects spent some considerable time staring across to where a car had been parked, as if, in his assessment, they were studying it to make sure it was absolutely right for the effect of the bomb. DC Viagas also witnessed the three suspects meeting in the area of the car-park, stating that all three turned and stared towards where the car was parked. He gave the time as about 14.55 hours. He stated that the Security Services made identification of all three at this moment.

At this moment, the possibility of effecting an arrest was considered. There were different recollections. Mr Colombo stated that he was asked whether he would hand over control to the military for the arrest but that he asked whether the suspects had been positively identified; he was told that there was 80% identification. Almost immediately the three suspects moved away from the car through the Southport Gate. He recalled that the movement of the three suspects towards the south gave rise to some discussion as to whether this indicated that the three suspects were on reconnaissance and might return for the car. It was for this reason that the decision was taken not to arrest at this point.

46. At 15.00 hours, Mr Colombo rang the Commissioner to inform him that it was more and more likely to be McCann and Farrell. When the Commissioner arrived shortly afterwards, Mr Colombo informed him that the suspects McCann and Farrell had met up with a third person thought to be Savage and that an arrest had almost been made.

47. The Commissioner asked for positive identification of the three suspects. Identification was confirmed by 15.25 hours when it was reported to the operations room that the three suspects had returned to the assembly area and gone past looking at the car again. The three suspects continued north and away from the car. Soldiers E and F recalled that control was passed to the military but immediately taken back as the Commissioner requested further verification of the identities of the suspects. The confirmation of identity which the Commissioner had requested was received almost immediately.

7. Examination of the suspect car in the assembly area

48. After the three suspects' identities had been confirmed and they had moved away from the assembly area, Soldier G examined the suspect car. He conducted an examination from the exterior without touching the car. He described it as a newish-looking white Renault. He detected nothing untoward inside the car or anything visibly out of place or concealed under the seats. He noted that the aerial of the car, which was rusty, was out of place with the age of the car. He was in the area for less than two minutes. He returned to the operations room and reported to the Commissioner that he regarded the car as a "suspect car bomb". At the inquest, he explained that this was a term of art for a car parked in suspicious circumstances where there is every reason to believe that it is a car bomb and that it could not be said that it was not a car bomb.

49. The Commissioner recalled that G had reported that it was a suspect car bomb since there was an old aerial situated centrally of a relatively new car. He stated that as a result they treated it as a "possible car bomb".

50. Soldier F referred to the aerial as rendering the car suspicious and stated that this information was passed on to all the parties on the ground.

51. Soldier E was more categorical and stated that as far as G could tell "from a cursory visual examination he was able to confirm our suspicion that they were dealing with a car bomb".

52. Soldier A stated that he believed 100 per cent that there was a bomb in the debussing area, that the suspects had

remote-control devices and were probably armed. This was what he had been told over the radio. Soldier C recalled that it had been confirmed by Soldier E that there was a device in Ince's Hall area which could be detonated by one of three suspects who was more likely to be Savage because he had been seen "fiddling" with something in the car earlier. He had also been told of the indication of an old aerial on a new car.

Soldier D said that it had been confirmed to him by Soldier E that there was a bomb there. To his recollection, no one told them that there was a possibility that the three suspects might not be carrying the remote-control devices with them on the Sunday or that possibly they had not brought a bomb in. He had been told by Soldier E - whom he fully trusted - that there was a bomb in the car.

53. At the inquest Soldier G was described as being the bomb-disposal adviser. He had experience of dealing with car bombs in Northern Ireland but at the inquest he stated in reply to various questions that he was neither a radio-communications expert nor an explosives expert. He had not thought of de-activating the suspect bomb by unscrewing the aerial from the car. When it was put to him in cross-examination, he agreed that to have attempted to unscrew the aerial would have been potentially dangerous.

8. Passing of control to the military for arrest

54. After receiving the report from Soldier G and in view of the fact that the three suspects were continuing northwards leaving the car behind, the Commissioner decided that the three suspects should be arrested on suspicion of conspiracy to murder. At 15.40 hours, he signed a form requesting the military to intercept and apprehend the suspects. The form, which had been provided in advance by the military, stated:

> "I, Joseph Luis Canepa, Commissioner of Police, having considered the terrorist situation in Gibraltar and having been fully briefed on the military plan with firearms, request that you proceed with the military option which may include the use of lethal force for the preservation of life."

After the form was signed, Soldier F walked across to the tactical net and issued instructions that the military should intervene.

Soldier E ascertained the positions of the soldiers by radio. Soldiers C and D had been visually monitoring the movement of the three suspects in Line Wall Road and Smith Dorrien Avenue. Soldiers A and B were making their way north through Casemates Square and into the Landport tunnel. The soldiers were informed that control had passed to them to make an arrest.

55. The evidence at the inquest given by the soldiers and Police Officer R and DC Ullger was that the soldiers had practised arrest procedures on several occasions with the police before 6 March 1988. According to these rehearsals, the soldiers were to approach the suspects to within a close distance, cover the suspects with their pistols and shout "Stop. Police. Hands up." or words to that effect. They would then make the suspects lie on the ground with their arms away from their bodies until the police moved in to carry out a formal arrest. Further, DC Ullger stated that special efforts had been made to identify a suitable place in Gibraltar for the terrorists to be held in custody following their arrest.

56. On reaching the junction of Smith Dorrien Avenue with Winston Churchill Avenue, the three suspects crossed the road and stopped on the other side talking. Officer R, observing, saw them appear to exchange newspapers. At this point, Soldiers C and D were approaching the junction from Smith Dorrien Avenue. Soldiers A and B emerging from Landport tunnel also saw the three suspects at the junction from their position where the pathway to the tunnel joined Corral Road.

57. As the soldiers converged on the junction, however, Savage split away from suspects McCann and Farrell turning south towards the Landport tunnel. McCann and Farrell continued north up the right-hand pavement of

Winston Churchill Avenue.

58. Savage passed Soldiers A and B, brushing against the shoulder of B. Soldier B was about to turn to effect the arrest but A told him that they should continue towards suspects McCann and Farrell, knowing that C and D were in the area and that they would arrest Savage. Soldiers C and D, aware that A and B were following suspects McCann and Farrell, crossed over from Smith Dorrien Avenue and followed Savage.

9. McCann and Farrell shootings

59. The evidence of Soldiers A and B at the inquest was to the following effect.

60. Soldiers A and B continued north up Winston Churchill Avenue after McCann and Farrell, walking at a brisk pace to close the distance. McCann was walking on the right of Farrell on the inside of the pavement. He was wearing white trousers and a white shirt, without any jacket. Farrell was dressed in a skirt and jacket and was carrying a large handbag.

61. When Soldier A was approximately ten metres (though maybe closer) behind McCann on the inside of the pavement, McCann looked back over his left shoulder. McCann appeared to look directly at A and the smile left his face, as if he had a realisation of who A was and that he was a threat.

Soldier A drew his pistol, intending to shout a warning to stop at the same time, though he was uncertain if the words actually came out. McCann's hand moved suddenly and aggressively across the front of his body. A thought that he was going for the button to detonate the bomb and opened fire. He shot one round into McCann's back from a distance of three metres (though maybe it may have been closer). Out of the corner of his eye, A saw a movement by Farrell. Farrell had been walking on the left of McCann on the side of the pavement next to the road. A saw her make a half turn to the right towards McCann, grabbing for her handbag which was under her left arm. A thought that she was also going for a button and shot one round into her back. He did not disagree when it was put to him that the forensic evidence suggested that he may have shot from a distance of three feet (see paragraph 111 below). Then A turned back to McCann and shot him once more in the body and twice in the head. A was not aware of B opening fire as this was happening. He fired a total of five shots.

62. Soldier B was approaching directly behind Farrell on the road side of the pavement. He was watching her. When they were three to four metres away and closing, he saw in his peripheral vision that McCann turned his head to look over his shoulder. He heard what he presumed was a shout from A which he thought was the start of the arrest process. At almost the same instant, there was firing to his right. Simultaneously, Farrell made a sharp movement to her right, drawing the bag which she had under her left arm across her body. He could not see her hands or the bag and feared that she was going for the button. He opened fire on Farrell. He deemed that McCann was in a threatening position and was unable to see his hands and switched fire to McCann. Then he turned back to Farrell and continued firing until he was certain that she was no longer a threat, namely, her hands away from her body. He fired a total of seven shots.

63. Both soldiers denied that Farrell or McCann made any attempt to surrender with their hands up in the air or that they fired at the two suspects when they were lying on the ground. At the inquest, Soldier A stated expressly that his intention had been to kill McCann "to stop him becoming a threat and detonating that bomb".

64. The shooting took place on the pavement in front of a Shell petrol station in Winston Churchill Avenue.

After the shooting, the soldiers put on berets so they would be recognised by the police. They noticed a police car, with its siren going, coming south from the sundial down the far side of Winston Churchill Avenue. A number of policemen jumped out of the car and leapt the central barrier. Soldier A still had his pistol in his hand. He put his hands up in the air and shouted "Police". A recalled hearing shooting from behind as the police car was approaching.

While neither of the soldiers was aware of the police car or siren until after the shooting, the majority of witnesses, including the police officers P, Q and R who were in the vicinity to support the soldiers in the arrest and a number of the surveillance team as well as civilian witnesses, recalled that the sound of the police siren preceded, if only by a very short time, the sound of the gunfire. Officers P and Q, who were watching from a relatively close distance, considered that Farrell and McCann reacted to the sound of the siren: Q was of the opinion that it was the siren that caused Farrell and McCann to stop and turn.

65. The arrival of the police car at the scene was an unintended occurrence. After the Commissioner had handed over control to the military at 15.40 hours, he instructed Mr Colombo to ensure that there was police transport available. Mr Colombo telephoned Chief Inspector Lopez at the Central Police Station, who in turn instructed the Controller Police Constable Goodman to recall the duty police car. The Controller recorded the call at 15.41 hours. He radioed the patrol car informing the officers that they were to return immediately. He did not know where the car was at the time or what the reason for the recall was. When Inspector Revagliatte who was in the car asked if it was urgent, the Controller told him it was a priority message and further instructions would be given on arrival.

66. At the time of the message, the police car was waiting in a queue of traffic in Smith Dorrien Avenue. Revagliatte told the driver to put on siren and beacons. The car pulled out into the opposite lane to overtake the queue of traffic. They cut back into the proper lane at the lights at the junction with Winston Churchill Avenue and continued north along Winston Churchill Avenue in the outer lane. As they passed the Shell garage, the four policemen in the car heard shots. Revagliatte instructed the driver to continue. When he looked back, he saw two persons lying on the pavement. The car went round the sundial roundabout and returned to stop on the other side of the road opposite the Shell garage. The police siren was on during this time. When the car stopped, the four policemen got out, three of them jumping the central barrier and Revagliatte walking round to arrive at the scene.

67. Officers P, Q and R were in the vicinity of the Shell petrol station and also arrived quickly on the scene of the McCann and Farrell shootings. Officers P and R placed their jackets over the bodies. Officer P dropped his gun while crouched and had to replace it in his holster. Officer Q and Revagliatte carried out a search of the bodies.

10. Eyewitness accounts of the McCann and Farrell shootings

68. The shooting took place on a fine Sunday afternoon, when there were many people out on the streets and the roads were busy with traffic. The Shell garage was also overlooked by a number of apartment buildings. The shooting consequently was witnessed by a considerable number of people, including police officers involved in the operation, police officers who happened to pass the area on other duties, members of the surveillance team and a number of civilians and off-duty policemen.

69. Almost all the witnesses who gave evidence at the inquest recalled that Farrell had carried her bag under her right arm, not as stated by Soldiers A and B under her left arm. The Coroner commented in his summing-up to the jury that this might have had significance with regard to the alleged justification of the soldiers for opening fire, namely, the alleged movement of the bag across the front of her body.

70. More significantly, three witnesses, two of whom gave an interview on the controversial television documentary concerning the events "Death on the Rock", gave evidence which suggested that McCann and Farrell had been shot while lying on the ground. They stated that they had witnessed the shooting from apartment buildings overlooking the Shell petrol station (see paragraph 125 below).

71. Mrs Celecia saw a man lying on a pavement with another nearby with his hands outstretched: while she did not see a gun she heard shots which she thought came from that direction. After the noise, the man whom she had thought was shooting appeared to put something inside his jacket. When shown a photograph of the aftermath of the scene, Mrs Celecia failed to identify either Soldier A or B as the man whom she thought that she had seen shooting.

72. Mr Proetta saw a girl put her hands up though he thought it was more in shock than in surrender. After she had been shot and fallen to the ground, he heard another fusillade of shots. He assumed that the men nearby were continuing to fire but agreed that there was an echo in the area and that the sound could have come from the Landport tunnel area.

Mrs Proetta saw a man and a woman raise their hands over their shoulders with open palms. They were shot, according to her recollection, by men who jumped the barrier. When the bodies were on the ground, she heard further shots and saw a gun in the hand of a man crouching nearby, though she did not see any smoke or cartridges ejecting from the gun. She assumed since she saw a gun that the shots came from it. It also appears that once the bodies fell they were obscured from her view by a low wall and all she saw was a man pointing in their direction.

73. Mr Bullock recalled seeing a man reeling backwards under fire with his hands thrown back.

None of the other witnesses saw McCann or Farrell put their hands up or the soldiers shoot at the bodies on the ground.

74. Witness I, a member of the surveillance team, stated that he saw McCann and Farrell shot when they were almost on the ground, but not on the ground.

75. While the soldiers were not sure that any words of warning were uttered by Soldier A, four witnesses (Officers P and Q, Witness K and Police Constable Parody) had a clear recollection of hearing words "Police, Stop" or words to that effect.

76. Officer P, who was approaching from the north and had reached the perimeter wall of the Shell garage, states that he saw McCann make a move as if going for a gun and that Farrell made a move towards her handbag which made him think that she was going for a detonator. Officer Q, who was watching from the other side of the road, also saw Farrell make a move towards her handbag, as did Police Constable Parody, an off-duty policeman watching from an overlooking apartment.

11. The shooting of Savage

77. At the inquest the evidence of Soldiers C and D was to the following effect.

78. After the three suspects had split up at the junction, Soldier D crossed the road and followed Savage who was heading towards the Landport tunnel. Savage was wearing jeans, shirt and a jacket. Soldier C was briefly held up on the other side of the road by traffic on the busy road but was catching up as D closed in on Savage. D

intended to arrest by getting slightly closer, drawing his pistol and shouting "Stop. Police. Hands up". When D was about three metres away, he felt that he needed to get closer because there were too many people about and there was a lady directly in line. Before D could get closer however, he heard gunfire to the rear. At the same time, C shouted "Stop". Savage spun round and his arm went down towards his right hand hip area. D believed that Savage was going for a detonator. He used one hand to push the lady out of line and opened fire from about two to three metres away. D fired nine rounds at rapid rate, initially aiming into the centre of Savage's body, with the last two at his head. Savage corkscrewed as he fell. D acknowledged that it was possible that Savage's head was inches away from the ground as he finished firing. He kept firing until Savage was motionless on the ground and his hands were away from his body.

79. Soldier C recalled following after Savage, slightly behind D. Savage was about eight feet from the entrance to the tunnel but maybe more. C's intention was to move forward to make arrest when he heard shots to his left rear from the direction in which Farrell and McCann had headed. Savage spun round. C shouted "Stop" and drew his pistol. Savage moved his right arm down to the area of his jacket pocket and adopted a threatening and aggressive stance. C opened fire since he feared Savage was about to detonate the bomb. He saw something bulky in Savage's right hand pocket which he believed to be a detonator button. He was about five to six feet from Savage. He fired six times as Savage spiralled down, aiming at the mass of his body. One shot went into his neck and another into his head as he fell. C continued firing until he was sure that Savage had gone down and was no longer in a position to initiate a device.

80. At the inquest, both soldiers stated under cross-examination that once it became necessary to open fire they would continue shooting until the person was no longer a threat. C agreed that the best way to ensure this result was to kill. D stated that he was firing at Savage to kill him and that this was the way that all soldiers were trained. Both soldiers, however, denied that they had shot Savage while he was on the ground.

Soldier E (the attack commander) stated that the intention at the moment of opening fire was to kill since this was the only way to remove the threat. He added that this was the standard followed by any soldier in the army who opens fire.

81. The soldiers put on berets after the incident to identify themselves to the police.

12. Eyewitness accounts of the Savage shooting

82. Witnesses H, I and J had been involved in surveillance of the three suspects in or about the Smith Dorrien/Winston Churchill area.

83. Witness H had observed Soldiers A and B moving after McCann and Farrell up Winston Churchill Avenue. He moved to follow Savage whom he noticed on the corner about to turn into the alleyway leading to the Landport tunnel. He indicated Savage to Soldiers C and D who were accompanying him at this point. While he was moving to follow Savage, H saw the McCann and Farrell shooting from a distance. He continued to follow after Savage, who had gone into the alleyway. He heard a siren, a shout of "Stop" and saw Savage spin round. The soldiers were five feet away from Savage. H then turned away and did not witness the shooting itself.

84. Witness I had met with Witness H and Soldier D and had confirmed that Savage had gone towards the Landport tunnel. Witness I entered the alleyway after the shooting had begun. He saw one or two shots being fired at Savage who was on the ground. He saw only one soldier firing from a distance of five, six or seven feet. He did not see the soldier put his foot on Savage's chest while shooting.

85. Witness J had followed after Savage when he had separated from McCann and Farrell. When Savage was twenty feet into the alleyway near a large tree, she heard noise of gunfire from behind and at that same time a police siren in fairly close proximity. Savage spun round very quickly at the sound of gunfire, looking very stunned. J turned away and did not see the shooting. When she turned round again, she saw Savage on his back and a soldier standing over him saying, "Call the police".

86. Mr Robin Mordue witnessed part of the shooting but as he fell to the ground himself and later took cover behind a car he saw only part of the incident. He did not recall Savage running. When he saw the soldier standing over Savage, there were no more shots.

87. The evidence of Mr Kenneth Asquez was surrounded by the most controversy. A handwritten statement made by him appears to have been used by Thames Television in its documentary "Death on the Rock" (see paragraph 125 below). The draft of an affidavit, prepared by a lawyer acting for Thames Television who interviewed Mr Asquez, but not approved by him, was also used for the script of the programme. In them, he alleged that while in a friend's car on the way to the frontier via Corral Road, he passed the Landport tunnel. He heard "crackers" and saw a man bleeding on the floor. He saw another man showing an ID card and wearing a black beret who had his foot on the dying man's throat and was shouting, "Stop. It's OK. It's the police". At that instant, the man fired a further three to four shots. At the inquest, he stated that the part of the statement relating to the shooting was a lie that he had made up. He appeared considerably confused and contradicted himself frequently. When it was pointed out to him that until the inquest it had not become known that the soldiers wore berets (no newspaper report had mentioned the detail), he supposed that he must have heard it in the street. When asked at the inquest why he had made up the statement, he referred to previous illness, pressure at work and the desire to stop being telephoned by a person who was asking him to give an interview to the media.

88. Miss Treacy claimed that she was in the path leading from the tunnel and that she was between Savage and the first of the soldiers as the firing began, though not in the line of fire. She recalled that Savage was running and thought that he was shot in the back as he faced towards the tunnel. She did not see him shot on the ground. Her account contained a number of apparent discrepancies with the evidence of other witnesses; she said the soldier shot with his left hand whereas he was in fact right-handed; no one else described Savage as running; and she described the body as falling with feet towards the nearby tree rather than his head which was the way all the other witnesses on the scene described it. The Coroner in his summing-up thought that it might be possible to reconcile her account by the fact that Miss Treacy may have not been looking at Savage as he spun round to face the soldiers and that by the time she did look he was spinning round towards the tunnel in reaction to the firing. 89. Mr Bullock and his wife stated that a man pushed past them as they walked up Smith Dorrien Avenue to the junction and that they saw that he had a gun down the back of his trousers. They saw him meet up with another man, also with a gun in his trousers, on the corner of the alleyway to the Landport tunnel. The men were watching the shooting outside the Shell garage and, when the shooting stopped, they turned and ran out of sight. After that there was another long burst of shooting.

90. Another witness, Mr Jerome Cruz, however, who was in a car in the traffic queue in Smith Dorrien Avenue and who remembered seeing Mr Bullock dive for cover, cast doubts on his version. In particular, he stated that Mr Bullock was not near the end of Smith Dorrien Avenue but further away from the Shell garage (more than 100 yards away) and that he had dived for cover as soon as there was the sound of shooting. He agreed that he had also seen persons crouching looking from behind a wall at the entrance to the pathway leading to the tunnel.

13. Events following the shootings

91. At 15.47-15.48 hours, E received a message in the operations room that apprehension of the three suspects had taken place. It was not clear at that stage whether they had been arrested or shot. By 16.00 to 16.05 hours, the report was received in the operations room that the three suspects had been shot.

92. At 16.05-16.06 hours, Soldier F handed a form to the Commissioner returning control. According to the transcript of the evidence given by the Commissioner at the inquest, this form addressed to him by Soldier F stated that "at 16.06 hours on 6 March a military assault force was completed at the military option in respect of the terrorist bombing ASU in Gibraltar. Control is hereby handed back to the Civil Power". Deputy Commissioner Colombo telephoned to Central Station for the evacuation plans to be put into effect. Instructions were also given with a view to taking charge of the scenes of the incidents. Soldier G was also instructed to commence the clearance of the car.

93. After the shooting, the bodies of the three suspects and Farrell's handbag were searched. No weapons or detonating devices were discovered.

94. At the Shell garage scene, the shell cases and cartridges were picked up without marking their location or otherwise recording their position. The positions of the bodies were not marked.

95. At the scene of the Savage shooting, only some of the cartridge positions were marked. No police photographs were taken of the bodies' positions. Inspector Revagliatte had made a chalk outline of the position of Savage's body. Within that outline, there were five strike marks, three in the area of the head.

96. Chief Inspector Lopez ordered a general recall of personnel and went directly to the assembly area to begin cordoning it off. The fire brigade also arrived at the assembly area.

The bomb-disposal team opened the suspect white Renault car but found no explosive device or bomb. The area was declared safe between 19.00 and 20.00 hours.

H. Police investigation following the shootings

97. Chief Inspector Correa was appointed in charge of the investigation.

98. Inside Farrell's handbag was found a key ring with two keys and a tag bearing a registration number MA9317AF. This information was passed at about 17.00 hours to the Spanish police who commenced a search for the car on the suspicion that it might contain explosives. During the night of 6 to 7 March, the Spanish police found a red Ford Fiesta with that registration number in La Linea. Inside the car were found keys for another car, registration number MA2732AJ, with a rental agreement indicating that the car had been rented at 10.00 hours on 6 March by Katharine Smith, the name on the passport carried in Farrell's handbag.

99. At about 18.00 hours on 8 March, a Ford Fiesta car with registration number MA2732AJ was discovered in a basement car-park in Marbella. It was opened by the Malaga bomb-disposal squad and found to contain an explosive device in the boot concealed in the spare-wheel compartment. The device consisted of five packages of Semtex explosive (altogether 64 kg) to which were attached four detonators and around which were packed 200 rounds of ammunition. There were two timers marked 10 hrs 45 mins and 11 hrs 15 mins respectively. The device was not primed or connected.

100. In the report compiled by the Spanish police on the device dated Madrid 27 March 1988, it was concluded that there was a double activating system to ensure explosion even if one of the timers failed; the explosive was hidden in the spare-wheel space to avoid detection on passing the Spanish/Gibraltarian customs; the quantity of

explosive and use of cartridges as shrapnel indicated the terrorists were aiming for greatest effect; and that it was believed that the device was set to explode at the time of the military parade on 8 March 1988.

101. Chief Inspector Correa, who acted also as Coroner's Officer, traced and interviewed witnesses of the shooting of the three suspects. Police officers visited residences in the area knocking on doors and returning a second time when persons were absent. The Attorney-General made two or three appeals to the public to come forward. At the inquest, Inspector Correa commented that the public appeared more than usually reluctant to come forward to give statements to the police.

102. A post-mortem was conducted in respect of the three deceased suspects on 7 March 1988. Professor Watson, a highly qualified pathologist from the United Kingdom, carried out the procedure. His report was provided to a pathologist, Professor Pounder, instructed by the applicants. Comment was later made at the inquest by both pathologists with regard to defects in the post-mortem procedures. In particular, the bodies had been stripped before Professor Watson saw them, depriving him of possible aid in establishing entry and exit wounds, there had been no X-ray facilities and Professor Watson had not later been provided either with a full set of photographs for reference, or the forensic and ballistics reports.

I. THE GIBRALTAR INQUEST

103. An inquest by the Gibraltar Coroner into the killings was opened on 6 September 1988. The families of the deceased (which included the applicants) were represented, as were the SAS soldiers and the United Kingdom Government. The inquest was presided over by the Coroner, who sat with a jury chosen from the local population.

104. Prior to the inquest, three certificates to the effect that certain information should not, in the public interest, be disclosed, were issued by the Secretary of State for the Home Department, the Secretary of State for Defence and the Deputy Governor of Gibraltar, dated respectively 26 August, 30 August and 2 September 1988. These stated that the public interest required that the following categories of information be protected from disclosure:

1. In the case of the seven military witnesses, the objection was to the disclosure of any information or documents which would reveal:

(i) their identity;

(ii) the identity, location, chains of command, method of operation and the capabilities of the units with which the soldiers were serving on 6 March 1988;

(iii) the nature of their specialist training or equipment;

(iv) the nature of any previous operational activities of the soldiers, or of any units with which any of them might at any time have served;

(v) in the case of Soldier G (the ammunition technical officer), any defence intelligence information, activities or operations (and the sources of intelligence), including those on the basis of which his assessments were made and details of security forces counter-measures capabilities, including methods of operation, specialist training and equipment.

2. In the case of Security Service witnesses, the objection was to the disclosure of information which would reveal:

(a) the identities of members of the Security Service, and details of their deployment, training and equipment;

(b) all sources of intelligence information;

(c) all details of the activities and operations of the Security Service.

105. As was, however, expressly made clear in the certificates, no objection was taken to the giving of evidence by either military or Security Service witnesses as to:

(i) the nature of the information relating to the feared IRA plot, which was transmitted to the Commissioner of Police and others concerned (including general evidence as to the nature of a Provisional IRA active service unit);

(ii) the assessments made by Soldier G as to the likelihood of, and the risks associated with, an explosive device and as to the protective measures which might have to be taken;

(iii) the events leading up to the shootings on 6 March 1988 and the circumstances surrounding them, including evidence relating to the transfer of control to the military power.

106. The inquest lasted until 30 September and during the nineteen days it sat, evidence was heard from seventy-nine witnesses, including the soldiers, police officers and surveillance personnel involved in the operation. Evidence was also heard from pathologists, forensic scientists and experts in relation to the detonation of explosive devices.

1. Pathologists' evidence at the inquest

107. Evidence was given by Professor Watson, the pathologist who had conducted the post-mortem on the deceased on 7 March 1988 and also by Professor Pounder called on behalf of the applicants (see paragraph 102 above).

108. Concerning Farrell, it was found that she had been shot three times in the back, from a distance of some three feet according to Professor Pounder. She had five wounds to the head and neck. The facial injuries suggested that either the entire body or at least the upper part of the body was turned towards the shooter. A reasonable scenario consistent with the wounds was that she received the shots to the face while facing the shooter, then fell away and received the shots to the back. Professor Watson agreed that the upward trajectory of the bullets that hit Farrell indicated that she was going down or was down when she received them. Altogether she had been shot eight times.

109. Concerning McCann, he had been shot in the back twice and had three wounds in the head. The wound on the top of the head suggested that the chest wounds came before the head wound and that he was down or very far down when it was inflicted. The shots to the body were at about a 45-degree angle. He had been hit by five bullets. 110. Concerning Savage, he had been hit by sixteen bullets. He had seven wounds to the head and neck, five on the front of the chest, five on the back of the chest, one on the top of each shoulder, three in the abdomen, two in the left leg, two in the right arm and two on the left hand. The position of the entry wounds suggested that some of the wounds were received facing the shooter. But the wounds in the chest had entered at the back of the chest. Professor Watson agreed that Savage was "riddled with bullets" and that "it was like a frenzied attack". He agreed that it would be reasonable to suppose from the strike marks on the pavement that bullets were fired into Savage's head as he lay on the ground. Professor Pounder also agreed that the evidence from strike marks on the ground and the angle and state of wounds indicated that Savage was struck by bullets when lying on his back on the ground by a person shooting standing towards his feet. He insisted under examination by counsel for the soldiers that the three strike marks on the ground within the chalk outline corresponded with wounds to the head. In his view "those wounds must have been inflicted when either the

head was on the ground or very close to the ground indeed" and when pressed "within inches of the ground". 2. Forensic evidence at the inquest

111. A forensic scientist specialising in firearms had examined the clothing of the three deceased for, inter alia, powder deposits which would indicate that shots had been fired at close range. He found signs of partly burnt propellant powder on the upper-right back of Farrell's jacket and upper-left front of Savage's shirt which suggested close-range firing. He conducted tests which indicated that such a result was only obtained with a Browning pistol at a range of up to six feet. The density on Farrell's jacket indicated a muzzle-to-target range of three feet and on Savage's shirt of four to six feet.

3. Evidence relating to detonation devices

112. Issues arose at the inquest as to whether, even if the three suspects had been carrying remote-control devices, they would have been able to detonate the suspected bomb which was approximately 1.4 km from the place where they were shot. Also it was questioned whether the soldiers could reasonably have expected that the applicants could have concealed the devices on their persons without it being apparent and whether in fact the device could have been detonated by pressing only one button.

113. Mr Feraday gave evidence for the Crown. He was a forensic scientist employed at Explosives Forensic Laboratory at Royal Armament Research and Development Establishment, with thirty-three years experience of explosives. He produced an ICOM IC2 transmitter, as an example of a device used in Northern Ireland, which was the size of a standard commercial walkie-talkie. It was also produced in evidence by the Government to both the Commission and Court in the Strasbourg proceedings (see paragraph 130 below).

While referring to the factors which could affect the range (for example, terrain, weather conditions) Mr Feraday stated that the equipment could, in optimum conditions, operate up to a thirty-mile range. In his opinion, the aerial on the suspect car could have received a signal though its efficiency would have been fairly poor as it was not the right length for the frequency. He considered that one would have to assume that from the distance of about a mile a bomb could be detonated by remote control using that aerial.

114. The applicants called Dr Scott, who held a masters degree and doctorate in engineering and was a licensed radio operator. He had been involved in two IRA trials in England. He had conducted tests with similar receivers along the route taken by the three suspects. He referred to the fact that there was rising ground between the sites of the shootings and the assembly area as well as a thick wall and a considerable number of buildings. The IRA used encoders and decoders on their devices to prevent spurious signals detonating their bombs: this required that a good clean signal be received. Having regard to the facts that the aerial, which "was a joke" from the point of view of effectiveness, the wrong length for the expected frequency and pointing along the roof rather than standing vertically, he stated that in his professional opinion the purported receiver could not have been detonated by a transmitter in the circumstances of the case. He also stated that the bomb could have been neutralised by removing the car aerial and that such a manoeuvre would not have destabilised the explosive device.

115. Dr Scott also explained how the transmitter would operate. Assuming the dial setting the frequency was already set, it would be necessary to activate the on/off power switch, followed by the on/off switch on the encoder and then a third button would have to be pressed in order to transmit. While it would be possible to set the device so that it would be necessary to press one button (the transmit button) in order to detonate a bomb, this would require leaving the power switches on for both the transmitter and the encoder with the risk that the batteries would run down. There would also be the risk that the device might be set off accidentally by being bumped in the street or being hit by a bullet or by a person falling awkwardly so as to hit the edge of a pavement or bench.

116. Captain Edwards was called by the lawyer representing the soldiers to rebut this evidence. He was a member of the Royal Corps of Signals and had experience in VHF/HF radio in combat net radio spectrum. He carried out tests to see if voice communications were possible on an ICOM-type radio in the area of or from the Shell garage to Ince's Hall. The equipment used was not identical to that of Dr Scott. He stated that it was possible to receive both voice communication and a single audio tone at the site of the shootings from the assembly area. He did not however use an encoder and his equipment was matched and compatible. Mr Feraday was also recalled. He gave the opinion that if a weak voice communication could be received then the signal would be sufficient to set off a bomb.

117. It appears to have been accepted by all that the IRA have developed the use of high-frequency devices, which require shorter aerials and have a surer line-of-sight effect. These are stated to have the characteristics suitable for detonation when the operator of the device has line of sight of the bomb and carry with them less possibility of interference from other radio sources or countermeasures. No examples were known or at least given as to this type of remote-control detonation being used other than in line-of-sight conditions.

4. Submissions made in the course of the inquest

118. At the inquest, the representative of the applicants, Mr P.J. McGrory, questioned the witnesses and made submissions to the effect, inter alia, that either the decision to shoot to kill the suspects had been made by the United Kingdom Government prior to the incident and the soldiers were ordered to carry out the shootings, or that the operation was planned and implemented in such a way that the killing of the suspects by the soldiers was the inevitable result. In any event, in light of the circumstances, the use of lethal force by the soldiers was not necessary or, if it was necessary, the force used was excessive and therefore not justified. He maintained throughout, however, that he did not challenge that the Commissioner of Police and his officers had acted properly and in good faith.

119. Soldier F (the senior military commander) and Soldier E (the tactical commander) denied that there had been a plan, express or tacit, to execute the suspects. When it was put to Soldiers A, B, C and D, they also denied that they had been sent out either expressly or on the basis of "a nod or a wink" to kill the suspects.

5. The Coroner's address to the jury

120. At the conclusion of the inquest, the Coroner addressed the jury in respect of the applicable law, in particular, Article 2 of the Gibraltar Constitution (see paragraph 133 below). As inquest proceedings did not allow for the parties to make submissions to the jury, he summed up the respective propositions of the applicants' representatives and the representatives of the soldiers and the Crown referring to the evidence. He concluded from the evidence given by the soldiers that when they opened fire they shot intending to kill and directed the jury as to the range of possible verdicts:

> "... If the soldiers set out that day with the express intent to kill that would be murder and it would be right to return a verdict of unlawfully killed. Example two: were you to find in the case of Savage (or any of the other two for that matter) that he was shot on the ground in the head after effectively being put out of action, that would be murder if you come to the conclusion that the soldiers continued to finish him off. In both cases they intended to kill not in self-defence or in the defence of others or in the course of arrest ... so it is murder and you will return a verdict of unlawfully killed. If in this second example you were to conclude that it is killing in pursuance of force used which was more than reasonably necessary, then the verdict should also be killed unlawfully but it would not have been murder. The third example I offer is precisely of that situation. If you accept the account that the soldiers' intention was genuinely to arrest (in the sense that they were to apprehend the three suspects and hand them over live to the Gibraltar police force) and that the execution of the arrest went wrong and resulted in the three deaths because either (a) force was used when it was not necessary or (b) the force that was used was more than was reasonably necessary, then that would not be murder ... and the verdict would be, as I say, unlawfully killed. Example four: if you are satisfied that the soldiers were acting properly but nevertheless the operation was mounted to encompass the deaths of the three suspects to the ignorance of the soldiers, then you would also bring in a verdict of unlawfully killed.

> ...So there are only three verdicts reasonably open to you and these are:
>
> (a) Killed unlawfully, that is unlawful homicide.
>
> (b) Killed lawfully, that is justifiable, reasonable homicide.
>
> (c) Open verdict.
>
> Remembering that you must be satisfied beyond reasonable doubt where the verdict of unlawfully killed is concerned, there are two situations to consider. The first concerning the soldiers themselves, the second if they have been the unwitting tools of a plot to dispose of the three suspects.
>
> As to the first concerning the soldiers themselves, I must tell you that if you are not satisfied beyond a reasonable doubt that they have killed unlawfully, you have then to decide whether your verdict should be an open verdict or one of justifiable homicide. My direction to you is that you should bring in a verdict of justifiable homicide, i.e. killed lawfully, because in the nature of the circumstances of this incident that is what you will have resolved if you do not return a verdict of unlawful homicide in respect of the soldiers themselves. That is the logic of the situation. You may reach a situation in which you cannot resolve either way, in which case the only alternative is to bring in an open verdict, but I must urge you, in the exercise of your duty, to avoid this open verdict. As to the second situation where they are unwitting tools, the same applies ..."

121. The jury returned verdicts of lawful killing by a majority of nine to two.

J. Proceedings in Northern Ireland

122. The applicants were dissatisfied with these verdicts and commenced actions in the High Court of Justice in Northern Ireland against the Ministry of Defence for the loss and damage suffered by the estate of each deceased as a result of their death. The statements of claim were served on 1 March 1990.

123. On 15 March 1990 the Secretary of State for Foreign and Commonwealth Affairs issued certificates under section 40 (3) a of the Crown Proceedings Act 1947, as amended by the Crown Proceedings (Northern Ireland) Order 1981. Section 40 (2) b of the same Act excludes proceedings in Northern Ireland against the Crown in respect of liability arising otherwise than "in respect of Her Majesty's Government in the United Kingdom". A similar exemption applies to the Crown in Northern Ireland pursuant to the 1981 Order. A certificate by the Secretary of State to that effect is conclusive. The certificates stated in this case that any alleged liability of the Crown arose neither in respect of Her Majesty's Government in the United Kingdom, nor in respect of Her Majesty's Government in Northern Ireland.

124. The Ministry of Defence then moved to have the actions struck out. The applicants challenged the legality of the certificates in judicial review proceedings. Leave to apply for judicial review was granted ex parte on 6 July 1990, but withdrawn on 31 May 1991, after a full hearing, on the basis that the application had no reasonable prospects of success. Senior Counsel advised that an appeal against this decision would be futile.

The applicants' High Court actions were struck off on 4 October 1991.

K. The television documentary "Death on the Rock"

125. On 28 April 1988 Thames Television broadcast its documentary entitled "Death on the Rock" (see paragraph 70 above), during which a reconstruction was made of the alleged surveillance of the terrorists' car by the Spanish police and witnesses to the shootings described what they had seen, including allegations that McCann and Farrell had been shot while on the ground. A statement by an anonymous witness was read out to the effect that Savage had been shot by a man who had his foot on his chest. The Independent Broadcasting Authority had rejected a request made by the Foreign and Commonwealth Secretary to postpone the programme until after the holding of the inquest into the deaths.

L. Other evidence produced before the Commission and Court

1. Statement of Chief Inspector Valenzuela

126. While an invitation had been made by the Gibraltar police for a Spanish police officer to attend the inquest to give evidence relating to the role of the Spanish police, he did not attend, apparently since he did not receive permission from his superiors.

127. The Government provided the Commission with a copy of a statement made by Chief Inspector Rayo Valenzuela, a police officer in Malaga, dated 8 August 1988. According to this statement, the United Kingdom police had at the beginning of March provided the Spanish police with photographs of the possible members of the ASU, named as Daniel McCann, Mairead Farrell and Sean Savage. The three individuals were observed arriving at Malaga Airport on 4 March 1988 but trace of them was lost as they left. There was then a search to locate the three suspects during 5 to 6 March 1988.

This statement provided by the Government was not included in the evidence submitted at the inquest, as the Coroner declined to admit it following the objection by Mr P.J. McGrory who considered that it constituted hearsay in the absence of any police officer from Spain giving evidence in person.

2. Statement of Mr Harry Debelius

128. This statement, dated 21 September 1988 and supplied on behalf of the applicants, was made by a journalist who acted as consultant to the makers of the Thames Television programme "Death on the Rock". He stated that the white Renault car used by the ASU was under surveillance by the Spanish authorities as it proceeded down the coast towards Gibraltar. Surveillance is alleged to have been conducted by four to five police cars which "leapfrogged" to avoid suspicion, by helicopter and by agents at fixed observation points. The details of the car's movements were transmitted to the authorities in Gibraltar who were aware of the car's arrival at the border. He refers to the source of this information as being Mr Augustín Valladolid, a spokesman for the Spanish Security Services in Madrid, with whom he and Mr Julian Manyon, a reporter for Thames Television, had an interview lasting from 18.00 to 19.20 hours on 21 March 1988.

129. The applicants intended submitting this statement as evidence before the inquest. The Coroner decided however that it should also be excluded as hearsay on the same basis as the statement relied upon by the Government (see paragraph 127 above).

3. Exhibits provided by the parties

130. An ICOM transmitter device was provided to the Commission and Court by the Government with an improvised encoder attached. The dimensions of the transmitter are 18 cm x 6.5 cm x 3.7 cm; the encoder (which is usually taped to the transmitter and which can be contained in a small flat Strepsil tin) is 8 cm x 9 cm x 3 cm. The aerial from the transmitter is 18 cm long.

4. Further material submitted by the applicants

131. The applicants also submitted a further opinion of Dr Scott, dated 22 October 1993, in which he reiterated his view that it would have been impossible for the three suspects to have detonated a bomb in the target area from the location where they were shot using an ICOM or any other conceivable concealable transmitter/aerial combination, which he maintains must have been well known to the authorities. He also drew attention to the fact that the strength of a hand-held transmitter is severely attenuated when held close to the human body; when transmitting it should be held well clear of the body with the aerial as high as possible.

5. Findings of fact by the Commission

132. In its report of 4 March 1994, the Commission made the following findings on questions of fact:

- that the suspects were effectively allowed to enter Gibraltar to be picked up by the surveillance operatives in place in strategic locations for that purpose (at paragraph 213);

- that there was no evidence to support the applicants' contention of a premeditated design to kill Mr McCann, Ms Farrell and Mr Savage (at paragraph 216);

- that there was no convincing support for any allegation that the soldiers shot Mr McCann and Ms Farrell when they were attempting to surrender or when they were lying on the ground. However the soldiers carried out the shooting from close proximity. The forensic evidence indicated a distance of as little as three feet in the case of Ms Farrell (at paragraphs 222 and 223);

- Ms Farrell and Mr McCann were shot by Soldiers A and B at close range after the two suspects had made what appeared to the soldiers to be threatening movements. They were shot as they fell to the ground but not when they were lying on the ground (at paragraph 224);

- it was probably either the sound of the police siren or the sound of the shooting of Mr McCann and Ms Farrell at the Shell garage, or indeed both, which caused Mr Savage to turn round to face the soldiers who were behind him. It was not likely that Soldiers C and D witnessed the shooting of Mr McCann and Ms Farrell before proceeding in pursuit of Savage (at paragraph 228);

- there was insufficient material to rebut the version of the shooting given by Soldiers C and D. Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he hit the ground. This conclusion was supported by the pathologists' evidence at the subsequent inquest (at paragraphs 229 and 230);

- Soldiers A to D opened fire with the purpose of preventing the threat of detonation of a car bomb in the centre of Gibraltar by suspects who were known to them to be terrorists with a history of previous involvement with explosives (at paragraph 231);

- a timer must in all probability have been mentioned at the Commissioner's operational briefing. For whatever reason, however, it was not a factor which was taken into account in the soldiers' view of the operation (at paragraph 241).

II. RELEVANT DOMESTIC LAW AND PRACTICE

133. Article 2 of the Gibraltar Constitution provides:

"1. No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

2. A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as a result of the use to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable:

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

...

(d) in order to prevent the commission by that person of a criminal offence."

134. The relevant domestic case-law establishes that the reasonableness of the use of force has to be decided on the basis of the facts which the user of the force honestly believed to exist: this involves the subjective test as to what the user believed and an objective test as to whether he had reasonable grounds for that belief. Given that honest and reasonable belief, it must then be determined whether it was reasonable to use the force in question in the prevention of crime or to effect an arrest (see, for example, Lynch v. Ministry of Defence [1983] Northern Ireland Law Reports 216; R v. Gladstone Williams [1983] 78 Criminal Appeal Reports 276, at p. 281; and R v. Thain [1985] Northern Ireland Law Reports 457, at p. 462).

135. The test of whether the use of force is reasonable, whether in self-defence or to prevent crime or effect an arrest, is a strict one. It was described in the following terms in the report of the Royal Commission appointed

to consider the law relating to indictable offences ([1879] 36 House of Lords Papers 117, at p. 167):

"We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes to preserve the public peace and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by or which might reasonably be anticipated from the force used is not disproportionate to the injury or mischief, which it is intended to prevent."

Lord Justice McGonigal in Attorney General for Northern Ireland's Reference ([1976] Northern Ireland Law Reports 169 (Court of Appeal)) stated his understanding of this approach as follows (at p. 187):

"... it appears to me that, when one is considering whether force used in any particular circumstances was reasonable, the test of reasonableness should be determined in the manner set out in that paragraph. It raises two questions:

(a) Could the mischief sought to be prevented have been prevented by less violent means?

(b) Was the mischief done or which could reasonably be anticipated from the force used disproportionate to the injury or mischief which it was intended to prevent?

These are questions to be determined objectively but based on the actions of reasonable men who act in the circumstances and in the light of the beliefs which the accused honestly believed existed and held. Force is not reasonable if

(a) greater than that necessary, or

(b) if the injury it causes is disproportionately greater than the evil to be prevented."

136. The document annexed to the operational order of the Commissioner of Police entitled "Firearms - rules of engagement" provided in so far as relevant:

"General rules

1. Do not use more force than necessary to achieve your objective.

2. If you use firearms you should do so with care for the safety of persons in the vicinity.

3. Warning before firing

(a) A warning should, if practicable, be given before opening fire. It should be as loud as possible and must include an order to stop attacking and a statement that fire will be opened if the orders are not obeyed.

(b) You may fire without warning in circumstances where the giving of a warning or any delay in firing could lead to death or serious injury to a person whom it is your duty to protect, or to yourself, or to another member in your operation.

4. Opening fire

You may open fire against a hostage taker

(a) If he is using a firearm or any other weapon or exploding a device and there is a danger that you or any member involved in the operation, or a person whom it is your duty to protect, may be killed or seriously injured.

(b) If he is about to use a firearm or any other weapon or about to explode an explosive device and his action is likely to endanger life or cause serious injury to you or another member involved in the operation, or any person whom it is your duty to protect ...

5. If he is in the course of placing an explosive charge in or near any vehicle, ship, building or installation which, if exploded, would endanger life or cause serious injury to you or another member involved in the operation or to any person whom it is your duty to protect and there is no other way to protect those in danger ..."

137. Also attached to the operational order was a guide to police officers in the use of firearms which read:

"Firearms: Use by Police.

The object of any police firearms operation is that the armed criminal is arrested with the least possible danger to all concerned. It is the first duty of the police to protect the general public, but the police should not endanger their lives or the lives of their colleagues for the sake of attempting to make an early arrest. The physical welfare of a criminal armed with a firearm should not be given greater consideration than that of a police officer, and unnecessary risks must not be taken by the police. In their full use of firearms, as in the use of any force, the police are controlled by the restrictions imposed by the law. The most important point which emerges from any study of the law on this subject is that the responsibility is an individual one. Any police officer who uses a firearm may be answerable to the courts or to a coroner's inquest and, if his actions were unlawful (or improper), then he as an individual may be charged with murder, manslaughter or unlawful wounding. Similarly, if his use of a firearm was unlawful or negligent the individual

could find himself defending a civil case in which substantial damages were being claimed against him. That a similar claim could be made against the Commissioner of Police will not relieve the individual of his liabilities.

The fact that a police officer used his firearms under the orders of a superior does not, of itself, exempt him from criminal liability. When a police officer is issued with a firearm he is not thereby given any form of authority to use it otherwise than strictly in accordance with the law. Similarly, when an officer is briefed about an operation, information about a criminal may indicate that he is desperate and dangerous. Whilst this will be one of the factors to consider it does not of itself justify shooting at him.

The final responsibility for his actions rests on the individual and therefore the final decision about whether a shot will or will not be fired at a particular moment can only be made by the individual. That decision must be made with a clear knowledge of the law on the subject and in the light of the conditions prevailing at the time."

III. UNITED NATIONS INSTRUMENTS

138. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ("UN Force and Firearms Principles") were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

139. Article 9 of the UN Force and Firearms Principles provides, inter alia, that "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

Other relevant provisions provide as follows:

Article 10

"... law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Article 22

"... Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control."

Article 23

"Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly."

140. Article 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by Economic and Social Council Resolution 1989/65, ("UN Principles on Extra-Legal Executions") provides, inter alia, that:

"There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ..."

Articles 9 to 17 contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

PROCEEDINGS BEFORE THE COMMISSION

141. The applicants lodged their application (no. 18984/91) with the Commission on 14 August 1991. They

complained that the killings of Daniel McCann, Mairead Farrell and Sean Savage by members of the SAS (Special Air Service) constituted a violation of Article 2 (art. 2) of the Convention.

142. On 3 September 1993 the Commission declared the applicants' complaint admissible.

In its report of 4 March 1994 (Article 31) (art. 31), it expressed the opinion that there had been no violation of Article 2 (art. 2) (eleven votes to six). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment [3].

FINAL SUBMISSIONS TO THE COURT

143. The Government submitted that the deprivations of life to which the applications relate were justified under Article 2 para. 2 (a) (art. 2-2-a) as resulting from the use of force which was no more than absolutely necessary in defence of the people of Gibraltar from unlawful violence and the Court was invited to find that the facts disclosed no breach of Article 2 (art. 2) of the Convention in respect of any of the three deceased.

144. The applicants submitted that the Government have not shown beyond reasonable doubt that the planning and execution of the operation was in accordance with Article 2 para. 2 (art. 2-2) of the Convention. Accordingly, the killings were not absolutely necessary within the meaning of this provision (art. 2-2).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 (art. 2) OF THE CONVENTION

145. The applicants alleged that the killing of Mr McCann, Ms Farrell and Mr Savage by members of the security forces constituted a violation of Article 2 (art. 2) of the Convention which reads:

> "1. 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.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article (art. 2) when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. Interpretation of Article 2 (art. 2)

1. General approach

146. The Court's approach to the interpretation of Article 2 (art. 2) must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, inter alia, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 34, para. 87, and the Loizidou v. Turkey (Preliminary Objections) judgment of 23 March 1995, Series A no. 310, p. 27, para. 72).

147. It must also be borne in mind that, as a provision (art. 2) which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15 (art. 15). Together with Article 3 (art. 15+3) of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above-mentioned Soering judgment, p. 34, para. 88). As such, its provisions must be strictly construed.

148. The Court considers that the exceptions delineated in paragraph 2 (art. 2-2) indicate that this provision (art. 2-2) extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2 (art. 2), read as a whole, demonstrates that paragraph 2 (art. 2-2) does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (art. 2-2-a, art. 2-2-b, art. 2-2-c) (see application no. 10044/82, Stewart v. the United Kingdom, 10 July 1984, Decisions and Reports 39, pp. 169-71).

149. In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c).

150. In keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

2. The obligation to protect life in Article 2 para. 1 (art. 2-1)

(a) Compatibility of national law and practice with Article 2 (art. 2) standards

151. The applicants submitted under this head that Article 2 para. 1 (art. 2-1) of the Convention imposed a positive duty on States to "protect" life. In particular, the national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the State. The State must also give appropriate training, instructions and briefing to its soldiers and other agents who may use force and exercise strict control over any operations which may involve the use of lethal force.

In their view, the relevant domestic law was vague and general and did not encompass the Article 2 (art. 2) standard of absolute necessity. This in itself constituted a violation of Article 2 para. 1 (art. 2-1). There was also a violation of this provision (art. 2-1) in that the law did not require that the agents of the State be trained in accordance with the strict standards of Article 2 para. 1 (art. 2-1).

152. For the Commission, with whom the Government agreed, Article 2 (art. 2) was not to be interpreted as requiring an identical formulation in domestic law. Its requirements were satisfied if the substance of the Convention right was protected by domestic law.

153. The Court recalls that the Convention does not oblige Contracting Parties to incorporate its provisions into

national law (see, inter alia, the James and Others v. the United Kingdom judgment of 21 February 1986, Series A no. 98, p. 47, para. 84, and The Holy Monasteries v. Greece judgment of 9 December 1994, Series A no. 301-A, p. 39, para. 90). Furthermore, it is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention (see, for example, the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 18, para. 33).

154. Bearing the above in mind, it is noted that Article 2 of the Gibraltar Constitution (see paragraph 133 above) is similar to Article 2 (art. 2) of the Convention with the exception that the standard of justification for the use of force which results in the deprivation of life is that of "reasonably justifiable" as opposed to "absolutely necessary" in paragraph 2 of Article 2 (art. 2-2). While the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts (see paragraphs 134-35 above), there is no significant difference in substance between the two concepts.

155. In the Court's view, whatever the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2 para. 1 (art. 2-1) could be found on this ground alone.

156. As regards the applicants' arguments concerning the training and instruction of the agents of the State and the need for operational control, the Court considers that these are matters which, in the context of the present case, raise issues under Article 2 para. 2 (art. 2-2) concerning the proportionality of the State's response to the perceived threat of a terrorist attack. It suffices to note in this respect that the rules of engagement issued to the soldiers and the police in the present case provide a series of rules governing the use of force which carefully reflect the national standard as well as the substance of the Convention standard (see paragraphs 16, 18 and 136-37 above).

(b) Adequacy of the inquest proceedings as an investigative mechanism

157. The applicants also submitted under this head, with reference to the relevant standards contained in the UN Force and Firearms Principles (see paragraphs 138-39 above), that the State must provide an effective ex post facto procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process to which relatives must have full access.

Together with the amici curiae, Amnesty International and British-Irish Rights Watch and Others, they submitted that this procedural requirement had not been satisfied by the inquest procedure because of a combination of shortcomings. In particular, they complained that no independent police investigation took place of any aspect of the operation leading to the shootings; that normal scene-of-crime procedures were not followed; that not all eyewitnesses were traced or interviewed by the police; that the Coroner sat with a jury which was drawn from a "garrison" town with close ties to the military; that the Coroner refused to allow the jury to be screened to exclude members who were Crown servants; that the public interest certificates issued by the relevant Government authorities effectively curtailed an examination of the overall operation.

They further contended that they did not enjoy equality of representation with the Crown in the course of the inquest proceedings and were thus severely handicapped in their efforts to find the truth since, inter alia, they had had no legal aid and were only represented by two lawyers; witness statements had been made available in advance to the Crown and to the lawyers representing the police and the soldiers but, with the exception of ballistic and pathology reports, not to their lawyers; they did not have the necessary resources to pay for copies of the daily transcript of the proceedings which amounted to £500-£700.

158. The Government submitted that the inquest was an effective, independent and public review mechanism which more than satisfied any procedural requirement which might be read into Article 2 para. 1 (art. 2-1) of the

Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations into the circumstances of death should be assessed. Moreover, it was important to distinguish between such an investigation and civil proceedings brought to seek a remedy for an alleged violation of the right to life. Finally, they invited the Court to reject the contention by the intervenors British-Irish Rights Watch and Others that a violation of Article 2 para. 1 (art. 2-1) will have occurred whenever the Court finds serious differences between the UN Principles on Extra-Legal Executions and the investigation conducted into any particular death (see paragraph 140 above).

159. For the Commission, the inquest subjected the actions of the State to extensive, independent and highly public scrutiny and thereby provided sufficient procedural safeguards for the purposes of Article 2 (art. 2) of the Convention.

160. The Court considers that it is unnecessary to decide in the present case whether a right of access to court to bring civil proceedings in connection with deprivation of life can be inferred from Article 2 para. 1 (art. 2-1) since this is an issue which would be more appropriately considered under Articles 6 and 13 (art. 6, art. 13) of the Convention - provisions (art. 6, art. 13) that have not been invoked by the applicants.

161. The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.

162. However, it is not necessary in the present case for the Court to decide what form such an investigation should take and under what conditions it should be conducted, since public inquest proceedings, at which the applicants were legally represented and which involved the hearing of seventy-nine witnesses, did in fact take place. Moreover, the proceedings lasted nineteen days and, as is evident from the inquest's voluminous transcript, involved a detailed review of the events surrounding the killings. Furthermore, it appears from the transcript, including the Coroner's summing-up to the jury, that the lawyers acting on behalf of the applicants were able to examine and cross-examine key witnesses, including the military and police personnel involved in the planning and conduct of the anti-terrorist operation, and to make the submissions they wished to make in the course of the proceedings.

163. In light of the above, the Court does not consider that the alleged various shortcomings in the inquest proceedings, to which reference has been made by both the applicants and the intervenors, substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings.

164. It follows that there has been no breach of Article 2 para. 1 (art. 2-1) of the Convention on this ground.

B. Application of Article 2 (art. 2) to the facts of the case

1. General approach to the evaluation of the evidence

165. While accepting that the Convention institutions are not in any formal sense bound by the decisions of the inquest jury, the Government submitted that the verdicts were of central importance to any subsequent

examination of the deaths of the deceased. Accordingly, the Court should give substantial weight to the verdicts of the jury in the absence of any indication that those verdicts were perverse or ones which no reasonable tribunal of fact could have reached. In this connection, the jury was uniquely well placed to assess the circumstances surrounding the shootings. The members of the jury heard and saw each of the seventy-nine witnesses giving evidence, including extensive cross-examination. With that benefit they were able to assess the credibility and probative value of the witnesses' testimony. The Government pointed out that the jury also heard the submissions of the various parties, including those of the lawyers representing the deceased.

166. The applicants, on the other hand, maintained that inquests are by their very nature ill-equipped to be full and detailed inquiries into controversial killings such as in the present case. Moreover, the inquest did not examine the killings from the standpoint of concepts such as "proportionality" or "absolute necessity" but applied the lesser tests of "reasonable force" or "reasonable necessity". Furthermore, the jury focused on the actions of the soldiers as they opened fire as if it were considering their criminal culpability and not on matters such as the allegedly negligent and reckless planning of the operation.

167. The Commission examined the case on the basis of the observations of the parties and the documents submitted by them, in particular the transcript of the inquest. It did not consider itself bound by the findings of the jury.

168. The Court recalls that under the scheme of the Convention the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area. The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see, inter alia, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, para. 74, and the Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

169. In the present case neither the Government nor the applicants have, in the proceedings before the Court, sought to contest the facts as they have been found by the Commission although they differ fundamentally as to the conclusions to be drawn from them under Article 2 (art. 2) of the Convention.

Having regard to the submissions of those appearing before the Court and to the inquest proceedings, the Court takes the Commission's establishment of the facts and findings on the points summarised in paragraphs 13 to 132 above to be an accurate and reliable account of the facts underlying the present case.

170. As regards the appreciation of these facts from the standpoint of Article 2 (art. 2), the Court observes that the jury had the benefit of listening to the witnesses at first hand, observing their demeanour and assessing the probative value of their testimony.

Nevertheless, it must be borne in mind that the jury's finding was limited to a decision of lawful killing and, as is normally the case, did not provide reasons for the conclusion that it reached. In addition, the focus of concern of the inquest proceedings and the standard applied by the jury was whether the killings by the soldiers were reasonably justified in the circumstances as opposed to whether they were "absolutely necessary" under Article 2 para. 2 (art. 2-2) in the sense developed above (see paragraphs 120 and 148-49 above).

171. Against this background, the Court must make its own assessment whether the facts as established by the Commission disclose a violation of Article 2 (art. 2) of the Convention.

172. The applicants further submitted that in examining the actions of the State in a case in which the use of

deliberate lethal force was expressly contemplated in writing, the Court should place on the Government the onus of proving, beyond reasonable doubt, that the planning and execution of the operation was in accordance with Article 2 (art. 2) of the Convention. In addition, it should not grant the State authorities the benefit of the doubt as if its criminal liability were at stake.

173. The Court, in determining whether there has been a breach of Article 2 (art. 2) in the present case, is not assessing the criminal responsibility of those directly or indirectly concerned. In accordance with its usual practice therefore it will assess the issues in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, para. 160, and the above-mentioned Cruz Varas and Others judgment, p. 29, para. 75).

2. Applicants' allegation that the killings were premeditated

174. The applicants alleged that there had been a premeditated plan to kill the deceased. While conceding that there was no evidence of a direct order from the highest authorities in the Ministry of Defence, they claimed that there was strong circumstantial evidence in support of their allegation. They suggested that a plot to kill could be achieved by other means such as hints and innuendoes, coupled with the choice of a military unit like the SAS which, as indicated by the evidence given by their members at the inquest, was trained to neutralise a target by shooting to kill. Supplying false information of the sort that was actually given to the soldiers in this case would render a fatal shooting likely. The use of the SAS was, in itself, evidence that the killing was intended.

175. They further contended that the Gibraltar police would not have been aware of such an unlawful enterprise. They pointed out that the SAS officer E gave his men secret briefings to which the Gibraltar police were not privy. Moreover, when the soldiers attended the police station after the shootings, they were accompanied by an army lawyer who made it clear that the soldiers were there only for the purpose of handing in their weapons. In addition, the soldiers were immediately flown out of Gibraltar without ever having been interviewed by the police.

176. The applicants referred to the following factors, amongst others, in support of their contention:

- The best and safest method of preventing an explosion and capturing the suspects would have been to stop them and their bomb from entering Gibraltar. The authorities had their photographs and knew their names and aliases as well as the passports they were carrying;

- If the suspects had been under close observation by the Spanish authorities from Malaga to Gibraltar, as claimed by the journalist, Mr Debelius, the hiring of the white Renault car would have been seen and it would have been known that it did not contain a bomb (see paragraph 128 above);

- The above claim is supported by the failure of the authorities to isolate the bomb and clear the area around it in order to protect the public. In Gibraltar there were a large number of soldiers present with experience in the speedy clearance of suspect bomb sites. The only explanation for this lapse in security procedures was that the security services knew that there was no bomb in the car;

- Soldier G, who was sent to inspect the car and who reported that there was a suspect car bomb, admitted during the inquest that he was not an expert in radio signal transmission (see paragraph 53 above). This was significant since the sole basis for his assessment was that the radio aerial looked older than the car. A real expert would have thought of removing the aerial to nullify the radio detonator, which could have been done without destabilising the explosive, as testified by Dr Scott. He would have also known that if the suspects had intended to explode a bomb by means of a radio signal they would not have used a rusty aerial - which would reduce the capacity to receive a clear signal - but a clean one (see paragraph 114 above). It also emerged from his evidence that he was not an explosives expert either. There was thus the possibility that the true role of

Soldier G was to report that he suspected a car bomb in order to induce the Gibraltar police to sign the document authorising the SAS to employ lethal force.

177. In the Government's submission it was implicit in the jury's verdicts of lawful killing that they found as facts that there was no plot to kill the three terrorists and that the operation in Gibraltar had not been conceived or mounted with this aim in view. The aim of the operation was to effect the lawful arrest of the three terrorists and it was for this purpose that the assistance of the military was sought and given. Furthermore, the jury must have also rejected the applicants' contention that Soldiers A, B, C and D had deliberately set out to kill the terrorists, whether acting on express orders or as a result of being given "a nod and a wink".

178. The Commission concluded that there was no evidence to support the applicants' claim of a premeditated plot to kill the suspects.

179. The Court observes that it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants.

180. In the light of its own examination of the material before it, the Court does not find it established that there was an execution plot at the highest level of command in the Ministry of Defence or in the Government, or that Soldiers A, B, C and D had been so encouraged or instructed by the superior officers who had briefed them prior to the operation, or indeed that they had decided on their own initiative to kill the suspects irrespective of the existence of any justification for the use of lethal force and in disobedience to the arrest instructions they had received. Nor is there evidence that there was an implicit encouragement by the authorities or hints and innuendoes to execute the three suspects.

181. The factors relied on by the applicants amount to a series of conjectures that the authorities must have known that there was no bomb in the car. However, having regard to the intelligence information that they had received, to the known profiles of the three terrorists, all of whom had a background in explosives, and the fact that Mr Savage was seen to "fiddle" with something before leaving the car (see paragraph 38 above), the belief that the car contained a bomb cannot be described as either implausible or wholly lacking in foundation.

182. In particular, the decision to admit them to Gibraltar, however open to criticism given the risks that it entailed, was in accordance with the arrest policy formulated by the Advisory Group that no effort should be made to apprehend them until all three were present in Gibraltar and there was sufficient evidence of a bombing mission to secure their convictions (see paragraph 37 above).

183. Nor can the Court accept the applicants' contention that the use of the SAS, in itself, amounted to evidence that the killing of the suspects was intended. In this respect it notes that the SAS is a special unit which has received specialist training in combating terrorism. It was only natural, therefore, that in light of the advance warning that the authorities received of an impending terrorist attack they would resort to the skill and experience of the SAS in order to deal with the threat in the safest and most informed manner possible.

184. The Court therefore rejects as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement amongst those involved in the operation.

3. Conduct and planning of the operation

(a) Arguments of those appearing before the Court

(1) The applicants

185. The applicants submitted that it would be wrong for the Court, as the Commission had done, to limit its assessment to the question of the possible justification of the soldiers who actually killed the suspects. It must examine the liability of the Government for all aspects of the operation. Indeed, the soldiers may well have been acquitted at a criminal trial if they could have shown that they honestly believed the ungrounded and false information they were given.

186. The soldiers had been told by Officer E (the attack commander) that the three suspects had planted a car bomb in Gibraltar, whereas Soldier G - the bomb-disposal expert - had reported that it was merely a suspect bomb; that it was a remote-control bomb; that each of the suspects could detonate it from anywhere in Gibraltar by the mere flicking of a switch and that they would not hesitate to do so the moment they were challenged. In reality, these "certainties" and "facts" were no more than suspicions or at best dubious assessments. However, they were conveyed as facts to soldiers who not only had been trained to shoot at the merest hint of a threat but also, as emerged from the evidence given during the inquest, to continue to shoot until they had killed their target.

In sum, they submitted that the killings came about as a result of incompetence and negligence in the planning and conduct of the anti-terrorist operation to arrest the suspects as well as a failure to maintain a proper balance between the need to meet the threat posed and the right to life of the suspects.

(2) The Government

187. The Government submitted that the actions of the soldiers were absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention. Each of them had to make a split-second decision which could have affected a large number of lives. They believed that the movements which they saw the suspects make at the moment they were intercepted gave the impression that the terrorists were about to detonate a bomb. This evidence was confirmed by other witnesses who saw the movements in question. If it is accepted that the soldiers honestly and reasonably believed that the terrorists upon whom they opened fire might have been about to detonate a bomb by pressing a button, then they had no alternative but to open fire.

188. They also pointed out that much of the information available to the authorities and many of the judgments made by them proved to be accurate. The three deceased were an IRA active service unit which was planning an operation in Gibraltar; they did have in their control a large quantity of explosives which were subsequently found in Spain; and the nature of the operation was a car bomb. The risk to the lives of those in Gibraltar was, therefore, both real and extremely serious.

189. The Government further submitted that in examining the planning of the anti-terrorist operation it should be borne in mind that intelligence assessments are necessarily based on incomplete information since only fragments of the true picture will be known. Moreover, experience showed that the IRA were exceptionally ruthless and skilled in counter-surveillance techniques and that they did their best to conceal their intentions from the authorities. In addition, experience in Northern Ireland showed that the IRA is constantly and rapidly developing new technology. They thus had to take into account the possibility that the terrorists might be equipped with more sophisticated or more easily concealable radio-controlled devices than the IRA had previously been known to use. Finally, the consequences of underestimating the threat posed by the active service unit could have been catastrophic. If they had succeeded in detonating a bomb of the type and size found in Spain, everyone in the car-park would have been killed or badly maimed and grievous injuries would have been caused to those in adjacent buildings, which included a school and an old-people's home.

190. The intelligence assessments made in the course of the operation were reasonable ones to make in the light of the inevitably limited amount of information available to the authorities and the potentially devastating consequences of underestimating the terrorists' abilities and resources. In this regard the Government made the following observations:

- It was believed that a remote-controlled device would be used because it would give the terrorists a better chance of escape and would increase their ability to maximise the proportion of military rather than civilian casualties. Moreover, the IRA had used such a device in Brussels only six weeks before.

- It was assumed that any remote-control such as that produced to the Court would be small enough to be readily concealed about the person. The soldiers themselves successfully concealed radios of a similar size about their persons.

- As testified by Captain Edwards at the inquest, tests carried out demonstrated that a bomb in the car-park could have been detonated from the spot where the terrorists were shot (see paragraph 116 above).

- Past experience strongly suggested that the terrorists' detonation device might have been operated by pressing a single button.

- As explained by Witness O at the inquest, the use of a blocking car would have been unnecessary because the terrorists would not be expected to have any difficulty in finding a free space on 8 March. It was also dangerous because it would have required two trips into Gibraltar, thereby significantly increasing the risk of detection (see paragraph 23 (point (e) above).

- There was no reason to doubt the bona fides of Soldier G's assessment that the car was a suspect car bomb. In the first place his evidence was that he was quite familiar with car bombs. Moreover, the car had been parked by a known bomb-maker who had been seen to "fiddle" with something between the seats and the car aerial appeared to be out of place. IRA car bombs had been known from experience to have specially-fitted aerials and G could not say for certain from an external examination that the car did not contain a bomb (see paragraph 48 above). Furthermore, all three suspects appeared to be leaving Gibraltar. Finally the operation of cordoning off the area around the car began only twenty minutes after the above assessment had been made because of the shortage of available manpower and the fact that the evacuation plans were not intended for implementation until 7 or 8 March.

- It would have been reckless for the authorities to assume that the terrorists might not have detonated their bomb if challenged. The IRA were deeply committed terrorists who were, in their view, at war with the United Kingdom and who had in the past shown a reckless disregard for their own safety. There was still a real risk that if they had been faced with a choice between an explosion causing civilian casualties and no explosion at all, the terrorists would have preferred the former.

(3) The Commission

191. The Commission considered that, given the soldiers' perception of the risk to the lives of the people of Gibraltar, the shooting of the three suspects could be regarded as absolutely necessary for the legitimate aim of the defence of others from unlawful violence. It also concluded that, having regard to the possibility that the suspects had brought in a car bomb which, if detonated, would have occasioned the loss of many lives and the possibility that the suspects could have been able to detonate it when confronted by the soldiers, the planning and execution of the operation by the authorities did not disclose any deliberate design or lack of proper care which might have rendered the use of lethal force disproportionate to the aim of saving lives.

(b) The Court's assessment

(1) Preliminary considerations

192. In carrying out its examination under Article 2 (art. 2) of the Convention, the Court must bear in mind that the

information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.

193. Several other factors must also be taken into consideration.

In the first place, the authorities were confronted by an active service unit of the IRA composed of persons who had been convicted of bombing offences and a known explosives expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.

Secondly, the authorities had had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction and, in co-ordination with the local Gibraltar authorities, to take measures to foil the attack and arrest the suspects. Inevitably, however, the security authorities could not have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses. 194. Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The Court will consider each of these points in turn.

(2) Actions of the soldiers

195. It is recalled that the soldiers who carried out the shooting (A, B, C and D) were informed by their superiors, in essence, that there was a car bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest (see paragraphs 23, 24-27, and 28-31 above).

196. As regards the shooting of Mr McCann and Ms Farrell, the Court recalls the Commission's finding that they were shot at close range after making what appeared to Soldiers A and B to be threatening movements with their hands as if they were going to detonate the bomb (see paragraph 132 above). The evidence indicated that they were shot as they fell to the ground but not as they lay on the ground (see paragraphs 59-67 above). Four witnesses recalled hearing a warning shout (see paragraph 75 above). Officer P corroborated the soldiers' evidence as to the hand movements (see paragraph 76 above). Officer Q and Police Constable Parody also confirmed that Ms Farrell had made a sudden, suspicious move towards her handbag (ibid.).

197. As regards the shooting of Mr Savage, the evidence revealed that there was only a matter of seconds between the shooting at the Shell garage (McCann and Farrell) and the shooting at Landport tunnel (Savage). The Commission found that it was unlikely that Soldiers C and D witnessed the first shooting before pursuing Mr Savage who had turned around after being alerted by either the police siren or the shooting (see paragraph 132 above).

Soldier C opened fire because Mr Savage moved his right arm to the area of his jacket pocket, thereby giving rise to the fear that he was about to detonate the bomb. In addition, Soldier C had seen something bulky in his pocket which he believed to be a detonating transmitter. Soldier D also opened fire believing that the suspect was trying to detonate the supposed bomb. The soldiers' version of events was corroborated in some respects by Witnesses H and J, who saw Mr Savage spin round to face the soldiers in apparent response to the police siren or the first shooting (see paragraphs 83 and 85 above).

The Commission found that Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he had hit the ground (see paragraph 132 above). This conclusion was supported by the pathologists' evidence at the inquest (see paragraph 110 above).

198. It was subsequently discovered that the suspects were unarmed, that they did not have a detonator device on their persons and that there was no bomb in the car (see paragraphs 93 and 96 above).

199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device (see paragraphs 61, 63, 80 and 120 above). According to the pathologists' evidence Ms Farrell was hit by eight bullets, Mr McCann by five and Mr Savage by sixteen (see paragraphs 108-10 above).

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195 above). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision (art. 2-2).

201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 (art. 2) and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

(3) Control and organisation of the operation

202. The Court first observes that, as appears from the operational order of the Commissioner, it had been the intention of the authorities to arrest the suspects at an appropriate stage. Indeed, evidence was given at the inquest that arrest procedures had been practised by the soldiers before 6 March and that efforts had been made to find a suitable place in Gibraltar to detain the suspects after their arrest (see paragraphs 18 and 55 above).

203. It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why, as emerged from the evidence given by Inspector Ullger, the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. Although surprised at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby (see paragraph 34 above). In addition, the Security Services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for (see paragraph 33 above).

204. On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities'

state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

205. The Court confines itself to observing in this respect that the danger to the population of Gibraltar - which is at the heart of the Government's submissions in this case - in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the authorities knew that there was no bomb in the car - which the Court has already discounted (see paragraph 181 above) - or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood.

The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C, and D it was considered likely that the attack would be by way of a large car bomb. A number of key assessments were made. In particular, it was thought that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted (see paragraphs 23-31 above).

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous. Nevertheless, as has been demonstrated by the Government, on the basis of their experience in dealing with the IRA, they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility (see paragraph 45 above).

In addition, at the briefings or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture (see paragraph 57 above). It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted (see paragraph 115 above).

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the inquest (see paragraphs 115 and 131 above), of which the competent authorities must have been aware, over-simplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a "suspect car bomb" was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb (see paragraphs 48, and 51-52 above). It is recalled that while Soldier G had experience in car bombs, it transpired that he was not an expert in radio communications or explosives; and that his assessment that there was a suspect car bomb, based on his

observation that the car aerial was out of place, was more in the nature of a report that a bomb could not be ruled out (see paragraph 53 above).

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car bomb which, according to the assessments that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

211. However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the Coroner in his summing-up to the jury at the inquest, all four soldiers shot to kill the suspects (see paragraphs 61, 63, 80 and 120 above). Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a "button" device (see paragraph 26 above). Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued (see paragraph 104, at point 1. (iii) above), it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement (see paragraphs 136 and 137 above).

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.

214. Accordingly, the Court finds that there has been a breach of Article 2 (art. 2) of the Convention.

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

215. Article 50 (art. 50) of the Convention provides as follows:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

216. The applicants requested the award of damages at the same level as would be awarded under English law to a person who was unlawfully killed by agents of the State. They also asked, in the event of the Court finding that the killings were both unlawful and deliberate or were the result of gross negligence, exemplary damages at the same level as would be awarded under English law to a relative of a person killed in similar circumstances.

217. As regards costs and expenses, they asked for all costs arising directly or indirectly from the killings, including the costs of relatives and lawyers attending the Gibraltar inquest and all Strasbourg costs. The solicitor's costs and expenses in respect of the Gibraltar inquest are estimated at £56,200 and his Strasbourg costs at £28,800. Counsel claimed £16,700 in respect of Strasbourg costs and expenses.

218. The Government contended that, in the event of a finding of a violation, financial compensation in the form of pecuniary and non-pecuniary damages would be unnecessary and inappropriate.

As regards the costs incurred before the Strasbourg institutions, they submitted that the applicants should be awarded only the costs actually and necessarily incurred by them and which were reasonable as to quantum. However, as regards the claim for costs in respect of the Gibraltar inquest, they maintained that (1) as a point of principle, the costs of the domestic proceedings, including the costs of the inquest, should not be recoverable under Article 50 (art. 50); (2) since the applicants' legal representatives acted free of charge, there can be no basis for an award to the applicants; (3) in any event, the costs claimed were not calculated on the basis of the normal rates of the solicitor concerned.

A. Pecuniary and non-pecuniary damage

219. The Court observes that it is not clear from the applicants' submissions whether their claim for financial compensation is under the head of pecuniary or non-pecuniary damages or both. In any event, having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award under this head. It therefore dismisses the applicants' claim for damages.

B. Costs and expenses

220. The Court recalls that, in accordance with its case-law, it is only costs which are actually and necessarily incurred and reasonable as to quantum that are recoverable under this head.

221. As regards the Gibraltar costs, the applicants stated in the proceedings before the Commission that their legal representatives had acted free of charge. In this connection, it has not been claimed that they are under any obligation to pay the solicitor the amounts claimed under this item. In these circumstances, the costs cannot be claimed under Article 50 (art. 50) since they have not been actually incurred.

222. As regards the costs and expenses incurred during the Strasbourg proceedings, the Court, making an equitable assessment, awards £22,000 and £16,700 in respect of the solicitor's and counsel's claims respectively, less 37,731 French francs received by way of legal aid from the Council of Europe.

FOR THESE REASONS, THE COURT

1. Holds by ten votes to nine that there has been a violation of Article 2 (art. 2) of the Convention;

2. Holds unanimously that the United Kingdom is to pay to the applicants, within three months, £38,700 (thirty-eight thousand seven hundred) for costs and expenses incurred in the Strasbourg proceedings, less 37,731 (thirty-seven thousand seven hundred and thirty-one) French francs to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;

3. Dismisses unanimously the applicants' claim for damages;

4. Dismisses unanimously the applicants' claim for costs and expenses incurred in the Gibraltar inquest;

5. Dismisses unanimously the remainder of the claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 September 1995.

Rolv RYSSDAL

President

Herbert PETZOLD

Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the joint dissenting opinion of Judges Ryssdal, Bernhardt, Thór Vilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek is annexed to this judgment.

R. R.

H. P.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, BERNHARDT, THÓR VILHJÁLMSSON, GÖLCÜKLÜ, PALM, PEKKANEN, SIR JOHN FREELAND, BAKA AND JAMBREK

1. We are unable to subscribe to the opinion of a majority of our colleagues that there has been a violation of Article 2 (art. 2) of the Convention in this case.

2. We will take the main issues in the order in which they are dealt with in the judgment.

3. As to the section which deals with the interpretation of Article 2 (art. 2), we agree with the conclusion in paragraph 155 that the difference between the Convention standard and the national standard as regards justification for the use of force resulting in deprivation of life is not such that a violation of Article 2 para. 1 (art. 2-1) could be found on that ground alone. We also agree with the conclusion in paragraph 164 that there has

been no breach of Article 2 para. 1 (art. 2-1) on the ground of any shortcoming in the examination at national level of the circumstances surrounding the deaths.

4. As to the section dealing with the application of Article 2 (art. 2) to the facts of the case, we fully concur in rejecting as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement among those involved in the operation (paragraph 184).

5. We also agree with the conclusion in paragraph 200 that the actions of the four soldiers who carried out the shootings do not, in themselves, give rise to a violation of Article 2 (art. 2). It is rightly accepted that those soldiers honestly believed, in the light of the information which they had been given, that it was necessary to act as they did in order to prevent the suspects from detonating a bomb and causing serious loss of life: the actions which they took were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

6. We disagree, however, with the evaluation made by the majority (paragraphs 202-14) of the way in which the control and organisation of the operation were carried out by the authorities. It is that evaluation which, crucially, leads to the finding of violation.

7. We recall at the outset that the events in this case were examined at the domestic level by an inquest held in Gibraltar over a period of nineteen days between 6 and 30 September 1988. The jury, after hearing the evidence of seventy-nine witnesses (including the soldiers, police officers and surveillance personnel involved in the operation and also pathologists, forensic scientists and experts on the detonation of explosive devices), and after being addressed by the Coroner in respect of the applicable domestic law, reached by a majority of nine to two a verdict of lawful killing. The circumstances were subsequently investigated in depth and evaluated by the Commission, which found in its report, by a majority of eleven to six, that there had been no violation of the Convention.

The finding of the inquest, as a domestic tribunal operating under the relevant domestic law, is not of itself determinative of the Convention issues before the Court. But, having regard to the crucial importance in this case of a proper appreciation of the facts and to the advantage undeniably enjoyed by the jury in having observed the demeanour of the witnesses when giving their evidence under examination and cross-examination, its significance should certainly not be underestimated. Similarly, the Commission's establishment and evaluation of the facts is not conclusive for the Court; but it would be mistaken for the Court, at yet one further remove from the evidence as given by the witnesses, to fail to give due weight to the report of the Commission, the body which is primarily charged under the Convention with the finding of facts and which has, of course, great experience in the discharge of that task.

8. Before turning to the various aspects of the operation which are criticised in the judgment, we would underline three points of a general nature.

First, in undertaking any evaluation of the way in which the operation was organised and controlled, the Court should studiously resist the temptations offered by the benefit of hindsight. The authorities had at the time to plan and make decisions on the basis of incomplete information. Only the suspects knew at all precisely what they intended; and it was part of their purpose, as it had no doubt been part of their training, to ensure that as little as possible of their intentions was revealed. It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken. It should not be so regarded unless it is established that in the circumstances as they were known at the time another course should have been preferred.

9. Secondly, the need for the authorities to act within the constraints of the law, while the suspects were operating in a state of mind in which members of the security forces were regarded as legitimate targets and incidental death or injury to civilians as of little consequence, would inevitably give the suspects a tactical advantage which should not be allowed to prevail. The consequences of the explosion of a large bomb in the centre of Gibraltar might well be so devastating that the authorities could not responsibly risk giving the suspects the opportunity to set in train the detonation of such a bomb. Of course the obligation of the United Kingdom under Article 2 para. 1 (art. 2-1) of the Convention extended to the lives of the suspects as well as to the lives of

all the many others, civilian and military, who were present in Gibraltar at the time. But, quite unlike those others, the purpose of the presence of the suspects in Gibraltar was the furtherance of a criminal enterprise which could be expected to have resulted in the loss of many innocent lives if it had been successful. They had chosen to place themselves in a situation where there was a grave danger that an irreconcilable conflict between the two duties might arise.

10. Thirdly, the Court's evaluation of the conduct of the authorities should throughout take full account of (a) the information which had been received earlier about IRA intentions to mount a major terrorist attack in Gibraltar by an active service unit of three individuals; and (b) the discovery which (according to evidence given to the inquest by Witness O) had been made in Brussels on 21 January 1988 of a car containing a large amount of Semtex explosive and four detonators, with a radio-controlled system - equipment which, taken together, constituted a device familiar in Northern Ireland.

In the light of (a), the decision that members of the SAS should be sent to take part in the operation in response to the request of the Gibraltar Commissioner of Police for military assistance was wholly justifiable. Troops trained in a counter-terrorist role and to operate successfully in small groups would clearly be a suitable choice to meet the threat of an IRA active service unit at large in a densely populated area such as Gibraltar, where there would be an imperative need to limit as far as possible the risk of accidental harm to passers-by.

The detailed operational briefing on 5 March 1988 (paragraphs 22-31) shows the reasonableness, in the circumstances as known at the time, of the assessments then made. The operational order of the Gibraltar Commissioner of Police, which was drawn up on the same day, expressly proscribed the use of more force than necessary and required any recourse to firearms to be had with care for the safety of persons in the vicinity. It described the intention of the operation as being to protect life; to foil the attempt; to arrest the offenders; and the securing and safe custody of the prisoners (paragraphs 17 and 18).

All of this is indicative of appropriate care on the part of the authorities. So, too, is the cautious approach to the eventual passing of control to the military on 6 March 1988 (paragraphs 54-58).

11. As regards the particular criticisms of the conduct of the operation which are made in the judgment, foremost among them is the questioning (in paragraphs 203-05) of the decision not to prevent the three suspects from entering Gibraltar. It is pointed out in paragraph 203 that, with the advance information which the authorities possessed and with the resources of personnel at their disposal, it would have been possible for them "to have mounted an arrest operation" at the border.

The judgment does not, however, go on to say that it would have been practicable for the authorities to have arrested and detained the suspects at that stage. Rightly so, in our view, because at that stage there might not be sufficient evidence to warrant their detention and trial. To release them, after having alerted them to the state of readiness of the authorities, would be to increase the risk that they or other IRA members could successfully mount a renewed terrorist attack on Gibraltar. In the circumstances as then known, it was accordingly not "a serious miscalculation" for the authorities to defer the arrest rather than merely stop the suspects at the border and turn them back into Spain.

12. Paragraph 206 of the judgment then lists certain "key assessments" made by the authorities which, in paragraph 207, are said to have turned out, in the event, to be erroneous, although they are accepted as all being possible hypotheses in a situation where the true facts were unknown and where the authorities were operating on the basis of limited intelligence information. Paragraph 208 goes on to make the criticism that "insufficient allowances appear to have been made for other assumptions".

13. As a first example to substantiate this criticism, the paragraph then states that since the bombing was not expected until 8 March "there was equally the possibility that the ... terrorists were on a reconnaissance mission".

There was, however, nothing unreasonable in the assessment at the operational briefing on 5 March that the car which would be brought into Gibraltar was unlikely, on the grounds then stated, to be a "blocking" car (see paragraph 23, point e). So, when the car had been parked in the assembly area by one of the suspects and all three had been found to be present in Gibraltar, the authorities could quite properly operate on the working

assumption that it contained a bomb and that, as the suspects were unlikely to risk two visits, it was not "equally" possible that they were on a reconnaissance mission.

In addition, Soldier F, the senior military adviser to the Gibraltar Commissioner of Police, gave evidence to the inquest that, according to intelligence information, reconnaissance missions had been undertaken many times before: reconnaissance was, he had been told, complete and the operation was ready to be run. In these circumstances, for the authorities to have proceeded otherwise than on the basis of a worst-case scenario that the car contained a bomb which was capable of being detonated by the suspects during their presence in the territory would have been to show a reckless failure of concern for public safety.

14. Secondly, it is suggested in the second sub-paragraph of paragraph 208 that, at the briefings or after the suspects had been spotted, "it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture".

Surely, however, the question is rather whether the authorities could safely have operated on the assumption that the suspects would be unlikely to be prepared to explode the bomb when, even if for the time being moving in the direction of the border, they became aware that they had been detected and were faced with the prospect of arrest. In our view, the answer is clear: certainly, previous experience of IRA activities would have afforded no reliable basis for concluding that the killing of many civilians would itself be a sufficient deterrent or that the suspects, when confronted, would have preferred no explosion at all to an explosion causing civilian casualties. It is relevant that, according to Soldier F's evidence at the inquest, part of the intelligence background was that he had been told that the IRA were under pressure to produce a "spectacular". He also gave evidence of his belief that, when cornered, the suspects would have no qualms about pressing the button to achieve some degree of propaganda success: they would try to derive such a success out of having got a bomb into Gibraltar and that would outweigh in their minds the propaganda loss arising from civilian casualties.

15. The second sub-paragraph of paragraph 208 goes on to suggest that it "might also have been thought improbable that at that point" - that is, apparently, as McCann and Farrell "strolled towards the border" - "[the suspects] would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted".

Here, the question ought, we consider, to be whether the authorities could prudently have proceeded otherwise than on the footing that there was at the very least a possibility that, if not before the suspects became aware of detection then immediately afterwards, the transmitter would be in a state of readiness to detonate the bomb.

16. It is next suggested, in the third sub-paragraph of paragraph 208, that "even if allowances are made for the technological skills of the IRA, the description of the detonation device as a `button job' without the qualifications subsequently described by the experts at the inquest ..., of which the competent authorities must have been aware, over-simplifies the true nature of these devices". The exact purport of this criticism is perhaps open to some doubt. What is fully clear, however, is that, as the applicants' own expert witness accepted at the inquest, a transmitter of the kind which was thought likely to be used in the present case could be set up so as to enable detonation to be caused by pressing a single button; and in the light of past experience it would have been most unwise to discount the possibility of technological advance in this field by the IRA.

17. Paragraph 209 of the judgment expresses disquiet that the assessment made by Soldier G that there was a "suspect car bomb" was conveyed to the soldiers on the ground in such a way as to give them the impression that the presence of a bomb had been definitely identified. But, given the assessments which had been made of the likelihood of a remote control being used, and given the various indicators that the car should indeed be suspected of containing a bomb, the actions which the soldiers must be expected to have taken would be the same whether their understanding of the message was as it apparently was or whether it was in the sense which Soldier G apparently intended. In either case, the existence of the risk to the people of Gibraltar would have been enough, given the nature of that risk, justifiably to prompt the response which followed.

18. Paragraph 209, in referring to the assessment made by Soldier G, also recalls that while he had

experience with car bombs, he was not an expert in radio communications or explosives. In considering that assessment, it would, however, be fair to add that, although his inspection of the car was of brief duration, it was enough to enable him to conclude, particularly in view of the unusual appearance of its aerial in relation to the age of the car and the knowledge that the IRA had in the past used cars with aerials specially fitted, that it was to be regarded as a suspect car bomb.

The authorities were, in any event, not acting solely on the basis of Soldier G's assessment. There had also been the earlier assessment, to which we have referred in paragraph 13 above, that a "blocking" car was unlikely to be used. In addition, the car had been seen to be parked by Savage, who was known to be an expert bomb-maker and who had taken some time (two to three minutes, according to one witness) to get out of the car, after fiddling with something between the seats.

19. Paragraph 210 of the judgment asserts, in effect, that the use of lethal force was made "almost unavoidable" by the conveyance to Soldiers A, B, C and D of a series of working hypotheses which were vitiated by the absence of sufficient allowances for alternative possibilities and by "the definite reporting ... of a car bomb which ..., could be detonated at the press of a button".

We have dealt in paragraphs 13-16 with the points advanced in support of the conclusion that insufficient allowance was made for alternative possibilities; and in paragraphs 17 and 18 with the question of reporting as to the presence of a car bomb.

We further question the conclusion that the use of lethal force was made "almost unavoidable" by failings of the authorities in these respects. Quite apart from any other consideration, this conclusion takes insufficient account of the part played by chance in the eventual outcome. Had it not been for the movements which were made by McCann and Farrell as Soldiers A and B closed on them and which may have been prompted by the completely coincidental sounding of a police car siren, there is every possibility that they would have been seized and arrested without a shot being fired; and had it not been for Savage's actions as Soldiers C and D closed on him, which may have been prompted by the sound of gunfire from the McCann and Farrell incident, there is every possibility that he, too, would have been seized and arrested without resort to shooting.

20. The implication at the end of paragraph 211 that the authorities did not exercise sufficient care in evaluating the information at their disposal before transmitting it to soldiers "whose use of firearms automatically involved shooting to kill" appears to be based on no more than "the failure to make provision for a margin of error" to which the beginning of the paragraph refers. We have dealt already with the "insufficient allowances for alternative possibilities" point (see, again, paragraphs 13-16 above), which we take to be the same as the alleged failure to provide for a margin of error which is referred to here. Any assessment of the evaluation by the authorities of the information at their disposal should, in any event, take due account of their need to reckon throughout with the incompleteness of that information (see paragraph 8 above); and there are no cogent grounds for any suggestion that there was information which they ought reasonably to have known but did not.

21. Paragraph 212, after making a glancing reference to the restrictive effect of the public interest certificates and saying that it is not clear "whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest", goes on to say that "their reflex action in this vital respect lacks the degree of caution ... to be expected from law-enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police". It concludes with the assertion that this "failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation".

22. As regards any suggestion that, if an assessment on the issue had been required by their training or instruction to be carried out by the soldiers, shooting to wound might have been considered by them to have been warranted by the circumstances at the time, it must be recalled that those circumstances included a genuine belief on their part that the suspects might be about to detonate a bomb by pressing a button. In that situation, to shoot merely to wound would have been a highly dangerous course: wounding alone might well not have immobilised a suspect and might have left him or her capable of pressing a button if determined to do so.

23. More generally as regards the training given, there was in fact ample evidence at the inquest to the effect that soldiers (and not only these soldiers) would be trained to respond to a threat such as that which was thought to be posed by the suspects in this case - all of them dangerous terrorists who were believed to be putting many lives at immediate risk - by opening fire once it was clear that the suspect was not desisting; that the intent of the firing would be to immobilise; and that the way to achieve that was to shoot to kill. There was also evidence at the inquest that soldiers would not be accepted for the SAS unless they displayed discretion and thoughtfulness; that they would not go ahead and shoot without thought, nor did they; but they did have to react very fast. In addition, evidence was given that SAS members had in fact been successful in the past in arresting terrorists in the great majority of cases.

24. We are far from persuaded that the Court has any sufficient basis for concluding, in the face of the evidence at the inquest and the extent of experience in dealing with terrorist activities which the relevant training reflects, that some different and preferable form of training should have been given and that the action of the soldiers in this case "lacks the degree of caution in the use of firearms to be expected of law-enforcement personnel in a democratic society". (We also question, in the light of the evidence, the fairness of the reference to "reflex action in this vital respect" - underlining supplied. To be trained to react rapidly and to do so, when the needs of the situation require, is not to take reflex action.)

Nor do we accept that the differences between the guide to police officers in the use of firearms (paragraph 137 of the judgment) and the "Firearms - rules of engagement" annexed to the Commissioner's operational order (paragraph 136), when the latter are taken together (as they should be) with the Rules of Engagement issued to Soldier F by the Ministry of Defence (paragraph 16), can validly be invoked to support a contention that the standard of care enjoined upon the soldiers was inadequate. Those differences are no doubt attributable to the differences in backgrounds and requirements of the recipients to whom they were addressed, account being taken of relevant training previously given to each group (it is to be noted that, according to the evidence of Soldier F at the inquest, many lectures are given to SAS soldiers on the concepts of the rule of law and the use of minimum force). We fail to see how the instructions for the soldiers could themselves be read as showing a lack of proper caution in the use of firearms.

Accordingly, we consider the concluding stricture, that there was some failure by the authorities in this regard suggesting a lack of appropriate care in the control and organisation of the arrest operation, to be unjustified.

25. The accusation of a breach by a State of its obligation under Article 2 (art. 2) of the Convention to protect the right to life is of the utmost seriousness. For the reasons given above, the evaluation in paragraphs 203 to 213 of the judgment seems to us to fall well short of substantiating the finding that there has been a breach of the Article (art. 2) in this case. We would ourselves follow the reasoning and conclusion of the Commission in its comprehensive, painstaking and notably realistic report. Like the Commission, we are satisfied that no failings have been shown in the organisation and control of the operation by the authorities which could justify a conclusion that force was used against the suspects disproportionately to the purpose of defending innocent persons from unlawful violence. We consider that the use of lethal force in this case, however regrettable the need to resort to such force may be, did not exceed what was, in the circumstances as known at the time, "absolutely necessary" for that purpose and did not amount to a breach by the United Kingdom of its obligations under the Convention.

---

[1] The case is numbered 17/1994/464/545. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2] Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

[3] Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 324 of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

CASE OF SALMAN v. TURKEY

(Application no. 21986/93)

JUDGMENT

STRASBOURG

27 June 2000

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Salman v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mr J.-P. COSTA,

Mr A. PASTOR RIDRUEJO,

Mr L. FERRARI BRAVO,

Mr G. BONELLO,

Mr J. MAKARCZYK,

Mr P. KūRIS,

Mrs F. TULKENS,

Mr V. BUTKEVYCH,

Mr J. CASADEVALL,

Mrs N. VAJIć,

Mrs H.S. GREVE,

Mr A.B. BAKA,

Mr R. MARUSTE,

Mrs S. BOTOUCHAROVA,

Mr M. UGREKHELIDZE,

Mr F. GöLCüKLü, ad hoc *judge*,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 2 February and 31 May 2000,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 7 June 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 21986/93) against the Republic of Turkey lodged with

the Commission under former Article 25 by a Turkish national, Mrs Behiye Salman, on 20 May 1993.

The Commission's request referred to former Articles 44 and 48 and to Rule 32 § 2 of former Rules of Court A[1]. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 13, 18 and former Article 25 of the Convention.

2. On 20 September 1999 a panel of the Grand Chamber decided that the case would be examined by the Grand Chamber of the Court (Article 5 § 4 of Protocol No. 11 and Rules 100 § 1 and 24 § 6 of the Rules of Court). The Grand Chamber included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4), Mr L. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rules 24 § 3 and 100 § 4).

Subsequently Mr Türmen, who had taken part in the Commission's examination of the case, withdrew from sitting in the Grand Chamber (Rule 28). On 22 October 1999 the Turkish Government ("the Government") appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1). Mr Fischbach and Mrs Strážnická, who were unable to take part in the further consideration of the case, were replaced by Mrs N. Vajić and Mr M. Ugrekhelidze, substitute judges (Rule 24 § 5 (b)).

3. The Registrar received the memorial of the applicant**Error! Bookmark not defined.** on 2 December 1999 and the memorial of the Government on 4 January 2000.

4. A hearing took place in public in the Human Rights Building, Strasbourg, on 2 February 2000.

There appeared before the Court:

(a) *for the Government*

Mr M. ÖZMEN, *Agent*,

Ms Y. KAYAALP,

Mr O. ZEYREK,

Ms M. GüLSEN,

Mr H. ÇETINKAYA, *Advisers*;

(b) *for the applicant*

Ms A. REIDY, *Counsel*,

Ms F. HAMPSON,

Mr O. BAYDEMIR,

Ms R. YALçINDAğ,

Mr M. KILAVUZ, *Advisers*.

The Court heard addresses by Ms Reidy and Mr Özmen.

5. On 31 May 2000 Mrs Palm, who was unable to take part in further consideration of the case, was replaced by Mr L. Ferrari Bravo (Rules 24 § 5 (b) and 28).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The facts of the case, particularly concerning events on 28 and

29 April 1992 when Agit Salman, the applicant's husband, was detained by police and subsequently died, were disputed by the parties. The Commission, pursuant to former Article 28 § 1 (a) of the Convention, conducted an investigation with the assistance of the parties.

The Commission heard witnesses in Ankara from 1 to 3 July 1996 and in Strasbourg on 4 December 1996 and 4 July 1997. The witnesses included the applicant; her son Mehmet Salman; her brother-in-law İbrahim Salman; Ahmet Dinçer and Şevki Taşçı, police officers who apprehended Agit Salman; Ömer İnceyılmaz, Servet Ozyılmaz and Ahmet Bal, custody officers on duty over the period of Agit Salman's detention; İbrahim Yeşil, Erol Çelebi and Mustafa Kayma, interrogation team officers who took Agit Salman to the hospital; Tevfik Aydın, the Adana public prosecutor who attended the autopsy; Dr Ali Tansı, the doctor at the Adana State Hospital who declared that Agit Salman was dead; Dr Fatih Şen, who conducted the autopsy; Dr Derek Pounder, Professor at Aberdeen University, a forensic expert called by the applicant, and Dr Bilge Kirangil, a member of the Istanbul Institute of Forensic Medicine which had reviewed the autopsy carried out by Dr Fatih Şen.

The Commission also requested an expert opinion on the medical issues in the case from Professor Cordner, Professor of Forensic Medicine at Monash University, Victoria (Australia) and Director of the Victorian Institute of Forensic Medicine.

7. The Commission's findings of fact, which are accepted by the applicant, are set out in its report of 1 March 1999 and summarised below (Section A). The Government's submissions concerning the facts and the expert medical reports are also summarised below (Sections B and C respectively).

A. The Commission's findings of fact

8. Agit Salman, the applicant's husband, worked as a taxi driver in Adana. At the time of events in this case he was 45 years old. He had no history of ill-health or heart problems.

9. On 26 February 1992 Agit Salman was taken into custody by police officers from the anti-terrorism branch of the Adana Security Directorate. İbrahim Yeşil was the officer in charge of interrogating him. Agit Salman was released at 5.30 p.m. on 27 February 1992. He told the applicant and their son Mehmet that he had been beaten and immersed in cold water during the night of his detention. He remained off work for two days with a chill.

10. During an operation conducted to apprehend a number of persons suspected of involvement with the PKK (Workers' Party of Kurdistan), police officers came to the applicant's house in the early hours of 28 April 1992, looking for Agit Salman. He was on a wanted list for activities which included attending the Newroz (Kurdish New Year) celebrations on 23 March 1992 and involvement in starting a fire and in an attack on the security forces in which one person died and four were injured. However, Agit Salman was out working in his taxi.

11. Police officers located Agit Salman at a taxi rank at Yeşilova at about 1 a.m. on 28 April 1992. Assistant Superintendent Ahmet Dinçer and officers Şevki Taşçı and Ali Şarı took him into custody. The apprehension report of the officers made no mention of any struggle or the necessity to use force to place Agit Salman in the police car. There was an inconsistency between their written statements later given to the public prosecutor on 22 May 1992 when they stated that some pushing and pulling might have occurred and their evidence to the Commission. In their oral

evidence to the Commission delegates, Ahmet Dinçer and Şevki Taşçı were adamant that they had to lead Agit Salman by the arms to the car but this did not involve the use of force and he did not receive any knocks or marks in the process. Mehmet Salman heard from the taxi drivers at the taxi rank that his father had not resisted arrest, nor had two taxi drivers who were asked to give statements by the public prosecutor heard that Agit Salman had resisted arrest.

12. Agit Salman was not taken to a doctor before being placed in a cell in the custody area. The Commission found that it was not established that he had suffered any injury on arrest or that he showed any signs of ill-health or respiratory difficulties.

13. The custody officer on duty, Ömer İnceyılmaz, entered Agit Salman's arrival in the custody area as occurring at 3 a.m. on 28 April 1992. There was no information recorded or evidence accounting for the time which elapsed between his apprehension, which took place according to the arresting officers' report at 1.30 a.m., and his registration in the custody area at 3 a.m.

14. Assistant Superintendent İbrahim Yeşil was the leader of the interrogation team assigned to Agit Salman. His team included officers Erol Çelebi, Mustafa Kayma and Hasan Arinç.

15. Two other suspects are known to have been apprehended in connection with the same operation: Behyettin El, taken into custody on 25 April 1992, and Ferhan Tarlak, detained also on 28 April 1992. A third suspect, Ahmet Gergin, was also detained in the custody area in relation to the offences under investigation. İbrahim Yeşil took a statement from Behyettin El and Ahmet Gergin on 29 April 1992. Behyettin El stated that he had been interrogated before the arrival of Ferhan Tarlak, which would have been on or before 28 April 1992.

16. No records existed of the movements of detainees to and from their cells, for example, noting the times of interrogations. The police officers concerned in the events denied in their statements to the public prosecutor taken between 18 and 25 May 1992 that Agit Salman had been interrogated during his detention, in particular, as no interrogations would take place before the operation was completed. İbrahim Yeşil, Mustafa Kayma and Hasan Arinç gave oral evidence to the same effect to the Commission's delegates. The Commission found that their assertion that Agit Salman had not been questioned during the twenty four hours following his apprehension to be implausible, inconsistent and lacking in credibility (see the Commission's analysis of the evidence, Commission's report of 1 March 1999, §§ 271-78). Taking into account also the other evidence, it found that Agit Salman had been questioned by the interrogation team during his period of detention.

17. In the early hours of 29 April 1992 İbrahim Yeşil, Mustafa Kayma, Hasan Arinç and Erol Çelebi brought Agit

Salman to the Adana State Hospital. Dr Ali Tansı examined him immediately. His heartbeat, breathing and other vital functions had stopped, cyanosis had developed on the face and ears and the pupils were dilated. He declared that Agit Salman was dead on arrival and concluded that he had died fifteen to twenty minutes previously.

18. According to a statement signed by the police officers who had said they had brought Agit Salman to hospital at 2 a.m. on 29 April 1992, the custody officer had informed them at 1.15 a.m. that Agit Salman was ill. The suspect told them that his heart was giving him trouble and they took him without delay to the State Hospital emergency ward.

19. On 29 April 1992 Dr Fatih Şen, the forensic doctor at Adana, examined the body in the presence of the public prosecutor. The examination record noted that there were two dried 1 cm by 3 cm graze wounds at the front of the right armpit, a fresh 1 cm by 1 cm graze on the front of the left ankle and an old traumatic ecchymosis measuring 5 cm by 10 cm on the front of the chest. There were no injuries from a pointed instrument or firearm. He concluded that an autopsy was necessary to discover the cause of death. The documents indicate that the autopsy was carried out the same day. Samples of organs were sent for analysis.

20. At about 1 p.m. on 29 April 1992 Mehmet Salman was brought by the police to the Security Directorate, where the public prosecutor informed him that his father had died of a heart attack. İbrahim Salman went to the forensic department on 30 April 1992 to identify the body. The body was released to the family who undertook to bury it the day before May Day. The family washed the body at the cemetery. İbrahim Salman saw bruises and visible marks in the armpits. There were marks in the back resembling holes. There were marks on one foot, which was swollen. Four colour photographs of the body were taken on behalf of the family.

21. On 21 May 1992 Dr Fatih Şen issued the autopsy report. It repeated the physical findings of the examination record, this time describing the ecchymosis on the front of the chest as purple. The internal examination disclosed that the lungs weighed 300 g each and were oedematic and that the heart, weighing 550 g, was larger than the norm. The brain was oedematic. There was some indication of arteriosclerosis in certain vessels and the parietal layer of the myocard adhered tightly to the heart. The sternum was fractured and the surrounding soft tissues revealed fresh haemorrhage which could have been caused by attempted resuscitation.

Reference was made also to the histopathological report of 18 May 1992, which found chronic bronchitis in the lungs, arteriosclerotic changes narrowing the lumen in the coronary arteries and chronic constructive pericarditis, chronic myocarditis, myocardial hyperplasy and hypertrophy in the heart. The toxicology report of 14 May 1992 found no abnormalities. The report concluded that the actual cause of death could not be established and suggested that the case should be referred to the Istanbul Forensic Medicine Institute.

22. On 22 May 1992 the photographs taken by the family were handed over to the public prosecutor.

23. Statements were taken by the public prosecutor from the interrogating team (İbrahim Yeşil, Hasan Arinç, Mustafa Kayma and Erol Çelebi) on 18 May 1992. Statements were taken from the arresting officers Ahmet Dinçer, Ali Sarı and Şevki Taşçı and the custody officers Ahmet Bal, Servet Ozyılmaz and Ömer İnceyılmaz on 22 May 1992. Statements were also taken from Behyettin El and Ferhan Tarlak on 8 May 1992, the applicant on 26 May 1992, Temir Salman (the father of Agit Salman) on 29 May 1992, Hasan Çetin and Abdurrahman Bozkurt, two taxi drivers, on 29 and 30 June 1992 respectively and from Dr Ali Tansı on 30 June 1992.

24. On 15 July 1992 the Istanbul Forensic Medicine Institute issued its opinion, which was signed by seven members of the First Specialist Committee, including Dr Bilge Kirangil. This report recalled that Agit Salman had been pushed and shoved during his arrest, that he had become unwell before his interrogation or, as was claimed, that he had died during interrogation. It deduced from the witness statements that he had been in his cell until he complained that his heart was giving him trouble, at which point he was taken immediately to hospital.

The report took up the findings of the internal and external examination conducted at the autopsy. It concluded that, apart from small, fresh, traumatic abrasions on the ankle and the old purple ecchymosis on the front of the chest, no other traumatic injuries were identified. The fresh haemorrhage around the sternum could be attributed to a resuscitation attempt. There was no evidence to suggest that he had died from any direct trauma. The superficial traumas on his body could be attributed to his resistance and struggle on arrest or his being put in the police vehicle,

although they could have been inflicted directly. They were not independently fatal. The relatively large size of the heart, the sclerosis in the heart arteries and the signs of an old infectious disease on the membrane and muscles of the heart, pointed to a long-standing heart disease. The report concluded that, although the deceased had lived and worked actively prior to his arrest, his death within twenty-four hours of being apprehended could have been caused by cardiac arrest connected with neurohumoral changes brought about by the pressure of the incident in addition to his existing heart disease.

25. On 19 October 1992 the Adana public prosecutor issued a decision not to prosecute. He stated that at about 1.15 a.m. on 29 April 1992 Agit Salman had informed officers that his heart was giving him trouble and he had been taken to Adana State Hospital, where he died. According to the forensic report, Agit Salman had had a long-standing heart disease, any superficial injuries could have occurred during his arrest and death was the result of a heart attack brought on by the pressure of the incident and his heart problem. There was no evidence justifying a prosecution.

26. On 13 November 1992 the applicant appealed against the decision not to prosecute, claiming that Agit Salman had been interrogated and had died under torture.

27. On 25 November 1992 the President of the Tarsus Assize Court rejected the applicant's appeal.

28. On 22 December 1992 the Minister of Justice referred the case to the Court of Cassation under Article 343 of the Code of Criminal Procedure. On 16 February 1994 the Court of Cassation quashed the non-prosecution decision and sent the case back to the Adana public prosecutor for the preparation of an indictment.

29. In an indictment dated 2 May 1994, ten police officers (Ömer İnceyılmaz, Ahmet Dinçer, Ali Sarı, Şevki Taşçı, Servet Ozyılmaz, Ahmet Bal, Mustafa Kayma, Erol Çelebi, İbrahim Yeşil, Hasan Arinç) were charged with homicide in case no. 1994/135. Hearings took place before the Adana Assize Court on, *inter alia*, 27 June, 26 September, 31 October and 1 December 1994. The defendants pleaded not guilty. Oral statements were given by six of the ten police officers (Ahmet Dinçer, Şevki Taşçı, Mustafa Kayma, Erol Çelebi, İbrahim Yeşil and Hasan Arinç) maintaining their written statements and denying any ill-treatment of Agit Salman. The court also heard Temir Salman, the father of Agit Salman, the applicant and Dr Ali Tansı, the doctor on duty in the emergency ward at Adana State Hospital. A written statement was obtained from Behyettin El.

30. In its decision of 26 December 1994, the Adana Assize Court found that it could not be established that the defendants had exerted force or used violence on Agit Salman or threatened him or tortured him in order to force him to confess. The superficial traumas on his body could have derived from other causes, for example, when he was arrested. The forensic reports indicated that Agit Salman had died from his previous heart condition being compounded by superficial traumas. However, there was no evidence proving that the traumas were caused by the accused. It acquitted the defendants on the ground of inadequate evidence.

31. The applicant, who had been a party to the proceedings as a complainant, did not appeal against the acquittal which became final on 3 January 1995.

32. The Commission found, in light of the written and oral evidence, the photographs and the medical opinions given by Professor Pounder and Professor Cordner, that Agit Salman had died rapidly, without a prolonged period of breathlessness. There were marks and abrasions on his left ankle for which there was no explanation and there was bruising and swelling on the sole of the left foot, which could not have been caused accidentally. These were consistent with the application of *falaka* (see paragraph 71 below). The bruise in the centre of the chest had not been dated with any accuracy by histopathological means and had not been shown to be dissociated from the broken sternum. These injuries together could not have been caused by cardiac massage. The Commission also disbelieved the oral evidence of officers İbrahim Yeşil, Mustafa Kayma and Erol Çelebi that cardiac massage had been applied, noting that this had first been mentioned as having occurred when evidence was given before its delegates in July 1996, four years after the events. The Commission concluded that Agit Salman had been subjected to torture during interrogation, which had provoked cardiac arrest and thereby caused his death.

33. On 24 January 1996 the applicant was summoned to the anti-terrorism branch of the Adana Security Directorate. A statement was taken by officers, on which her thumbprint was placed. It was headed “Concerning her application for

help to the European Human Rights [institutions]" and began, "The witness was asked: You are asked to explain whether you applied to the European Human Rights Association, if you asked for help and whether you filled in the application form. Who mediated in your application?" The statement purported to set out her explanations as to how she came to submit her application to the Commission. She confirmed that the legal aid documents had been filled in by her. In her oral evidence, which the Commission found credible and substantiated, the applicant claimed that she had been blindfolded, kicked and struck at the Directorate and that the officers had told her to drop the case.

34. The applicant was summoned a second time. A report dated 9 February 1996, signed by police officers, listed details of the applicant's income and expenditure and confirmed her declaration of means. On this or another date, she was taken before the public prosecutor and again asked about her statement of means. No threats were made during that interview.

B. The Government's submissions on the facts

35. The Government referred to the evidence given by the police officers, the autopsy report and the report of the Istanbul Forensic Medicine Institute, and the oral evidence of Dr Bilge Kirangil before the Commission's delegates.

36. Agit Salman had suffered from a pre-existing heart disease. When he was arrested, he sustained minor injuries. The bruise on his chest, which was purple and therefore old, predated his arrest. During his detention in the custody area at Adana Security Directorate, he was not interrogated as the operation had not yet been completed. At about 1 a.m., he called for assistance and told the custody officer that his heart was giving him trouble. The custody officer sought help from the officers of the interrogating team who were waiting nearby for the next stage of the operation. These officers put Agit Salman, who was having difficulty breathing, in a police van and drove him to the hospital. On the way, they stopped the van and Mustafa Kayma briefly applied mouth-to-mouth resuscitation and cardiac massage. They took Agit Salman to the emergency ward, where they were told that he had died.

37. The autopsy and the report of the Istanbul Forensic Medicine Institute established that Agit Salman had not suffered any major trauma, that the broken sternum was caused by cardiac massage and that he had died of natural causes, despite all possible assistance being given.

38. In her evidence before the Commission delegates, Dr Bilge Kirangil had expressed the opinion that the bruise on the chest was at least 2 to 3 days old and unrelated to the broken sternum and that the oedema in the brain was indicative of a prolonged period of breathlessness prior to death. No findings could be drawn from the photographs, which were amateur and of poor quality. She did not consider the lack of proper forensic photographs to be a major deficiency. There had been no findings of ill-treatment in the Institute's report since there was no evidence of such. Cardiac arrest as in this case could be triggered by hormonal or environmental factors, such as extremes of temperature. If a direct blow had caused the bruise and fractured the sternum, she would have expected to see contusion and ecchymosis on the back surface of the sternum and bruising on the front and back surface of the right ventricle of the heart. While the lungs of an individual who had been breathless for thirty minutes could generally be expected to increase to a weight of 500 to 600 g, this was not necessarily the case but depended on the individual (see the summary of Dr Kirangil's evidence, Commission's report, §§ 233-41).

C. The expert medical reports

1. Report of Professor Pounder submitted on 26 November 1996 on behalf of the applicant

39. Professor Pounder was Professor of the Department of Forensic Medicine at the University of Dundee, and was, *inter alia*, a Fellow of the Royal College of Pathologists, Overseas Fellow of the Hong Kong College of Pathologists, a Fellow of the Faculty of Pathology of the Royal College of Physicians of Ireland and a Fellow of the Royal College of Pathologists of Australasia. The report was drafted, *inter alia*, on the basis of the domestic autopsy documents and statements and testimony of witnesses. It may be summarised as follows.

40. The autopsy findings indicated that Agit Salman suffered from pre-existing natural heart disease, namely, chronic inflammation involving pericardial adhesions, which was old and inactive. In the distant past, he might have suffered from rheumatic heart disease, which would have manifested itself at that time as an acute febrile illness, without

necessarily any symptoms of heart involvement. The heart was enlarged, weighing 550 g, showing that the heart muscle had increased to compensate.

41. A heart with a weight greater than 500 g might give rise to sudden unexpected death at any time as a consequence of an abnormality of heart rhythm. This might be precipitated by physical or emotional stress or occur apparently spontaneously without any precipitating event.

42. In addition to the heart disease, there were four injuries.

At the front of the right armpit, there were two abrasions, each 3 cm by 1 cm and described as dried and parchmented. It was not apparent whether they had been dissected to discover if there was any associated bruising but, given the description, it was reasonable to accept they were post-mortem changes.

There were two grazes measuring 1 cm by 1 cm on the front of the left ankle and described as fresh and bloody. It appeared that these must have been caused during the period of police detention, but their location and size did not point to any specific cause.

There was a 5 cm by 10 cm bruise in the centre of the chest, which was described as old and purple in colour.

The sternum was fractured, with fresh bleeding in adjacent soft tissues.

43. The bruise to the chest directly overlay the fracture to the sternum. The haemorrhage around the fracture suggested that the fracture was produced before and not after death. The production of such a fracture would be sufficient to induce an abnormality in the rhythm of the underlying heart and thus cause a sudden death. Consequently, the fracture of the sternum represented a possible cause of death. While, theoretically, a fracture could be produced by a fall, it would be unusual, requiring impact on a raised object or edge and it would be associated with injuries to other parts of the body. Cardiac massage could also produce a fracture if very considerable force was applied. The fracture could also have been produced by a blow. In that case, bruising of the skin would be expected, even if the death which followed was rapid. Although Dr Fatih Şen characterised the bruise on the chest as old and by implication as resulting from a different event, his own view was that, given that the bruise directly overlay the fracture, it would require compelling medical evidence to conclude that they were unrelated. Dr Şen's opinion on the age of the bruise was based on the subjective, naked-eye assessment of the colour. However, the bruise was described as purple, which was entirely consistent with a fresh bruise. A bruise 2 to 3 days old would have been expected to have developed a yellowish tinge. A simple histopathological test would have clearly established whether it was a fresh bruise or an old bruise. Such a bruise would not have occurred as a result of the hand pressure applied during cardiac massage. His opinion was that, given the contiguity of the bruise and fracture and the absence of any clear evidence that the bruise occurred on a separate occasion, the bruise and fracture occurred at the same time as a result of a blow, which precipitated an abnormality of heart rhythm.

44. The autopsy findings, in particular the weight of the lungs (300 g each, that is, close to the minimum) indicated that the death was very rapid rather than prolonged. In individuals dying slowly with gradual heart failure, a lung weight of 500 to 600 g was common and up to 1,000 g could occur. This was the result of accumulation of fluid in the lungs consequent on the failure of the pumping action of the heart and was expressed clinically by breathlessness and difficulty in breathing. Deaths involving instantaneous collapse were associated with light lung weight as in this case. A relatively slow death would also be associated with a congested liver. Thus, the autopsy findings and histopathological examination weighed heavily against the possibility of a prolonged dying period with symptoms of breathlessness and pointed rather towards a rapid death.

45. As regarded the autopsy procedures, these were seriously deficient. Although the only two theoretical possibilities for the fracture were external heart massage or a blow, no steps were taken to establish conclusively whether or not massage had been performed. The statement in the autopsy report that it could have been caused by massage did not represent a full and frank statement and could be misread to imply that Dr Şen had knowledge that such resuscitation was attempted whereas he did not. He should have distinguished fact from speculation. There was also a need to include as much descriptive detail as possible concerning the bruise, fracture and heart disease and in this respect the detail was manifestly insufficient.

2. Additional Report of Professor Pounder submitted on 26 November 1996 on behalf of the applicant

46. In the addendum of 26 November 1996, there was an analysis of the four photographs, which were described as being of poor quality. However, the photograph of the soles of the feet nonetheless showed a distinctive purple-red discolouration of the sole of the left foot, with mild swelling. The right little toe had a white glistening band at its base. The discolouration of the instep and sole of the left foot was strongly suggestive of bruising with associated minor swelling and was not consistent with post-mortem gravitational pooling of blood. Bruising of this extent could not be produced as a result of post-mortem injury and injury in such a location was unlikely to be caused by a fall sustained while the victim was alive. Therefore the injury was strongly suggestive of one or more blows to the foot. The mark to the right little toe was strongly suggestive of a ligature mark, although there was no congestion such as to suggest tight application of a ligature while the victim was alive; nor was the appearance suggestive of the passage of electricity. Neither possibility could be excluded and the mark was unusual.

47. The red injuries to the front of the left ankle, taken with the injuries to the sole of the left foot, suggested that the ankles were restrained by a mechanism across the front of both ankles and that, so restrained, the person was struck on the sole of his left foot.

48. The marks in the right armpit were not clearly shown. Their position, alignment and colouration were not what would normally be expected of post-mortem artefactual injury and raised the possibility of an electrical contact mark produced while the victim was alive. Combined with the unusual marking to the right little toe, it raised the suspicion of the use of electricity with one terminal tied round the little toe and the other terminal applied to the right armpit. Whether or not the marks were electrical burns could have been established by histopathological examination.

49. The photograph of the back showed post-mortem artefactual staining, with white areas of contact pallor. There were distinct marks, including a bright red abrasion at the spine at waist level and above this two dark reddish marks. Above these was a horizontal line of pink bruising or abrasion. All these could be post-mortem injuries, caused by the manipulation of the body over a rough or cutting surface. They could also have been caused before death. To distinguish the two would have required dissection.

50. The photographs indicated that the autopsy dissection was inadequate in that the back was not dissected, nor were the sole of the left foot or the injuries to the ankle. It was not clear whether the injury to the armpit was dissected. They also indicated that the description of the body in the autopsy was incomplete.

3. Report of Professor Cordner submitted on 12 March 1998 at the request of the Commission

51. This report was drawn up by Professor Cordner, instructed by the Commission's delegates (see paragraph 6 above), on the basis of the domestic medical evidence, the witness testimonies, the reports of Professor Pounder and the photographs supplied by the applicant.

52. As regarded the photographs, the variation in colour or mottling on the foot represented bruising. He considered that the photograph was too blurred to conclude that the white glistening band on the right little toe was associated with a ligature nor could he reach any conclusion that the marks in the right armpit were the result of the application of electrical devices. On the legs, he noted, in addition to the marks which could correspond to the abrasions on the left ankle, small areas of reddening on the front and inner side of the right ankle. He agreed with Professor Pounder's findings on the back and noted in addition other areas of redness. Without the benefit of a dissection and/or histology of the dissection, the nature of the marks was uncertain. They could have been caused before death or be a post-mortem phenomenon. Bruising of the soles of the feet was relatively unusual and represented at least moderately severe force. Beating on the sole of the foot could cause such bruising. A person with such an injury would not be able to walk without at least an obvious limp.

53. As regarded the ageing of the chest bruise, recent authors in forensic medicine agreed that caution should be exercised. It was not practicable to construct an accurate calendar of colour changes as was done in earlier textbooks as there were too many variables. If the purple colour of the chest bruise was relied on to distinguish its age from the “fresh” haemorrhage around the sternal fracture, this was an invalid conclusion. The materials did not permit a

distinction in age to be drawn between the two. A recent study issued to show the level of disagreement amongst authors concluded that the only point of agreement was that a bruise with identifiable yellowing was more than 18 hours old. Thus, the purple bruise could be fresh (that is, less than 24 hours old) but could be older.

54. Concerning the broken sternum, there had been no complaint of chest pain so one could infer that it occurred shortly before or around the time of death. His view was that there was a coincidence of two injuries (the bruise and the fracture) which could not be distinguished in age, or there was just one injury. If there was no chest bruise when Agit Salman was taken into custody, the issue was relatively easily resolved. Most pathologists would tend to regard them, prima facie, as one injury or state that there was a rebuttable presumption that they were one injury. As regarded the possibility of the bruising and fractured sternum being caused by an attempt at resuscitation, significant chest bruising was rare in this context. Sternal fractures caused by cardiopulmonary resuscitation were usually associated with fractured ribs and not with surrounding haemorrhage or overlying bruising. If the chest bruise and fracture with accompanying haemorrhage were the result of one trauma, it was not one associated with a resuscitation attempt. A fracture from a fall onto a flat surface would be unusual. A heavy direct fall onto a relatively smooth broad protrusion could cause such an injury but he had no recollection of having seen this as an isolated accidental injury (that is, without injuries to other parts of the body occurring at the same time). A blow from a fist, knee or foot could also cause such an injury.

55. Lungs with oedema sufficient to be regarded as a sign of heart failure and to cause breathlessness of twenty to thirty minutes weighed more than 300 g. The lung weights in this case fitted with a substantially more rapid death. The oedema found in the brain was not significant, the weight of the victim's brain being slightly under the average brain weight for a man of his age.

56. The finding of underlying heart disease was undisputed. In his view, the best explanation for the death was as follows. Before he died, Agit Salman sustained significant traumas to the sole of his left foot and to the front of his chest, causing bruising and prima facie fracturing the sternum and causing a surrounding haemorrhage. Fear and pain associated with these events resulted in a surge of adrenalin increasing the heart rate and raising blood pressure. This put a severe strain on an already compromised heart, which caused cardiac arrest and a rapid death. Alternatively, the compression of the chest associated with the fracturing of the sternum fatally disturbed the rhythm of the heart without leaving observable damage. The weakness of this opinion lay in the conclusion that the chest injuries represented one trauma rather than two, and this depended partly on circumstantial factors and could not be completely resolved. However, even allowing for the possibility that they were separate injuries, the chest bruise could still be regarded as fresh and as having occurred while in custody, in which case the formal cause of death would be the same, namely, cardiac arrest in a man with heart disease following the occurrence of injuries to the left foot and chest. If the fractured sternum was regarded as due to an attempt at resuscitation, the cause of death would only change if it was concluded that the bruise occurred prior to being taken into custody.

57. The critical task of an autopsy in this case was to evaluate the circumstances in which it was proposed that this man died, in particular, whether it was a natural death in custody or not. In this evaluation, the age of the chest bruise was critical. Even allowing for Dr Şen's view of the age based on colour, the autopsy should have been conducted in a way which allowed another pathologist at another time to come to his or her own view. Important observations had to be justified objectively. In the absence of photographs, histology was the obvious way for Dr Şen to establish the truth of his view. The lack of proper photographs had also seriously impeded the investigation and evaluation of this case. Deficiencies also appeared in the insufficient subcutaneous dissection to seek out bruises not visible externally and the absence of a histological examination of the lesions critical to the proper evaluation of the circumstances of the death.

58. Professor Cordner had met Professor Pounder professionally. He had not met either Dr Kirangil or Dr Şen.

II. RELEVANT DOMESTIC LAW AND PRACTICE

59. The principles and procedures relating to liability for acts contrary to the law may be summarised as follows.

A. Criminal prosecutions

60. Under the Turkish Criminal Code all forms of homicide

(Articles 448-55) and attempted homicide (Articles 61-62) constitute criminal offences. It is also an offence for a State employee to subject anyone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment). The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutors' offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If there is evidence to suggest that a death is not due to natural causes, members of the security forces who have been informed of that fact are required to advise the public prosecutor or a criminal court judge

(Article 152). By Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the exercise of his duty is liable to imprisonment.

A public prosecutor who is informed by any means whatsoever of a situation that gives rise to the suspicion that an offence has been committed is obliged to investigate the facts in order to decide whether or not there should be a prosecution (Article 153 of the Code of Criminal Procedure).

61. In the case of alleged terrorist offences, the public prosecutor is deprived of jurisdiction in favour of a separate system of national security prosecutors and courts established throughout Turkey.

62. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the council. If a decision not to prosecute is taken, the case is automatically referred to that court.

63. By virtue of Article 4, paragraph (i), of Decree no. 285 of 10 July 1987 on the authority of the governor of a state of emergency region, the 1914 Law (see paragraph 62 above) also applies to members of the security forces who come under the governor's authority.

64. If the suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. Thus, if it is a “military offence” under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and their rules of procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9 to 14 of Law no. 353).

The Military Criminal Code makes it a military offence for a member of the armed forces to endanger a person's life by disobeying an order (Article 89). In such cases civilian complainants may lodge their complaints with the authorities referred to in the Code of Criminal Procedure (see paragraph 60 above) or with the offender's superior.

B. Civil and administrative liability arising out of criminal offences

65. Under section 13 of Law no. 2577 on administrative procedure, anyone who sustains damage as a result of an act by the authorities may, within one year after the alleged act was committed, claim compensation from them. If the claim is rejected in whole or in part or if no reply is received within sixty days, the victim may bring administrative proceedings.

66. Article 125 §§ 1 and 7 of the Constitution provides:

"All acts or decisions of the authorities are subject to judicial review ...

...

The authorities shall be liable to make reparation for all damage caused by their acts or measures."

That provision establishes the State's strict liability, which comes into play if it is shown that in the circumstances of a particular case the State has failed in its obligation to maintain public order, ensure public safety or protect people's lives or property, without it being necessary to show a tortious act attributable to the authorities. Under these rules, the authorities may therefore be held liable to compensate anyone who has sustained loss as a result of acts committed by unidentified persons.

67. Article 8 of Decree no. 430 of 16 December 1990, the last sentence of which was inspired by the provision mentioned above (see paragraph 66), provides:

"No criminal, financial or legal liability may be asserted against ... the governor of a state of emergency region or by provincial governors in that region in respect of decisions taken, or acts performed, by them in the exercise of the powers conferred on them by this legislative decree, and no application shall be made to any judicial authority to that end. This is without prejudice to the rights of individuals to claim reparation from the State for damage which they have been caused without justification."

68. Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages

(Articles 41-46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of an act done in the performance of duties governed by public law may, in principle, only bring an action against the authority by whom the civil servant concerned is employed and not directly against the civil servant (see Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Obligations). That is not, however, an absolute rule. When an act is found to be illegal or tortious and, consequently, is no longer an "administrative" act or deed, the civil courts may allow a claim for damages to be made against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Obligations).

III. RELEVANT INTERNATIONAL REPORTS

A. Investigations by the European Committee for the Prevention of Torture (CPT)

69. The European Committee for the Prevention of Torture (CPT) has carried out seven visits to Turkey. The first two visits, in 1990 and 1991, were *ad hoc* visits considered necessary in light of the considerable number of reports received from a variety of sources containing allegations of torture or other forms of ill-treatment of persons deprived of their liberty, in particular, those held in police custody. A third periodic visit took place at the end of 1992, involving a visit to Adana Security Directorate. Further visits took place in October 1994, August and September 1996 and October 1997 (the latter two of which involved a visit to police establishments in Adana). The CPT's reports on these visits, save that of October 1997, have not been made public, such publication requiring the consent of the State concerned, which has not been forthcoming.

70. The CPT has issued two public statements.

71. In its public statement adopted on 15 December 1992, the CPT concluded that torture and other forms of severe ill-treatment were important characteristics of police custody. On its first visit in 1990, the following types of ill-treatment were constantly alleged, namely, palestinian hanging, electric shocks, beating of the soles of the feet (*falaka*), hosing with pressurised cold water and incarceration in very small, dark, unventilated cells. Its medical

examinations disclosed clear medical signs consistent with very recent torture and other severe ill-treatment of both a physical and psychological nature. The on-site observations in police establishments revealed extremely poor material conditions of detention.

On its second visit in 1991, it found that no progress had been made in eliminating torture and ill-treatment by the police. Many persons complained of similar types of ill-treatment – an increasing number of allegations were heard of forcible penetration of bodily orifices with a stick or truncheon. Once again, a number of the persons making such claims were found on examination to display marks or conditions consistent with their allegations. On its third visit, from 22 November to 3 December 1992, its delegation was inundated with allegations of torture and ill-treatment. Numerous persons examined by its doctors displayed marks or conditions consistent with their allegations. It listed a number of these cases. On this visit, the CPT had visited Adana, where a prisoner at Adana Prison displayed haematomas on the soles of his feet and a series of vertical purple stripes (10 cm long, 2 cm wide) across the upper part of his back, consistent with his allegation that he had recently been subjected to *falaka* and beaten on the back with a truncheon while in police custody. At the headquarters of Ankara and Diyarbakır Security Directorates, it found equipment that could be used for torture and the presence of which had no other credible explanation. The CPT concluded in its statement that "the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey".

72. In its second public statement, issued on 6 December 1996, the CPT noted that some progress had been made over the intervening four years. However, its findings after its visit in 1994 demonstrated that torture and other forms of ill-treatment were still important characteristics of police custody. In the course of visits in 1996, CPT delegations once again found clear evidence of the practice of torture and other forms of severe ill-treatment by the police. It referred to its most recent visit in September 1996 to police establishments in Adana, Bursa and Istanbul, when it also went to three prisons in order to interview certain persons who had very recently been in police custody in Adana and Istanbul. A considerable number of persons examined by the delegations' forensic doctors displayed marks or conditions consistent with their allegations of recent ill-treatment by the police, and in particular of beating of the soles of the feet, blows to the palms of the hands and suspension by the arms. It noted the cases of seven persons who had been very recently detained at the headquarters of the anti-terrorism branch of Istanbul Security Directorate and which ranked among the most flagrant examples of torture encountered by CPT delegations in Turkey. They showed signs of prolonged suspension by the arms, with impairments in motor function and sensation which, in two persons, who had lost the use of both arms, threatened to be irreversible. It concluded that resort to torture and other forms of severe ill-treatment remained a common occurrence in police establishments in Turkey.

B. The United Nations Model Autopsy Protocol

73. The "Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions" adopted by the United Nations in 1991 includes a Model Autopsy Protocol aimed at providing authoritative guidelines for the conduct of autopsies by public prosecutors and medical personnel. In its introduction, it noted that an abridged examination or report was never appropriate in potentially controversial cases and that a

systematic and comprehensive examination and report were required to prevent the omission or loss of important details:

"It is of the utmost importance that an autopsy performed following a controversial death be thorough in scope. The documentation and recording of those findings should be equally thorough so as to permit meaningful use of the autopsy results."

74. In part 2(c), it stated that adequate photographs were crucial for thorough documentation of autopsy findings. Photographs should be comprehensive in scope and confirm the presence of all demonstrable signs of injury or disease commented upon in the autopsy report.

PROCEEDINGS BEFORE THE COMMISSION

75. Mrs Behiye Salman applied to the Commission on 20 May 1993. She alleged that her husband, Mr Agit Salman had died as a result of being tortured while in police custody. She relied on Articles 2, 3, 6, 13, 14 and 18 of the

Convention. In the course of the proceedings before the Commission, the applicant further alleged that she had been hindered in the effective exercise of the right of individual petition as guaranteed by former Article 25 § 1.

76. The Commission declared the application (no. 21986/93) admissible on 20 February 1995. In its report of 1 March 1999 (former Article 31)[1], it expressed the unanimous opinion that there had been a violation of Article 2 on account of the death in custody of the applicant's husband; that there had been a violation of Article 3 in that her husband had been tortured; that there had been a violation of Article 13; that there had been no violations of Articles 14 and 18; and that Turkey had failed to comply with its obligations under former Article 25.

FINAL SUBMISSIONS TO THE COURT

77. In her memorial, the applicant requested the Court to find that the respondent State was in violation of Articles 2, 3, 13, and former Article 25 § 1 of the Convention. She requested the Court to award her just satisfaction under Article 41.

78. The Government requested the Court to dismiss the case as inadmissible on account of the applicant's failure to exhaust domestic remedies. In the alternative, they argued that the applicant's complaints were not substantiated by the evidence.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

79. The Government objected that the applicant had not exhausted domestic remedies, as required by Article 35 of the Convention, by making proper use of the available redress through the instituting of criminal proceedings, or by bringing claims in the civil or administrative courts. They referred to the Court's upholding of their preliminary objection in the Aytekin case (see the Aytekin v. Turkey judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VII).

The Government maintained that the applicant had been a party to the criminal proceedings brought against the police officers accused of torturing her husband and causing his death and that she had failed to appeal to the Court of Cassation against their acquittal. The Court of Cassation had previously quashed the decision not to prosecute the officers and could not be considered as an ineffective remedy. The applicant could also have obtained from domestic judicial bodies the compensation for pecuniary and non-pecuniary damage which she sought in the present proceedings.

80. The applicant's counsel submitted at the hearing that the applicant's appeal against the decision not to prosecute had been rejected before she introduced her complaints before the Commission. The procedure whereby the Minister of Justice referred the case to the Court of Cassation, which sent the case for trial, was an extraordinary remedy which the applicant was not required to exhaust. She also submitted that a further appeal would have served no purpose in light of the inadequate investigation and lack of evidence before the courts.

81. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2275-76, §§ 51-52, and the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, §§ 65-67).

82. The Court notes that Turkish law provides administrative, civil and criminal remedies against illegal and criminal acts attributable to the State or its agents (see paragraphs 59 et seq. above).

83. With respect to an action in administrative law under Article 125 of the Constitution based on the authorities' strict liability (see paragraphs 65-66 above), the Court recalls that a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if in respect of complaints under those Articles an applicant were to be required to exhaust an administrative-law action leading only to an award of damages (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 74).

Consequently, the applicant was not required to bring the administrative proceedings in question and the preliminary objection is in this respect unfounded.

84. As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents (see paragraph 68 above), the Court notes that a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, no evidence was forthcoming as to which police officer was responsible for the ill-treatment which was alleged by the applicant to have been inflicted on her husband and, indeed, the report from the Istanbul Forensic Medicine Institute, the highest authority in the country, did not establish that any unlawful acts had occurred (see paragraph 24 above).

85. With regard to the criminal-law remedies (see paragraphs 60-62 above), the Court notes that the applicant appealed unsuccessfully against the decision not to prosecute the police officers involved in her husband's detention. The procedure whereby the Minister of Justice referred the case to the Court of Cassation was an extraordinary remedy, which must normally be considered as falling outside the scope of Article 35 § 1 of the Convention. It is, however, the case that the applicant acted as a party in the proceedings which followed the Court of Cassation's decision to send the case for trial. The trial ended in an acquittal of the police officers on the basis that there was insufficient evidence to establish that they had ill-treated her husband prior to his death or to establish that he had died because of ill-treatment. This was also the basis for the public prosecutor's original decision not to prosecute. The applicant has argued that in these circumstances a further appeal had no reasonable prospect of success and cannot be regarded as a requirement of the principle of exhaustion of domestic remedies.

86. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see the Akdivar and Others judgment cited above, p. 1211, § 69, and the Aksoy judgment cited above, p. 2276, §§ 53-54).

87. The Court considers that the limb of the Government's preliminary objection concerning civil and criminal remedies raises issues concerning the effectiveness of the criminal investigation that are closely linked to those raised in the applicant's complaints under Articles 2, 3 and 13 of the Convention. It also observes that this case differs from the Aytekin case relied on by the Government as, in that case, the soldier who had shot the applicant's husband had been convicted of unintentional homicide by the Batman Criminal Court. The appeal which was pending before the Court of Cassation concerned both the applicant's and the public prosecutor's claims that he should have been convicted of a more serious degree of homicide. In those circumstances, it could not be said that the investigation conducted by the authorities did not offer reasonable prospects of bringing the person responsible for the death of her husband to justice (see the Aytekin judgment cited above, p. 2827, § 83).

88. Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the administrative remedy relied on (see paragraph 83 above). It joins the preliminary objection concerning remedies in civil and criminal law to the merits (see paragraphs 104-09 below).

II. THE COURT'S ASSESSMENT OF THE FACTS

89. The Court reiterates its settled case-law that under the Convention system prior to 1 November 1998 the establishment and verification of the facts was primarily a matter for the Commission (former Articles 28 § 1 and 31). While the Court is not bound by the Commission's findings of fact and remains free to make its own assessment in the light of all the material before it, it is however only in exceptional circumstances that it will exercise its powers in this area (see, among other authorities, the Akdivar and Others judgment cited above, p. 1214, § 78).

90. The facts in dispute between the parties are closely linked to issues of State responsibility for the treatment and death of Agit Salman while in police custody. The Court will examine together the factual and legal questions as they are relevant to the applicant's complaints under Articles 2, 3 and 13 of the Convention set out below.

III. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

91. The applicant alleged that her husband, Agit Salman, had died as a result of torture at the hands of police officers at Adana Security Directorate. She also complained that no effective investigation had been conducted into the circumstances of the murder. She argued that there had been a breach of Article 2 of the Convention, which provides:

“1. 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.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

92. The Government disputed those allegations. The Commission expressed the opinion that Article 2 had been infringed on the ground that Agit Salman had died following torture in police custody and also on the ground that the authorities had failed to carry out an adequate criminal investigation into the circumstances surrounding the death of Agit Salman.

A. Submissions of those who appeared before the Court

1. The applicant

93. The applicant submitted that her husband had been killed while in custody. The weight of the medical evidence established that he had been subjected to force which had led to cardiac arrest. The authorities had been unable to provide any satisfactory explanation as to how Agit Salman had died but had developed a story clearly designed to cover up the truth. She submitted that, where an individual was taken into custody in good health and died, that death must be attributable to the actions of the authorities in the absence of a plausible explanation. No such explanation had been provided for the chest bruise, the broken sternum, the bruising to the left foot, the grazes on the left ankle and the wounds to the armpit.

94. The applicant also asked the Court to endorse the Commission's opinion that there had been a violation of Article 2 of the Convention on the ground that the investigation into the death of her husband had been so inadequate and ineffective as to amount to a failure to protect the right to life. In particular, the investigation was ineffective in providing the necessary medical evidence concerning Agit Salman. For example, there was a lack of histopathological analysis of the bruises and no forensic photographs were taken contrary to the recommendations of the United Nations Model Autopsy Protocol (see paragraphs 73-74 above). Both

Dr Şen and the Istanbul Forensic Medicine Institute drew subjective conclusions without giving equal weight to the

possible causes which cast a negative light on the authorities. Similarly, the public prosecutors made no effort to test the veracity of the police officers' statements or to ensure that the necessary evidence for criminal proceedings was obtained.

2. The Government

95. The Government maintained that the applicant's allegations were unfounded. The autopsy and the Istanbul Forensic Medicine Institute report established that Agit Salman died of a cardiac arrest brought on by the excitement surrounding his apprehension and detention. He suffered breathlessness in his cell and was taken to hospital by police officers, who tried to resuscitate him en route, causing the broken sternum. The allegations that he suffered torture are unsubstantiated and based on unreliable photographs and speculations of doctors who did not examine the body. The Government emphasised that the Istanbul Forensic Medicine Institute was a body of the highest professional excellence whose findings could not be put in doubt.

96. The Government contended that the investigation was adequate and effective. Statements were taken from all relevant witnesses and officials and all appropriate medical and forensic examinations were performed, including the verification of the cause of death by obtaining an expert opinion from the Istanbul Forensic Medicine Institute. The Ministry of Justice referred the case to the Court of Cassation, which quashed the decision not to prosecute the police officers and sent the case for trial. The evidence was examined by the court which acquitted the officers. All necessary steps had therefore been taken in investigating the incident.

B. The Court's assessment

1. The death of Agit Salman

97. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-47).

98. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor, however, to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (see the McCann and Others judgment cited above, p. 46, §§ 148-49).

99. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, among other authorities, *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.

100. In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt” (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the

authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.

101. The Court finds that the Commission's evaluation of the facts in this case accords with the above principles.

102. Agit Salman was taken into custody in apparent good health and without any pre-existing injuries or active illness. No plausible explanation has been provided for the injuries to the left ankle, bruising and swelling of the left foot, the bruise to the chest and the broken sternum. The evidence does not support the Government's contention that the injuries might have been caused during the arrest, or that the broken sternum was caused by cardiac massage. The opinion of Dr Kirangil that the chest bruise pre-dated the arrest and that Agit Salman died of a heart attack brought on by the stress of his detention alone and after a prolonged period of breathlessness was rebutted by the evidence of Professors Pounder and Cordner. In accepting their evidence as to the rapidity of death and the probability that the bruise and broken sternum were caused by the same event – a blow to the chest – the Commission did not fail to accord Dr Kirangil's evidence proper weight nor did it give undue preference to the evidence of Professors Cordner and Pounder. It may be observed that Dr Kirangil signed the Istanbul Forensic Medicine Institute report which was in issue before the Commission and on that basis could not claim to be either objective or independent. There is no substance, moreover, in the allegations of collusion between the two professors made by the Agent of the Government at the hearing.

103. The Court finds, therefore, that the Government have not accounted for the death of Agit Salman by cardiac arrest during his detention at Adana Security Directorate and that the respondent State's responsibility for his death is engaged.

It follows that there has been a violation of Article 2 in that respect.

2. Alleged inadequacy of the investigation

104. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann and Others judgment cited above, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 329, § 105).

105. In that connection, the Court points out that the obligation mentioned above is not confined to cases where it is apparent that the killing was caused by an agent of the State. The applicant and the father of the deceased lodged a formal complaint about the death with the competent investigation authorities, alleging that it was the result of torture. Moreover, the mere fact that the authorities were informed of the death in custody of Agit Salman gave rise *ipso facto* to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (see, *mutatis mutandis*, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1778, § 82, and the Yaşa judgment cited above, p. 2438, § 100). This involves, where appropriate, an autopsy which provides a complete and accurate record of possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death.

106. Turning to the particular circumstances of the case, the Court observes that the autopsy examination was of critical importance in determining the facts surrounding Agit Salman's death. The difficulties experienced by the Commission in establishing any of those facts, elements of which were still disputed by the parties before the Court, derives in a large part from the failings in the post-mortem medical examination. In particular, the lack of proper forensic photographs of the body and the lack of dissection and histopathological analysis of the injuries and marks on the body obstructed the accurate analysis of the dating and origin of those marks, which was crucial to establishing whether Agit Salman's death had been provoked by ill-treatment in the twenty-four hours preceding his death. The unqualified assumption by Dr Şen that the broken sternum could have been caused by cardiac massage was included in his report without seeking any verification as to whether such massage had been applied and was in the circumstances misleading. The examination of Dr Şen's findings by the Istanbul Forensic Medicine Institute did not remedy these

shortcomings. It compounded them by confirming that the autopsy disclosed that Agit Salman had died of a heart attack provoked by the combination of a pre-existing heart disease and the excitement of his apprehension.

107. The lack of medical support for the applicant's allegations of torture was the basis for the public prosecutor's decision of 19 October 1992 not to prosecute and the Adana Assize Court's decision of 26 December 1994 to acquit the police officers. The Court considers that the defects in the autopsy examination fundamentally undermined any attempt to determine police responsibility for Agit Salman's death. Furthermore, the indictment named indiscriminately all the officers known to have come into contact with Agit Salman from the time of his arrest to his death, including the three custody officers on duty over the period. No evidence was adduced concerning the more precise identification of the officers who did, or could have, ill-treated Agit Salman.

108. In these circumstances, an appeal to the Court of Cassation, which would only have had the power to remit the case for reconsideration by the first-instance court, had no effective prospect of clarifying or improving the evidence available. The Court is not persuaded therefore that the appeal nominally available to the applicant in the criminal-law proceedings would have been capable of altering to any significant extent the course of the investigation that was made. That being so, the applicant must be regarded as having complied with the requirement to exhaust the relevant criminal-law remedies.

109. The Court concludes that the authorities failed to carry out an effective investigation into the circumstances surrounding Agit Salman's death. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil limb of the Government's preliminary objection (see paragraphs 84-88 above) and holds that there has been a violation of Article 2 in this respect.

IV. ALLEGED VIOLATIONS OF ARTICLE 3 OF THE CONVENTION

110. The applicant complained that her husband was tortured before his death. She invoked Article 3 of the Convention which provides:

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

111. The applicant submitted that her husband was subjected to treatment amounting to torture whilst in the custody of Adana Security Directorate. She relied on the marks on his feet and ankles as showing that he had been subjected to *falaka*. He had also received a blow to the chest powerful enough to break the sternum. No other plausible explanation for the injuries on his body had been forthcoming from the authorities. She further argued that the claim that he had been tortured had never been properly investigated by the authorities, in violation of the procedural aspect of Article 3 of the Convention.

112. The Government denied that there was any sign of torture revealed by the medical evidence. They also disputed that there were any failings in the investigation.

113. The Court has found above that the Government have not provided a plausible explanation for the marks and injuries found on Agit Salman's body after he was taken into custody in apparent good health (see paragraph 102 above). Moreover, the bruising and swelling on the left foot combined with the grazes on the left ankle were consistent with the application of *falaka*, which the European Committee for the Prevention of Torture reported was one of the forms of ill-treatment in common use, *inter alia*, at the Adana Security Directorate. It was not likely to have been caused accidentally. The bruise to the chest overlying a fracture of the sternum was also more consistent with a blow to the chest than a fall. These injuries, unaccounted for by the Government, must therefore be considered attributable to a form of ill-treatment for which the authorities were responsible.

114. In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167). In addition to the severity of the treatment, there is a purposive element, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or

Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating (Article 1 of the United Nations convention).

115. Having regard to the nature and degree of the ill-treatment (*falaka* and a blow to the chest) and to the strong inferences that can be drawn from the evidence that it occurred during interrogation about Agit Salman's suspected participation in PKK activities, the Court finds that it involved very serious and cruel suffering that may be characterised as torture (see also *Selmouni* cited above, §§ 96-105).

116. The Court concludes that there has been a breach of Article 3 of the Convention.

117. It does not deem it necessary to make a separate finding under Article 3 of the Convention in respect of the alleged deficiencies in the investigation.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

118. The applicant complained that she had not had an effective remedy within the meaning of Article 13 of the Convention, which provides:

“Everyone whose rights and freedoms as set forth in [the] 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.”

119. The Government argued that the investigation into the incident and the prosecution and trial of the police officers provided an effective remedy into the applicant's allegations. Furthermore, she had failed to avail herself of the possibility of appeal against the acquittal of the police officers and had therefore not made use of the available effective remedies.

120. The Commission, with whom the applicant agreed, was of the opinion that the investigation and criminal trial were rendered ineffective by the inadequate forensic investigation. The applicant also contended that the attempt of the authorities to concoct a story to conceal what had occurred gave rise to a serious aggravation of the violation of Article 13 in this case.

121. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State (see the Aksoy judgment cited above, p. 2286, § 95; the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; and the Kaya judgment cited above, pp. 329-30, § 106).

Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure (see the Kaya judgment cited above, pp. 330-31, § 107).

122. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Articles 2 and 3 of the Convention for the death and torture in custody of the applicant's husband. The applicant's complaints in this regard are therefore “arguable” for the purposes of Article 13 (see the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya and Yaşa judgments cited above, pp. 330-31, § 107, and p. 2442, § 113, respectively).

123. The authorities thus had an obligation to carry out an effective investigation into the circumstances of the death of the applicant's husband. For the reasons set out above (see paragraphs 104-09), no effective criminal investigation can be considered to have been conducted in accordance with Article 13, the requirements of which may be broader than the obligation to investigate imposed by Article 2 (see the Kaya judgment cited above, pp. 330-31, § 107). The Court finds, therefore, that the applicant has been denied an effective remedy in respect of the death of her husband and thereby access to any other available remedies at her disposal, including a claim for compensation.

Consequently, there has been a violation of Article 13 of the Convention.

VI. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 2, 3 AND 13 OF THE CONVENTION

124. The applicant maintained that there existed in Turkey an officially tolerated practice of violating Articles 2, 3 and 13 of the Convention, which aggravated the breach of which she and her husband had been the victims. Referring to other cases concerning events in south-east Turkey in which the Commission and the Court had also found breaches of these provisions, the applicant submitted that they revealed a pattern of denial by the authorities of allegations of serious human-rights violations as well as a denial of remedies.

125. Having regard to its findings under Articles 2, 3 and 13 above, the Court does not find it necessary to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VII. ALLEGED VIOLATION OF FORMER ARTICLE 25 OF THE CONVENTION

126. Finally, the applicant complained that she had been subjected to serious interference with the exercise of her right of individual petition, in breach of former Article 25 § 1 of the Convention (now Article 34), which provided:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.”

127. The applicant submitted that she was summoned three times by the authorities. On the first occasion, she was blindfolded and beaten, forced to sign a document and told explicitly to drop her case before the Commission. On the two other occasions, she was questioned at length about her application for legal aid to the Commission. She submitted that this disclosed an interference with the free exercise of her right of individual petition.

128. The Commission, whose delegates heard evidence from the applicant, accepted that she had been summoned on at least two occasions. This was substantiated by the documents provided by the Government, which showed that officers of the anti-terrorism branch had questioned her about her application, and not merely her legal aid claim. The Commission also found that her claims that she had been blindfolded, struck and kicked at the anti-terrorism branch headquarters were credible and substantiated, although it did not make any specific finding of ill-treatment in so far as any questioning of an applicant about her application by the police was, in its view, incompatible with the State's obligations under former Article 25 of the Convention.

129. The Government asserted that the applicant was contacted by the authorities in order to verify the declaration of means she had submitted in her application for legal aid to the Commission. She was asked only about her possessions and income and not subjected to any intimidation or pressure. In any event, she could not seriously claim to have been intimidated as she had been free to pursue the domestic proceedings against the police officers without any hindrance or fear.

130. The Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by former Article 25 (now Article 34) that applicants or potential applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities

to withdraw or modify their complaints (see the Akdivar and Others judgment cited above, p. 1219, § 105; the Aksoy judgment cited above, p. 2288, § 105; the Kurt v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1192, § 159; and the Ergi judgment cited above, p. 1784, § 105). In this context, "pressure" includes not only direct coercion and flagrant acts of intimidation but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see the above-mentioned Kurt judgment, loc. cit.).

Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practices from the standpoint of former Article 25 § 1 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities (see the Akdivar and Others and Kurt judgments cited above, p. 1219, § 105, and pp. 1192-93, § 160, respectively). In previous cases, the Court has had regard to the vulnerable position of applicant villagers and the reality that in south-east Turkey complaints against the authorities might well give rise to a legitimate fear of reprisals, and it has found that the questioning of applicants about their applications to the Commission amounts to a form of illicit and unacceptable pressure which hinders the exercise of the right of individual petition in breach of former Article 25 of the Convention (ibid.).

131. In the instant case, it is not in dispute between the parties that the applicant was questioned by police officers from the Adana anti-terrorism branch on 24 January 1996 and by police officers again on 9 February 1996. The document recording the first interview shows that the applicant was questioned, not only about her declaration of means, but also about how she introduced her application to the Commission and with whose assistance. Furthermore, the Government have not denied that the applicant was blindfolded while at the Adana anti-terrorism branch headquarters.

132. The Court finds that blindfolding would have increased the applicant's vulnerability, causing her anxiety and distress, and discloses, in the circumstances of this case, oppressive treatment. Furthermore, there is no plausible explanation as to why the applicant was questioned twice about her legal aid application and in particular why the questioning was conducted on the first occasion by police officers of the anti-terrorism branch, whom the applicant had claimed were responsible for the death of her husband. The applicant must have felt intimidated by these contacts with the authorities. This constituted undue interference with her petition to the Convention organs.

133. The respondent State has therefore failed to comply with its obligations under former Article 25 § 1 of the Convention.

VIII. APPLICATION OF ARTICLE 41 OF THE CONVENTION

134. Article 41 of the Convention provides:

"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."

A. Pecuniary damage

135. The applicant claimed loss of earnings of 39,320.64 pounds sterling (GBP). She submitted that her husband, who worked as a taxi driver at the time of his death and was 45 years old, earned the equivalent of GBP 242.72 per month. Taking into account the average life expectancy in Turkey in that period, the calculation according to actuarial tables resulted in the capitalised sum quoted above.

136. The Government made no observations on the amount claimed, refuting that any violations requiring an award of just satisfaction had occurred.

137. As regards the applicant's claim for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in appropriate cases, include compensation in respect of loss of earnings (see, among other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20, and

Çakıcı v. Turkey [GC], no. 23657/94, § 127, ECHR 1999-IV). The Court has found (see paragraph 103 above) that the authorities were liable under Article 2 of the Convention for Agit Salman's death. In these circumstances, there was a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that the Government have not queried the amount claimed by the applicant. Having regard, therefore, to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Agit Salman's death, the Court awards the sum of GBP 39,320.64 to the applicant for pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of payment.

B. Non-pecuniary damage

138. The applicant claimed, having regard to the severity and number of violations, GBP 60,000 in respect of her husband and GBP 10,000 in respect of herself for non-pecuniary damage.

139. The Government made no observations on the amounts claimed, refuting that any violations requiring an award of just satisfaction had occurred.

140. The Court recalls that it has found that the authorities were responsible for the death of the applicant's husband and that he had been tortured in police custody before he died. In addition to violations of Articles 2 and 3 in that respect, it has also found that the authorities failed to provide an effective investigation and remedy in respect of these matters, contrary to the procedural obligation under Article 2 of the Convention and in breach of Article 13. In addition, the applicant was subjected to intimidation while pursuing her application. In these circumstances and having regard to the awards made in comparable cases, the Court awards, on an equitable basis, the sum of GBP 25,000 for the non-pecuniary damage suffered by Agit Salman and to be held by the applicant as surviving spouse, and the sum of GBP 10,000 for the non-pecuniary damage suffered by the applicant in her personal capacity, such sums to be converted into Turkish liras at the rate applicable at the date of payment.

C. Costs and expenses

141. The applicant claimed a total of GBP 28,779.58 for fees and costs incurred in bringing the application, less the amounts received from the by way of legal aid from the Council of Europe. This included fees and costs incurred in respect of attendance at the taking of evidence before the Commission's delegates at hearings in Ankara and Strasbourg and attendance at the hearing before the Court in Strasbourg. A sum of GBP 10,035 is listed as fees and administrative costs incurred in respect of the Kurdish Human Rights Project (KHRP) in its role as liaison between the legal team in the United Kingdom and the lawyers and the applicant in Turkey, which included GBP 2,800 for translation costs. A sum of GBP 4,235.98 was claimed in respect of work undertaken by lawyers in Turkey.

142. The Government made no comments on the fees claimed.

143. Save as regards the translation costs, the Court is not persuaded that the fees claimed in respect of the KHRP were necessarily incurred. Deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, it awards the applicant the sum of GBP 21,544.58 together with any value-added tax that may be chargeable, less the 11,195 French francs received by way of legal aid from the Council of Europe, such sum to be paid into the applicant's sterling bank account in the United Kingdom as set out in her just satisfaction claim.

D. Default interest

144. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by sixteen votes to one the Government's preliminary objection;

2. *Holds* by sixteen votes to one that there has been a violation of Article 2 of the Convention in respect of the death

of Agit Salman in custody;

3. *Holds* unanimously that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out an adequate and effective investigation into the circumstances of Agit Salman's death in custody;

4. *Holds* unanimously that there has been a violation of Article 3 of the Convention;

5. *Holds* by sixteen votes to one that there has been a violation of Article 13 of the Convention;

6. *Holds* unanimously that the respondent State has failed to comply with its obligations under former Article 25 § 1 of the Convention;

7. *Holds* by sixteen votes to one

(a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable at the date of settlement:

(i) GBP 39,320.64 (thirty-nine thousand three hundred and twenty pounds sterling sixty-four pence) for pecuniary damage;

(ii) GBP 35,000 (thirty-five thousand pounds sterling) for non-pecuniary damage;

(b) that simple interest at an annual rate of 7.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

8. *Holds* by sixteen votes to one

(a) that the respondent State is to pay the applicant, within three months and into the latter's bank account in the United Kingdom, in respect of costs and expenses, GBP 21,544.58 (twenty-one thousand five hundred and forty-four pounds sterling fifty-eight pence) together with any value-added tax that may be chargeable, less FRF 11,195 (eleven thousand one hundred and ninety-five French francs) to be converted into pounds sterling at the rate applicable at the date of delivery of this judgment;

(b) that simple interest at an annual rate of 7.5% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

9. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 June 2000.

Luzius WILDHABER

President

Michele DE SALVIA

Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mrs Greve joined by Mr Bonello;

(b) dissenting opinion of Mr Gölcüklü.

L. W.

M. de S.

CONCURRING OPINION OF JUDGE GREVE

JOINED BY JUDGE BONELLO

I have voted with my colleagues in the majority in this case. The facts of the case suffice for the court's finding of violations as pronounced in the judgment. I do however, find it necessary to elaborate on a few aspects of the judgment where I believe the majority have made inferences beyond what is merited by the facts.

1. Agit Salman was subjected to torture at the Adana Security Directorate but beyond this few conclusions as to the circumstances can be reached

In paragraph 115 the majority concludes that Agit Salman was ill-treated when interrogated about his suspected participation in PKK activities. I cannot share this inference. There is absolutely *no* information in the case file supporting a presumption that Agit Salman was tortured *during* interrogation and no possibility of establishing the issues addressed under the assumed interrogation. The Turkish authorities denied that Agit Salman was interrogated at all when in the custody of the Adana Security Directorate.

What can be established from the evidence available to the Court is this: The nature and degree of the ill-treatment inflicted on Agit Salman *when in the custody of the Adana Security Directorate* involved very serious and cruel suffering that may be characterised as torture. The body of Agit Salman showed injuries, some of which are compatible with him having been subjected to *falaka*, and a blow to the chest. It is known that Agit Salman was wanted by the Security Directorate as he was suspected of alleged participation in PKK activities. Whether his ill-treatment and death occurred prior to interrogation as claimed by the Turkish authorities, or in connection with interrogation – or after interrogation for that matter – is of no relevance to the Court's conclusion concerning torture.

2. The post-mortem examination of Agit Salman gives limited information and leaves a number of questions unanswered

The investigation carried out by the Commission in the case of Agit Salman was based on the understanding that his body had been subjected to an autopsy, that is, an autopsy as this term is normally understood (see in this context, for example, how "autopsy" is described in the United Nations Model Autopsy Protocol as referred to in paragraphs 73 of the judgment and also in Recommendation no. R (99) 3 of the Committee of Ministers of the Council of Europe to member States on the harmonisation of medico-legal autopsy rules of 2 February 1999).

There are strong reasons in Agit Salman's case for referring to a post-mortem medical examination of Agit Salman rather than an autopsy. In particular, the significance of information in the case may be overlooked or confused due to the general inferences which may be made from a reference to an autopsy.

Concerning the "autopsy" of Agit Salman, the following information which raises serious questions concerning the content of the examination is available:

(a) The autopsy report dated 29 April 1992 states that Agit Salman had died at Adana State Hospital on that very day and that his death occurred "in suspicious circumstances". The autopsy had been requested in a letter of that date by the Adana public prosecutor. The report states, *inter alia*, that "In the framework of the autopsy performed at ... in the presence of ..., *parts of the deceased have been received for examination ..., there is no objection to burial* and *the detailed report will be produced later*, ... as *no other ... reason for examination is observed* [emphasis added]". The report is signed by the public prosecutor Tevfik Aydın and the forensic medical expert Dr Fatih Şen.

(b) Concerning the autopsy, Dr Şen later gave the following witness statement:

"*In most of our autopsies, we weigh every organ individually*: the brain, the heart, the liver, the spleen, the kidneys, all

included. The weight of the heart of a normal adult male varies between 350 g and 450 g. Since we found a heart of 550 g in this case, a size greater than normal, I concluded that the heart was larger than normal. This is an objective evaluation, made *entirely visually* – that the heart was oversized [emphasis added].

Well, in cases where we cannot arrive at the cause of death macroscopically, that is visually, we take small pieces of the organs for microscopic examination. As you will see in the report, these include almost all organs: from lungs, the coronary arteries of the heart, the heart muscle, the liver, the spleen, the suprarenal gland, the kidneys, the brain, the cerebellum and the spinal cord.

As the result of the examination of the corpse we made on 29 April 1992 and the autopsy conducted the same day, I indicated all the macroscopic (*what can be seen with the eye*) and the microscopic (laboratory) examinations in the conclusion of my autopsy report [emphasis added]."

This leaves open the question, at the very least, whether in the case of Agit Salman all organ samples were actually removed from the body and weighed separately or whether the weights were estimated visually. The latter may be the most likely, considering also the remarkably short time-span between Agit Salman's death, some time between 1.20 a.m. and 2 a.m. on 29 April 1992, and the release of his body for burial. The body was released only after all relevant examinations had been carried out, at about noon that same day, some ten hours after death had occurred – that is, ten hours of which only a few were ordinary working hours. Agit Salman's son had been sought by the security forces at approximately 12 noon to be questioned about his father's health, only to be told that his father had died and that he was expected to take the body with him from the morgue.

In his witness statement, Dr Şen described his working conditions as follows:

"[I] was a physician working alone in Adana at the time. I was carrying out the forensic work for the entire Adana region alone. I did not have a single assistant either. I found the interpretation and presentation of a report on this issue [the death of Agit Salman] by only one person to be inadequate. Since that was my opinion, I stated in my report that it should be sent to the Istanbul Forensic Medicine Institute."

The public prosecutor Tevfik Aydın also gave information about his workload in his witness statement, saying:

"I think we heard about it [the death] either through a police message or when the hospital officials reported it to our clerk. If we are available at that moment we go immediately but if, let us say, I am in another hospital examining a body or if I am inspecting the scene of a road accident, I go whenever I have finished that business. It sometimes happens that we receive notification of a death from two, three or four places at the same time. So we attend to those calls one after the other, depending on how we can work out the itinerary."

The photographs taken of Agit Salman before he was buried show that, while an ordinary autopsy had been carried out – with the removal of entire organs, the opening of the skull, etc. – the medical examination was carried out with an extraordinary effort to ensure a minimal impact on the appearance of the body when released for burial, and the time required for such an exercise is not consistent with an ordinary and rougher approach.

If the "autopsy" was limited, the subsequent elaborate considerations of the exact meaning to be given to the weight of Agit Salman's heart and lungs, in particular, are likely to be flawed.

(c) The detailed "autopsy report" in Agit Salman's case is only dated 21 May 1992. In contradistinction to an ordinary autopsy report, the conclusion in this report is based not solely on the medical findings in the autopsy as such but also on "the findings of the judicial investigation". About the latter, Dr Şen has explained:

"The information given in the record of examination of the corpse is judicial investigation information for us. In the conclusion to our autopsy report, we rely on that information as well. As you may notice, we use the words 'judicial investigation'. In the autopsy report, the reference to the judicial investigation concerns the information supplied to us from outside, in the record of the examination of the corpse. We call this judicial investigation."

The autopsy report does not itself contain this added information and its content thus cannot be read out of the report.

(d) Some of the injuries/irregularities to which the photographs of Agit Salman bear witness, and which his wife and brother described in their statements, are not recorded in the "autopsy" documents. When the "autopsy" was performed, it was not known to the authorities that the dead person would later be photographed or that there would be an international court case examining Agit Salman's death.

The day after Agit Salman's death and examination an *identification report* ascertained that his body had been examined by the public prosecutor on duty before it was transported to the morgue for autopsy. On the day of the death and the "autopsy", it was noted that "it was discovered that it was not possible to show the body to someone who knew the deceased and get a clear identification, and the relatives of the deceased applied to the prosecution today and because of their presence" were brought to the morgue for identification. This is not correct. The security forces had picked up Agit Salman's son to inform him of his father's death and told the son that he was expected to take his father's body with him, only some ten hours after Agit Salman had died.

To conclude, I find the post-mortem medical examination of Agit Salman and the investigation into his death to be so dismal that, at best, they gave no proper guidance as to the true causes of Agit Salman's death, and, at worst, were utterly misleading. In short, they were not in conformity with the State's obligation to investigate loss of life in detention. The investigation/examination may have been superficial simply because the true cause of death was not considered to be important in a case where the next of kin were not expected to pursue the matter. One should thus not jump to the conclusion that the shortcomings stem from a premeditated cover-up. This, however, does not limit the responsibility of the Turkish authorities to ensure proper investigations in a case like this.

3. The sole fact that someone has acted as a medico-legal expert does not deprive the expert of independence and impartiality

As emphasised in the above-mentioned Recommendation no. R (99) 3, it is important that medico-legal experts exercise their functions with total independence and impartiality, and that they should be objective in the exercise of their functions. The sole fact that someone has acted as a medico-legal expert cannot be a reason for questioning that person's objectivity or independence. I thus cannot share my colleagues' negative remarks in paragraph 102 of the judgment concerning Dr Kirangil of the Istanbul Institute of Forensic Medicine.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

I regret that I am unable to share the view of the majority in this case for the reasons set out below.

1. I agree that the Minister of Justice's appeal to the Court of Cassation against the decision not to prosecute was not available to the applicant and that the appeal was an extraordinary one. However, I do not agree with the opinion of the majority that once the criminal proceedings were initiated as a result of the appeal by the Minister of Justice, the applicant was dispensed from exhausting the whole criminal procedure because that procedure was an extraordinary one owing to the nature of the initiating appeal. That conclusion does not reflect the facts of Turkish law. I would like to underline that, notwithstanding the nature of the initiating motion or appeal, the criminal proceedings in the Turkish courts follow the general ordinary rules, as they did in the instant case.

For this very reason, the applicant did not hesitate to intervene in the criminal proceedings and did not feel this to be superfluous merely because the proceedings in question were extraordinary ones owing to the nature of the initiating appeal. In view of the fact that the proceedings ensuing from the appeal of the Minister of Justice were of an entirely ordinary nature and that the applicant, acting in the full capacity of an intervener, carried on with the proceedings in the court of first instance, it cannot be said that the applicant was not required to seek a remedy under domestic law.

2. In my view, the underlying problem is that the applicant started to follow the rules of domestic law by intervening in the criminal proceedings but did not pursue the proceedings when it came to the appellate stage. Apparently, she simply gave up without having any acceptable reason for doing so. The applicant did not invoke any development that had taken place during the proceedings which would justify her not exhausting the legal remedies. In this regard, I am

not convinced that the acquittal would amount to a reasonable excuse for the applicant's not pursuing the appellate review, given the fact that the appellate review would be carried out by the Court of Cassation, the court which quashed the non-prosecution decision prior to the criminal proceedings at first instance.

3. This also means that the appellate review which would be carried out by the Court of Cassation cannot be regarded as unavailable or ineffective. The Court of Cassation's decision quashing the non-prosecution decision at the outset of the whole procedure sufficiently proved the contrary.

It must also be noted that the Court of Cassation's examination is in no way confined to reviewing the legality of the decision of the first-instance

court. The court is equally competent to examine the merits of the case. It therefore cannot be said beforehand that the Court of Cassation would not enter into the merits of the case, thus leaving out the assessment of the evidence already gathered at first instance. It must be stressed that supervision of the assessment of evidence by the first-instance court is the prime issue in the appellate review carried out by the Court of Cassation.

I am not convinced that the state of the evidence would affect the appellate review adversely. I find no basis for such an assumption. Given that the Commission based its conclusions mainly on the evidence collected by the domestic authorities, it was equally possible for the Court of Cassation to evaluate the same body of evidence as the Commission and reach a similar conclusion. I therefore do not agree with the view of the majority that the appellate review of the Court of Cassation would have been ineffective.

4. I should have been satisfied if the majority of the Court had set out the reasons for departing from the grounds of the judgment of 23 September 1998 in the case of Aytekin v. Turkey (*Reports of Judgments and Decisions* 1998-VII). In that case, the Court gave significant weight to the intervention of the applicant, Mrs Gülten Aytekin, in the criminal proceedings. The Court also concluded that, as a consequence of that intervention, the applicant should have pursued the compensation remedies before the administrative courts in parallel to the criminal proceedings in which she had intervened (loc. cit., p. 2828, § 84). It is clear that this conclusion is independent of the conviction by the domestic court, because the Court said “in parallel to the criminal proceedings” to mean that it should have been pursued prior to the conviction.

In the Aytekin judgment, the Court pointed out the prospect of redress underlying the criminal proceedings (ibid.). Proceedings under the ordinary rules of procedure took place in the Aytekin case similar to those in the Salman case. There was therefore nothing in the procedure to prevent Mrs Behiye Salman from achieving a similar result to that in the Aytekin case, only Mrs Salman gave up and left the legal steps incomplete.

In my opinion, it is not legally well-founded to assume that the Court of Cassation would – in any event – have upheld the acquittal by the court below. That could not be predicted in the absence of the necessary appeal by Mrs Salman.

In conclusion, I must state that the circumstances of the present case do not justify departing from the standards of the Aytekin judgment. I am thus unable to share the view of the majority set out in paragraphs 82 and 83 of the judgment.

5. As to the violation of Article 2, I voted for finding a violation, but only with respect to the manner in which the investigation into Agit Salman's death was conducted. As to the responsibility for Agit Salman's death, I share entirely the partly dissenting opinion on the point of

Mr Alkema, a member of the Commission (see the Commission's report in this case). There is no doubt that, as he said, “the conditions for applicability of Article 2 set out in paragraph 312 of the report (intentional killing or the outcome of permitted use of force) have ... not been met”. He continued: “To quote from paragraph 284: 'There was no disagreement amongst the various doctors and experts that Agit Salman had an underlying heart disease'. This heart condition ... was apparently not known to those responsible for Agit Salman's arrest and detention.”

It could be accepted that the circumstances of the treatment that Agit Salman was subjected to could have caused the heart failure and consequently Agit Salman's death. There is, however, no proof of *intentional killing*. The force applied to Agit Salman might amount to a violation of Article 3. But there is no evidence that the officers in charge

could and ought to have foreseen that their ill-treatment would be lethal in effect. Thus, the conditions for applying Article 2 exclusively to this ill-treatment are not fulfilled.

6. As regards the finding of a violation of Article 13 of the Convention, I refer to my dissenting opinion in the case of Ergi v. Turkey (judgment of 28 July 1998, *Reports* 1998-IV).

Further, once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (judgment of 19 February 1998, *Reports* 1998-I) and the opinion expressed by a large majority of the Commission (see Aytekin v. Turkey, application no. 22880/93, Commission's report of 18 September 1997; Ergi v. Turkey, application no. 23818/94, Commission's report of 20 May 1997; and Yaşa v. Turkey, application no. 22495/93, Commission's report of 8 April 1997).

7. As to the application of Article 41 of the Convention, I dissent from the majority judgment, firstly, as regards just satisfaction and, secondly, as regards the manner of reimbursing costs, for the following reasons.

8. To begin with, the compensation. In the great majority of cases the Court has pointed out and clearly affirmed the speculative and fictitious nature of claims in respect of pecuniary damage where primarily “actuarial calculations” were entailed and consequently has nearly always dismissed this type of claim.

9. In the rare, exceptional cases in which it awarded the applicant a specified sum for pecuniary damage, it determined the amount on an *equitable* basis, never exceeding reasonable limits and thereby avoiding any speculative calculation.

10. In the instant case the Court – ignoring its settled case-law – has not only undertaken speculative “actuarial calculations” but has moreover considered it just and reasonable to award the applicant an unprecedented and more than excessive sum (39,320.64 pounds sterling (GBP) plus GBP 35,000). The average sum is between GBP 15,000 and GBP 20,000. I consider that the credibility and persuasive force of judicial decisions stem from consistency of case-law and adherence to it, which means avoiding extremes.

By way of justifying what has just been said, I take the liberty of referring to earlier judgments of the Court, as illustrations. I set out the relevant paragraphs in full below[2].

Kurt judgment of 25 May 1998

(Forced disappearance – Violation)

[A. Non-pecuniary damage]

[Claim]

“171. The applicant maintained that both she and her son had been victims of specific violations of the Convention as well as a practice of such violations. She requested the Court to award a total amount of *70,000 pounds sterling* (GBP) which she justified as follows: GBP 30,000 for her son in respect of his disappearance and the absence of safeguards and effective investigative mechanisms in that regard; GBP 10,000 for herself to compensate for the suffering to which she had been subjected on account of her son's disappearance and the denial of an effective remedy with respect to his disappearance; and GBP 30,000 to compensate both of them on account of the fact that they were victims of a practice of 'disappearances' in south-east Turkey.”

[Award]

“174. The Court recalls that it has found the respondent State in breach of Article 5 in respect of the applicant's son. It considers that an award of compensation should be made in his favour having regard to the gravity of the breach in

question. It awards the sum of *GBP 15,000*, which amount is to be paid to the applicant and held by her for her son and his heirs."

Tekin judgment of 9 June 1998

(Violation of Article 3)

[A. Damage]

[Claim and award]

"75. The applicant claimed compensation in respect of non-pecuniary damage of *25,000 pounds sterling* (GBP) and aggravated damages of *GBP 25,000*."

...

"77. The Court considers that an award should be made in respect of non-pecuniary damage bearing in mind its findings of violations of Articles 3 and 13 of the Convention. Having regard to the high rate of inflation in Turkey, it expresses the award in pounds sterling, to be converted into Turkish liras at the rate applicable on the date of settlement (see the above-mentioned Selçuk and Asker judgment, p. 917, § 115). It awards the applicant *GBP 10,000*.

78. The Court rejects the claim for 'aggravated damages' (see the above-mentioned Selçuk and Asker judgment, p. 918, § 119)."

Ergi judgment of 28 July 1998

(Violation of Articles 3 and 13)

[A. Non-pecuniary damage]

[Claim]

"107. The applicant submitted that he, his deceased sister and the latter's daughter had been the victims both of individual violations and of a practice of such violations. He claimed *30,000 pounds sterling* (GBP) in compensation for non-pecuniary damage. In addition, he sought *GBP 10,000* for aggravated damages resulting from the existence of a practice of violation of Article 2 and of a denial of effective remedies in south-east Turkey in aggravated violation of Article 13."

[Award]

"110. The Court observes from the outset that the initial application to the Commission was brought by the applicant not only on his own and his sister's behalf but also on behalf of his niece, Havva Ergi's daughter. ... Having regard to the gravity of the violations (see paragraphs 86 and 98 above) and to equitable considerations, it awards the applicant *GBP 1,000* and Havva Ergi's daughter *GBP 5,000*, which amount is to be paid to the applicant's niece or her guardian to be held on her behalf.

111. On the other hand, it dismisses the claim for aggravated damages."

***Oğur* judgment of 20 May 1999**

(Violation of Article 2)

[A. Damage]

[Claim]

"95. In respect of the damage she had sustained, the applicant claimed *500,000 French francs* (FRF), of which FRF 400,000 was for pecuniary damage and FRF 100,000 for non-pecuniary damage. She pointed out that she had had no means of support since the death of her son, who had maintained the family by working as a night-watchman."

[Award]

"98. ...

Having regard to its conclusions as to compliance with Article 2 and to the fact that the events complained of took place more than eight years ago, the Court considers that it is required to rule on the applicant's claim for just satisfaction.

As regards pecuniary damage, the file contains no information on the applicant's son's income from his work as a night-watchman, the amount of financial assistance he gave the applicant, the composition of her family or any other relevant circumstances. That being so, the Court cannot allow the compensation claim submitted under this head (Rule 60 § 2).

As to non-pecuniary damage, the Court considers that the applicant undoubtedly suffered considerably from the consequences of the double violation of Article 2. ... On an equitable basis, the Court assesses that non-pecuniary damage at *FRF 100,000*." (FRF 100,000 being approximately 10,000 pounds sterling)

***çakıcı* judgment of 8 July 1999**

(Violation of Articles 2, 3, 5 and 13)

[A. Pecuniary damage]

[Claim]

"123. The applicant requested that pecuniary damages be paid for the benefit of his brother's surviving spouse and children. He claimed a sum of 282.47 pounds sterling (GBP) representing 4,700,000 Turkish liras (TRL), which it is alleged was taken from Ahmet Çakıcı on his apprehension by a first lieutenant and *GBP 11,534.29* for loss of earnings, this capital sum being calculated with reference to Ahmet Çakıcı's estimated monthly earnings of *TRL 30,000,000*."

[Award]

"125. The Court observes that the applicant introduced this application on his own behalf and on behalf of his brother. In these circumstances, the Court may, if it considers it appropriate, make awards to the applicant to be held by him for his brother's heirs (see the Kurt judgment cited above, p. 1195, § 174).

...

127. As regards the applicant's claims for loss of earnings, the Court's case-law establishes that there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings (see, amongst other authorities, the Barberà, Messegué and Jabardo v. Spain judgment of 13 June 1994 (*Article 50*), Series A no. 285-C, pp. 57-58, §§ 16-20). The Court has found (paragraph 85 above) that it may be taken as established that Ahmet Çakıcı died following his apprehension by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In these circumstances, there is a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them. The Court notes that *the Government have not queried the amount claimed by the applicant*. Having regard therefore to the detailed submissions by the applicant concerning the actuarial basis of calculation of the appropriate capital sum to reflect the loss of income due to Ahmet Çakıcı's death, the Court awards the sum of *GBP 11,534.29* to be held by the applicant on behalf of his brother's surviving spouse and children."

[B. Non-pecuniary damage]

[Claim]

"128. The applicant claimed *GBP 40,000* for non-pecuniary damage in relation to the violations of the Convention suffered by his brother ..."

[Award]

"130. The Court recalls that in the Kurt judgment (cited above, p. 1195, §§ 174-75) the sum of GBP 15,000 was awarded for violations of the Convention under Articles 5 and 13 in respect of the disappearance of the applicant's son while in custody, which sum was to be held by the applicant for her son and his heirs, while the applicant received an award of GBP 10,000 in her own favour, due to the circumstances of the case which had led the Court to find a breach of Articles 3 and 13. In the present case, the Court has held, in addition to breaches of Articles 5 and 13, that there has been a violation of the right to respect for life guaranteed under Article 2 and torture contrary to Article 3. *Noting the awards made in previous cases from south-east Turkey concerning these provisions* (see, concerning Article 3, the Aksoy judgment cited above, pp. 2289-90, § 113, the Aydın judgment cited above, p. 1903, § 131, the Tekin judgment cited above, pp. 1521-22, § 77; and, concerning Article 2, the Kaya judgment cited above, p. 333, § 122, the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, p. 1734, § 88, the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110, the Yaşa judgment cited above, pp. 2444-45, § 124, and *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) and having regard to the circumstances of this case, the Court has decided to award the sum of *GBP 25,000* in total in respect of non-pecuniary damage to be held by the applicant for his brother's heirs ..."

***Mahmut Kaya* judgment of 28 March 2000**

(Violation of Articles 2, 3 and 13)

[A. Pecuniary damage]

[Claim]

"133. The applicant claimed 42,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 27 at the time of his death and working as a doctor with a salary equivalent to GBP 1,102 per month, can be said to have sustained a capitalised loss of earnings of GBP 253,900.80. However, *in order to avoid any unjust enrichment*, the applicant claimed the lower sum of *GBP 42,000*."

[Award]

"135. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed that the applicant was in any way dependent on him. This does not exclude an award in respect of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention. ... In the present case, however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. *The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head*."

[B. Non-pecuniary damage]

[Claim]

"136. The applicant claimed, having regard to the severity and number of violations, *GBP 50,000* in respect of his brother and GBP 2,500 in respect of himself."

[Award]

"138. As regards the claim made by the applicant in respect of non-pecuniary damage on behalf of his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violations of Articles 2, 3 and 13 in respect of the failure to protect the life of Hasan Kaya ... It finds it appropriate in the circumstances of the present case to award *GBP 15,000*, which is to be paid to the applicant and held by him for his brother's heirs.

139. The Court accepts that the applicant has himself suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Making its assessment on an equitable basis, the Court awards the sum of GBP 2,500, to be converted into Turkish liras at the rate applicable at the date of payment."

***Kılıç* judgment of 28 March 2000**

(Violation of Article 2)

[A. Pecuniary damage]

[Claim]

"100. The applicant claimed 30,000 pounds sterling (GBP) in respect of the pecuniary damage suffered by his brother who is now dead. He submitted that his brother, aged 30 at the time of his death and working as a journalist with a salary equivalent to GBP 1,000 per month, could be said to have sustained a capitalised loss of earnings of GBP 182,000. However, *in order to avoid any unjust enrichment*, the applicant claimed the lower sum of *GBP 30,000*."

[Award]

"102. The Court notes that the applicant's brother was unmarried and had no children. It is not claimed the applicant was in any way dependent on him. This does not exclude an award in respect of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see the Aksoy [v. Turkey] judgment [of 18 December 1996, *Reports* 1996-VI], pp. 2289-90, § 113, where the pecuniary claims made by the applicant prior to his death for loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award to the applicant's father who had continued the application). *In the present case, however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant's brother*. They do not represent losses actually incurred either by the applicant's brother before his death or by the applicant after his brother's death. *The Court does not find it appropriate in the circumstances of this case to make any award to the applicant under this head*.

[B. Non-pecuniary damage]

[Claim]

103. The applicant claimed, having regard to the severity and number of violations, *GBP 40,000* in respect of his brother and *GBP 2,500* in respect of himself."

[Award]

"105. As regards the claim made by the applicant in respect of non-pecuniary damage on behalf of his deceased brother, the Court notes that awards have previously been made to surviving spouses and children and, where appropriate, to applicants who were surviving parents or siblings. ... The Court notes that there have been findings of violations of Article 2 and 13 in respect of failure to protect the life of Kemal Kılıç, who died instantaneously, after a brief scuffle with unknown gunmen. It finds it appropriate in the circumstances of the present case to award *GBP 15,000*, which amount is to be paid to the applicant and held by him for his brother's heirs."

***Ertak* judgment of 9 May 2000**

(Violation of Article 2)

[A. Damage]

[Claim]

"146. The applicant claimed pecuniary damages amounting to *60,630.44 pounds sterling* (GBP) for loss of earnings, that sum being calculated with reference to Mehmet Ertak's estimated monthly earnings of 180,000,000 Turkish liras (TRL) at current values, to be held by the applicant on behalf of his son's widow and four children.

147. The applicant claimed a sum of *GBP 40,000* for the non-pecuniary damage arising from the violations of the Convention suffered by his son and from the alleged practice of such violations, to be held by him on behalf of his son's widow and four children, as well as a sum of GBP 2,500 for himself on account of the lack of an effective remedy. He referred to the Court's previous decisions regarding unlawful detention, torture and the lack of an effective investigation."

[Award]

"150. As regards the applicant's claims for loss of earnings, the ... Court has found (see paragraph 131 above) that it may be taken as established that Mehmet Ertak died following his arrest by the security forces and that the State's responsibility is engaged under Article 2 of the Convention. In those circumstances, there is indeed a direct causal link between the violation of Article 2 and the loss by his widow and children of the financial support which he provided for them (see the *Çakıcı* judgment cited above, § 127). The Court awards the applicant the sum of *GBP 15,000*, to be held by him on behalf of his son's widow and children.

151. As regards non-pecuniary damage, ... the Court has held that there has been a substantive and a procedural violation of Article 2. Noting the awards made in previous cases involving the application of the same provision in south-eastern Turkey (see the Kaya judgment cited above, p. 333, § 122; the Güleç judgment cited above, p. 1734, § 88; the Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1785, § 110; the Yaşa judgment cited above, pp. 2444-45, § 124; and *Oğur v. Turkey* [GC], no. 21594/93, § 98, ECHR 1999-III) and having regard to the circumstances of this case, the Court awards the sum of *GBP 20,000* in respect of non-pecuniary damage, to be held by the applicant on behalf of his son's widow and four children ..."

11. Lastly, I cannot accept that the legal costs awarded under Article 41 should be paid into the applicant's "*bank account in the United Kingdom*".

This point is an aspect of the general issue of payment of "costs and expenses". To make clear what I mean, I must go back to certain earlier facts and arguments.

The manner of implementing former Article 50 (now Article 41) as regards legal costs (including counsel's fees) was discussed in depth by the old Court because some applicants' lawyers (always the same ones) continually sought, very insistently, to have the costs paid to them direct into their bank account abroad in a foreign currency. The Court always dismissed those applications except in one or two cases in which it agreed to payment in a foreign currency (but always in the country of the respondent State). After deliberating, *the Court decided that costs would be paid (1) to the applicant, (2) in the country of the respondent State, and (3) in the currency of the respondent State* (if there was a high rate of inflation in the respondent State, the sum was to be expressed in a foreign currency and converted into that State's currency at the date of payment – see the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1521-22, § 77). In accordance with that decision, all other types of application have been categorically rejected. Whereupon, counsel for the applicant began to seek to have costs paid *to the applicant*, a national of the respondent State and resident in its territory, *in his bank account abroad and in a foreign currency*. They have never succeeded. Despite numerous applications of this kind (always by the same counsel), not a single decision has yet been taken allowing such an application.

Is it not astonishing that almost all the applicants living in very humble circumstances in a small village or hamlet in a remote corner of south-eastern Anatolia should have bank accounts in a town of another European State?

12. If certain counsel have problems with their clients, that is none of the respondent State's business, since the contract between the lawyer and his client is a private one which concerns them alone and the respondent State is not a party to disputes concerning them.

13. I must point out that in the system established by the Convention, *the Court has no jurisdiction to issue orders to the Contracting States as to the manner in which its judgments are to be executed*.

In my opinion, any payment under Article 41 must be made to the applicant as before, in the currency of the country and in the country concerned.

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

[3]. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

[1]. *Note by the Registry*. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

[1]. *Note by the Registry*. The report is obtainable from the Registry.

1. Emphasis has been added to some of the phrases and figures.

Judgments - Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant)

HOUSE OF LORDS

SESSION 2002-03
[2003] UKHL 51
on appeal from: [2002] EWCA Civ 390

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant)

ON

THURSDAY 16 OCTOBER 2003

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Slynn of Hadley

Lord Steyn

Lord Hope of Craighead

Lord Hutton

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

IN THE CAUSE

Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC)

[2003] UKHL 51

LORD BINGHAM OF CORNHILL

My Lords,

1. In March 2000 Zahid Mubarek, a 19 year-old prisoner serving a sentence in Feltham Young Offender Institution, was wantonly murdered by Robert Stewart, with whom he shared a cell. The issue in this appeal is whether the United Kingdom has complied with its duty under article 2 of the European Convention on Human Rights to investigate the circumstances in which this crime came to be committed.

   The facts

2. Zahid Mubarek ("the deceased") was born on 23 October 1980. He lived in East London. His criminal record was a short one. On 16 January 1997, for an offence of possessing an imitation firearm with intent to cause fear of violence, he was the subject of an attendance centre order. It appears the offence may have been committed in response to provocation and racist abuse. In March 1999 he was cautioned for handling stolen goods. On 17 January 2000 he was sentenced to a total of 90 days' detention in a young offender institution for offences of theft, going equipped for theft and interfering with a motor vehicle. These were offences which he committed, as it seems, to fund a growing heroin addiction. But it seems he had not complied with bail conditions imposed to address his drug problem. He was sent to Feltham, spent his first night there in the induction wing, and on 22 January 2000 was transferred to Swallow Unit where he was accommodated in cell 38, a double cell which he occupied on his own until the arrival of Stewart on 8 February. The evidence suggests that the deceased was a model prisoner who caused no trouble and appeared to have no enemies.

3. Robert Stewart was born on 4 August 1980 and lived at Hyde in Greater Manchester. Beginning with a conviction of arson when aged 13, he was convicted of 21 further offences before being sentenced for the first time to detention in a young offender institution in August 1995. Further such sentences followed in January 1996, February 1997 (after the making of community service and supervision orders), November 1997, October 1998 and January 2000. Only two of Stewart's convictions were of offences of personal violence (assault occasioning actual bodily harm and common assault). At the end of 1999 he faced charges under the Protection from Harassment Act 1997 which were due to be heard in London. It appears that these offences, or some of them, may have been thought to be racially motivated. His personal security file suggested that while in custody he had been implicated in violence, damage to prison property, escape attempts, hostage holding, the stabbing of other inmates (one of whom had lost his eye), suspected (but unproved) involvement in the murder of another prisoner, arson, the threatening of other inmates with a metal bar and a wooden table or chair leg and threats of violence against prison staff whose addresses he had ascertained. An intercepted letter suggested that he was in possession of a gun and knew the address of a prison governor. It appears that from about January 1999 his behaviour in custody improved, although he was later diagnosed to be suffering from "a long-standing deep-seated

personality disorder" and "an untreatable mental condition".

4. Stewart's first visit to Feltham was on 10 January 2000 for purposes of a court hearing in London. It was judged that he needed to be watched and he was put in a single cell. An intercepted letter written by him was found to contain a reference to "Niggers". An officer who read Stewart's security file at this time formed the opinion that Stewart was "very dangerous and a threat to both staff and other inmates". He made a note in Stewart's wing file: "Staff are advised to see the security file on this inmate (held in security). Very dangerous individual. Be careful." Having made his court appearance, Stewart returned to Hindley Young Offender Institution (from which he had come) on 12 January.

5. Stewart returned to Feltham on 24 January for a further court appearance. He was accommodated on a different wing, where staff were warned that he was dangerous. He left again on 26 January.

6. Stewart was transferred to Feltham on a longer-term basis on 7 February 2000. He spent his first night on a wing where he had not been before. On the following day, 8 February 2000, he was placed in cell 38 on Swallow Wing, with the deceased. It is said that the wing had a maximum capacity of 60 prisoners, that there were already 59 before the arrival of Stewart and that the vacant place in cell 38 was the only place available. The allocation decision was made by an officer who had, according to one source, been warned to "watch [Stewart] as he was dangerous". The officer himself does not, it appears, recollect such a warning, and did not consult Stewart's security file, or his wing file which did not reach Feltham until later.

7. Stewart shared cell 38 with the deceased from 8 February to 21 March 2000. During that time he wrote and sent a letter, not intercepted, couched in violent and racist terms. On 19 March Stewart's sentence expired and he was thereafter held on remand pending trial of the outstanding charges, but he was not moved. There is no evidence of hostility or discord between the deceased and Stewart during the time they were sharing cell 38, although the deceased may have expressed a wish to share with someone else. There is evidence that other prisoners regarded Stewart as "strange" and "weird" and "aggressive", partly because of his manner and behaviour, partly because of a cross, with the letters RIP, tattooed on his forehead.

8. On 21 March 2000 at about 3.35 am Stewart battered the deceased into a coma with a wooden table leg. The deceased was due to be released that day. He never recovered, dying in hospital of brain damage a week later. After the attack Stewart pressed the cell alarm button and, when an officer responded, said that his cell-mate had had an accident. When moved to a nearby cell he drew a large swastika on the wall with the heel of his rubber shoe; above it he wrote "Just killed me padmate" and below it "RIP". The Director General of HM Prison Service met the parents of the deceased at the hospital on the day of the attack and, on learning of the death, wrote a letter apologising unreservedly for the failure of the Prison Service to look after the deceased and accepting responsibility for his death. He told them of an internal inquiry he had set up under the leadership of Mr Ted Butt, a serving governor and senior investigating officer of the Prison Service.

9. Stewart was charged with murder, and his trial started on 24 October 2000. He admitted the killing. The issue was whether he was guilty of murder or of manslaughter by reason of diminished responsibility. He was convicted of murder. Although the court heard evidence of the circumstances immediately surrounding the killing, including the actions of prison officers at that time, there was no exploration at the trial of cell allocation procedures or other events before the murder.

10. An inquest into the death of the deceased was formally opened on 31 March 2000 and then adjourned pending trial of the murder charge against Stewart. Following the conviction HM Coroner for West London declined to resume the inquest, a decision to which she adhered despite representations inviting her to reconsider it. In an affidavit she has given detailed reasons why the constraints to which coroners and inquests are subject make an inquest an unsuitable vehicle for

investigating publicly the issues raised by this case.

11. The police investigated whether the Prison Service or any of its employees should be prosecuted for manslaughter by gross negligence or under section 3 of the Health and Safety at Work etc Act 1974. The advice of counsel was that there was insufficient evidence to provide a realistic prospect of securing any conviction relating to the death of the deceased. His family were so informed in August 2001.

12. The terms of reference of the Butt inquiry were to investigate the circumstances surrounding the murder and in particular to consider the issue of shared accommodation both generally and with particular reference to Stewart, in the light of what was known about his criminal history and institutional behaviour. The family of the deceased were consulted about these terms of reference but were not present at any stage of the investigation and although invited to meet Mr Butt did not avail themselves of this opportunity. Mr Butt's report was in two parts, completed at the end of October and November 2000 respectively. Copies of both parts were made available to the family, save for certain confidential annexes relating to individual prisoners, and no restriction was placed on their use of the report, save for the transcripts of interviews with members of the Prison Service annexed to the first part of the report. The report was made available to the police and the Commission for Racial Equality ("the CRE") but was not published. It identified a number of shortcomings at Feltham and made 26 recommendations for change.

13. On 17 November 2000 the CRE announced that it would be conducting a formal investigation into racial discrimination in the Prison Service. Its terms of reference were wide-ranging and general across the Prison Service but made specific reference to the circumstances leading to the murder of the deceased and any contributing act or omission on the part of the Prison Service. The family were involved in the preparation of the terms of reference and expressed views on the procedures proposed. The family wrote to the CRE asking that they be allowed to participate in its inquiry and for its hearings to be in public, but the CRE refused this request. It stated that the inquiry had to be seen to be impartial and that, although there was to be a "public component" in its proceedings, it could not conduct the whole inquiry in public. In the event, a public hearing was held on 18 September 2001 when certain high-level policy witnesses made statements and were questioned by counsel for the CRE. Before this hearing the family were offered a meeting with counsel at which they could raise topics which they would like to be covered in the cross-examination. They did not take up this offer and did not attend the public hearing. They had no opportunity to question witnesses. The CRE published its report relating to the deceased in July 2003, very shortly before the hearing in the House. It made a finding of race discrimination against the Prison Service and identified 20 respects in which the administration of Feltham had failed.

14. Very shortly after the death of the deceased, on 3 April 2000, solicitors for his family wrote to the responsible minister of state, asking for an independent public inquiry into the death. On 7 and 12 April the minister replied that it was too early to make a decision about a public inquiry pending the police investigation and the Butt inquiry. At a meeting on 2 November 2000 the minister did not agree to establish a public inquiry. On 31 July 2001 he was asked to reconsider this decision, but he replied that he saw no reason to reverse his earlier decision not to hold such an enquiry.

15. The appellant, an uncle of the deceased, sought judicial review of (a) the decision of the CRE not to allow the family to participate in the proceedings in any meaningful manner or to hold any significant part of its investigation in public, (b) the decision of the Coroner not to resume the inquest and (c) the decision of the Home Secretary not to hold an inquiry in public. Hooper J, before whom these applications came, adjourned the applications against the CRE and the Coroner but granted permission to pursue the claim against the Home Secretary. This claim he upheld, ruling that the refusal to hold a public inquiry was a breach of article 2 of the Convention: [2001] EWHC Admin 719. He declared that

> "an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights."

The Home Secretary appealed against this decision. In a judgment of the court (Lord Woolf CJ, Laws and Dyson LJJ) the appeal was allowed and the judge's order set aside: [2002] EWCA Civ 390; [2003] QB 581. The appellant challenges the ruling of the Court of Appeal and seeks to restore the judge's order.

Domestic law

16. For many centuries the law of England has required a coroner to investigate the death of one who dies in prison. *Sewell on Coroners* (1843), referring to the Statute de Officio Coronatoris 1276, put it thus at page 32:

> "It is observable that this statute being wholly directory, and in affirmance of the common law, the coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty, not mentioned in it, which was incident to his office before; and therefore, though the statute mentions only inquiries of the deaths of persons slain, drowned, or suddenly dead, yet the coroner ought also to inquire of the death of those who die in prison; to the end that the public may be satisfied whether such persons came to their end by the common cause of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined".

This duty was recognised by Hale (*History of the Pleas of the Crown*, 1736, volume II, page 57) and Blackstone (*Commentaries on the Laws of England, vol 4, Of Public Wrongs*, 1769, page 271). It found expression in section 11 of the Gaols etc (England) Act 1823, section 48 of the Prisons Act 1865, section 56 of the General Prisons (Ireland) Act 1877, section 53 of the Prisons (Scotland) Act 1877, section 3 of the Coroners Act 1887, section 13(2)(b) of the Coroners (Amendment) Act 1926 and section 8 of the Administration of Justice (Emergency Provisions) (Northern Ireland) Act 1939. These statutes are not to identical effect. But in all of them deaths in prison are singled out as cases calling for inquiry. All of them require the inquiry to be conducted by an independent judicial officer (in England, Wales, Ireland and Northern Ireland, a coroner, in Scotland, a sheriff or sheriff substitute). Most of them expressly require the inquiry to be before a jury, and some (the Acts of 1823 and 1865 and the Irish Act of 1877) provide that no inmate or officer of the prison where the death occurred shall be a juror. In some it is provided that, if practicable, "sufficient time shall be allowed before the holding of the inquest to allow the attendance of the nearest relative of the deceased" (the Irish Act of 1877) or that "sufficient time shall intervene between the day of the death and the day of the holding the inquiry, to allow the attendance of the next of kin of the deceased" (the Scottish Act of 1877).

17. Section 8(1)(c) of the Coroners Act 1988, applicable in England and Wales, requires a coroner to hold an inquest on being informed that a person has died in prison. Such an inquest must, by section 8(3)(a), be conducted with a jury. By section 8(6), neither a prisoner in the prison where the deceased died nor any person engaged in any sort of trade or dealing with the prison may serve as a juror at the inquest. The inquest must be held in public: Coroners Rules 1984 (SI 1984/552), rule 17. The family may attend and be legally represented: Coroners Rules 1984, rule 20. They or their representative may question witnesses at the hearing. The coroner is however ordinarily required by section 16(1)(a)(i) to adjourn the inquest on being informed that a person has been charged with the murder or manslaughter of the deceased and on the conclusion of the criminal proceedings has a discretionary power (conferred by section 16(3)) to resume the adjourned inquest "if in his opinion there is sufficient cause to do so". Section 17A(1)(a) provides for the adjournment of an inquest if the coroner is informed by the Lord Chancellor that a public inquiry conducted or chaired by a judge is being or is to be held into the events surrounding the death.

The Convention

18. By article 1 of the Convention member states bound themselves to secure to everyone within their respective jurisdictions the rights and freedoms defined in Section 1 of the Convention. The first of those rights, expressed in article 2(1), is the right to life:

> "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 provisions of article 2(2), relating to the use of necessary force in defence against unlawful violence, to effect an arrest or prevent an escape from lawful detention or to quell a riot or insurrection, have no bearing on this appeal. Article 2(1) has been repeatedly described as "one of the most fundamental provisions in the Convention": *McCann v United Kingdom* (1995) 21 EHRR 97, para 147; *Salman v Turkey* (2000) 34 EHRR 425, para 97; *Jordan v United Kingdom* (2001) 37 EHRR 52, para 102. The European Court has made plain that its approach to the interpretation of article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective: *McCann*, para 146; *Salman*, para 97; *Jordan*, para 102.

19. The primary purposes of article 2 were well described by the European Court in paragraph 115 of its judgment in *Osman v United Kingdom* (1998) 29 EHRR 245 when it said (I omit the footnote):

> "115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. . . ."

But the scope of article 2(1) goes beyond the primary purposes thus defined, as the Commission explained in paragraph 193 (page 140) of its opinion in the report of *McCann*:

> "193. Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the State that everyone's right to life shall be 'protected by law' may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. The nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention."

20. Most of the recent European cases to which reference was made in argument before the House concerned killings deliberately carried out, or allegedly carried out, by agents of the state.

Naturally, therefore, such deliberate killings by state agents were the primary, although not the exclusive, subject of the Court's attention. The cases clearly establish a number of important propositions:

(1) It is established by *McCann*, paragraph 161, *Yasa v Turkey* (1998) 28 EHRR 408, paragraph 98, *Salman*, paragraph 104 and *Jordan*, paragraph 105 that (as it was put in *McCann*):

> "The obligation to protect the right to life under [article 2(1)], read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State."

(2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight: paragraph 192 of the opinion of the Commission in *McCann*, set out at pages 139-140.

(3) As it was put in *Salman*, paragraph 99,

> "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies."

Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred: *Salman*, paragraph 100; *Jordan*, paragraph 103.

(4) The obligation to ensure that there is some form of effective official investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state: *Salman*, paragraph 105.

(5) The essential purpose of the investigation was defined by the Court in *Jordan*, paragraph 105:

> "… to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures …..".

(6) The investigation must be effective in the sense that (*Jordan*, paragraph 107)

> "it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . and to the identification and punishment of those responsible . . . This is not an obligation of result, but of means."

(7) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary (*Jordan*, paragraph 106)

> "for the persons responsible for and carrying out the investigation to be independent from those implicated in the events . . . This means not only a lack of hierarchical or institutional connection but also a practical independence . . . ".

(8) While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 (*Jordan*, paragraph 121), there must (*Jordan*, paragraph 109)

> "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case."

(9) "In all cases", as the Court stipulated in *Jordan*, paragraph 109:

> "the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests".

(10) The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: *Jordan*, paragraph 143. But it is "indispensable" (*Jordan*, paragraph 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.

21. As pointed out above, the propositions I have sought to summarise were, in the main, laid down in cases involving deliberate killing or alleged killing by agents of the state. *Edwards v United Kingdom* (2002) 35 EHRR 487 is of central importance in this appeal because it was not such a case. Factually it bore strong similarities to the present case. Christopher Edwards, who had shown marked signs of mental illness, was remanded in custody and placed in a prison cell with another man, Richard Linford, who was suffering from acute mental illness. During their first night in the shared cell Richard Linford kicked and stamped Christopher Edwards to death. There were factual differences between that case and this. The period for which the two men shared a cell was much shorter. Richard Linford's plea of guilty to manslaughter on grounds of diminished responsibility was accepted by the prosecution, and a hospital order was made, so there was no contested trial. There was no acceptance of responsibility by the Prison Service. There was in that case a long and thorough inquiry conducted by independent Queen's Counsel. But the case is important because, although addressing a case in which there had been no killing or alleged killing by state agents and the responsibility of the state (if any) could only rest on its negligent failure to protect the life of Christopher Edwards, a prisoner in its custody, the European Court applied essentially the same principles as in the cases already considered. In my respectful opinion, the Court was fully justified in doing so, for while any deliberate killing by state agents is bound to arouse very grave disquiet, such an event is likely to be rare and the state's main task is to establish the facts and prosecute the culprits; a systemic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more intractable problems.

22. In its judgment in *Edwards* the Court repeated (in paragraph 54) the passage in paragraph 115 of *Osman* quoted in paragraph 19 above, and it found a breach of the obligation there defined (paragraph 64). It then turned to consider the procedural obligation to carry out effective investigations. Having summarised the parties' competing submissions the Court made its assessment which (omitting footnotes) it is necessary to quote:

> "69. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such

> investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.
>
> 70. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.
>
> 71. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.
>
> 72. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.
>
> 73. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

23. No light is shed on the present problem by two cases decided since *Edwards. Menson v United Kingdom* (6 May 2003, Application No 47916/99) concerned a racist attack on a victim who was set on fire and killed in the street by assailants who were not agents of the state and who were duly prosecuted, convicted and sentenced. No blame attached to state authorities for the killing and no breach of the state's investigative duty was found. While certain familiar principles were rehearsed, the complaint was held to be manifestly ill-founded. *Finucane v United Kingdom* (1 July 2003, Application No 29178/95) was a much more difficult and complex case, but it laid down no principles which had not been laid down before.

The judge's decision

24. In approaching the present case Hooper J had the benefit of a recent judgment of Jackson J in *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520; [2001] UKHRR 1399. That case concerned a serving prisoner who suffered a severe asthmatic attack in his cell and died. An inquest was held at which the family of the deceased were present, but unrepresented for want of legal aid. There was no inquiry into the quality of the medical treatment the deceased had received in prison. It later emerged that the responsible medical officer had been suspended from duty and had previously been found guilty of serious professional misconduct. In a civil action

against the Home Secretary liability was admitted, thus precluding forensic investigation of the case. The family sought judicial review on the grounds, among others, of a failure to protect the life of the deceased and a failure of the procedural obligation arising under article 2 of the Convention to investigate the circumstances of the death.

25. In a succinct and accurate judgment Jackson J reviewed the domestic and Strasbourg case law, deriving from *Jordan v United Kingdom* (2001) 37 EHRR 52 the requirement that an investigation, to satisfy article 2, must have certain features (paragraph 41):

    (1) The investigation must be independent.

    (2) The investigation must be effective.

    (3) The investigation must be reasonably prompt.

    (4) There must be a sufficient element of public scrutiny.

    (5) The next of kin must be involved to an appropriate extent.

    From the recent case law Jackson J derived five propositions of which the fourth was:

    > "Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom* at paras 106-109".

    The judge concluded on the facts that there had not been an effective official investigation into the death of the deceased and held that there should be an independent investigation, to be held in public, at which the family should be represented.

26. Hooper J examined the facts of the present case, so far as they are known, in some detail, reviewed the relevant case law, adopted Jackson J's summary of the features identified in *Jordan* as necessary if an investigation were to comply with article 2 and accepted the fourth proposition put forward by Jackson J and quoted above. He concluded that the inquiries and investigations which had been conducted did not, singly or cumulatively, satisfy the investigative duty of the United Kingdom under article 2. In paragraph 91 of his judgment he said:

    > "91. Zahid Mubarek was murdered in Feltham by a racist cell mate with 'an alarming and violent criminal record, both in and out of custody'. It is accepted that Zahid Mubarek was put in the same cell as his killer because of 'systemic failures'. Established procedures were not followed and there is an appalling history at Feltham of failure to comply with earlier recommendations. It seems likely (and it is certainly arguable) that there were serious human failings both at the wing level and at higher levels which have not been publicly identified. On the facts of this case the obligation to hold an effective and thorough investigation can, in my judgment, only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses. Against the background of the material which I have set out at some length, the family and the public are entitled to such an investigation".

    He accordingly made the declaration quoted in paragraph 15 above. Neither Jackson J nor Hooper J had the benefit of the Court's judgment in *Edwards v United Kingdom* (2002) 35 EHRR 487.

    The Court of Appeal decision

27. In paragraph 32 of its judgment the Court of Appeal outlined its general approach to the investigative duty arising under article 2:

> "32. Against this framework of obligations created by article 2, it is useful?and here is our third preliminary?to make some general observations about the nature of the procedural duty to investigate. Plainly there is *no* duty on the face of the Convention to investigate a death. It is clear that such a duty has been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by article 2 would or might in some cases be rendered nugatory or ineffective. Thus the duty to investigate is adjectival to the duty to protect the right to life, and to the prohibition of the taking of life. It follows that by its nature it cannot be a duty defined by reference to fixed rules. It only has life case by case, contingent upon what is required in any individual instance for the substantive right's protection. Across the spectrum of possible article 2 violations, there are classes of case which can readily be distinguished. One class is that of allegations of deliberate killing? murder?by servants of the state. A second is that of allegations of killing by gross negligence?manslaughter?by servants of the state. A third is that of plain negligence by servants of the state, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the state has concealed or is concealing its responsibility for the death. That possibility gives rise to the paradigm case of the duty to investigate. The duty is in every instance fashioned to support and made good the substantive article 2 rights. We shall see, as we go through the movements of the argument, that this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic".

After addressing other matters not now relevant, the court considered the scope of the duty to investigate and said, in paragraph 45:

> "45. In the terms in which it was articulated by Mr Crow [for the Home Secretary] at the hearing, the focus of this part of the case appeared to be relatively narrow. Building on Jackson J's judgment in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399, 1409-1410, para 41, which we need not set out, Hooper J held, *R (Amin) v Secretary of State for the Home Department* [2001] EWHC Admin 719 at [81]-[86], that for an investigation to satisfy the procedural requirements of article 2 a number of conditions must be met, including these two: (a) there must be a sufficient element of public scrutiny, and (b) the next of kin must be involved to the appropriate extent. Mr Crow submitted that that is a wrong approach. There are not discrete and cumulative requirements of publicity and family participation. Depending on the particular facts, participation by the next of kin may itself satisfy applicable standards of openness without any additional requirement of public hearings. Now, while these two elements are plainly of great potential importance, it seems to us that this part of the case raises a deeper, or at any rate a more general question. How far may the nature and quality of any investigation embarked upon in satisfaction of the article 2 adjectival duty vary according to the context and subject matter of the case? Are such requirements as publicity and family participation, and other virtuous procedures, *constant?* It was broadly the claimant's position that they are: the duty is essentially a uniform one, whether the death is due to unlawful violence by state servants, or to recklessness or to negligence. In so submitting Mr O'Connor built especially on *Jordan v United Kingdom* 11 BHRC I, and now also on *Edwards v United Kingdom* The Times, 1 April 2002."

The court then considered the relevant cases, citing passages from the decisions in *Jordan, Wright* and *Edwards* and expressed clear conclusions in paragraphs 60-63:

> "60 In our view *Edwards's* case represents no fresh departure in the Strasbourg jurisprudence, which in this area, as it is generally, is essentially pragmatic. The *Jordan* requirements are by no means set in stone. Particular considerations?the absent witnesses, the relative exclusion of the family?coloured the court's decision in *Edwards's* case, just as they might colour the decision of a common law court.

61 In light of the arguments on *Edwards's* case it is right to draw special attention to two matters in particular. The first is that the procedural duty to investigate does not appear on the Convention's face: it is no more nor less than an adjectival duty, imposed as a corollary of the substantive right guaranteed by article 2. Secondly, the task of our courts is to develop a domestic jurisprudence of fundamental rights, drawing on the Strasbourg cases of which by section 2 of the Human Rights Act 1998 we are enjoined to take account, but by which we are not bound. In this present context, these two features march together. The reason is that the nature and scope of an adjectival duty, which by definition is not expressly provided for in the Convention, must especially be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive Convention rights.

62 Accordingly, this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. Just as, in our view, on question (2) Mr Crow originally adopted too rigid an approach to the Human Rights court's jurisprudence in submitting that the duty to investigate was only triggered in cases of the use of unlawful force by state agents, so also on question (3) Mr O'Connor makes the same error in submitting that there are fixed requirements of publicity and family participation, uniformly applicable to every investigation. What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state had laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards's* case are perfectly consistent with this. And it is an approach which embraces what we will say in the *Middleton* appeal about the coroner's jurisdiction and inquest verdicts of neglect.

63 In all these circumstances we agree with Mr Crow that publicity and family participation are not necessarily discrete compulsory requirements which must be distinctly and separately fulfilled in every case where the procedural duty to investigate is engaged. Further, and somewhat more broadly, we consider that Jackson J's fourth proposition in para 43 of his judgment in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399, 1410 cannot be accepted at face value. For convenience we set it out again:

'4. Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom* at paras 106-109.'

This might seem to suggest something of a universal formula for all investigations undertaken in fulfilment of article 2, and to that extent we disagree with it. In fairness the judge had just indicated, in proposition (3), that 'there is no universal set of rules for the form which an effective official investigation must take', and in our judgment that is entirely correct."

The Court of Appeal accepted the submission, made on behalf of the Home Secretary, that the judge should have held, on the facts of the case, that the procedural obligation of the United Kingdom had been discharged.

28. In argument before the House Mr O'Connor QC, for the appellant, sought to restore the order of the judge for very much the reasons the judge had given and contended that the Court of Appeal, in departing from the judge's reasoning, had erred. He accepted that it was for member states to decide

how the investigative duty arising under article 2 should be discharged and accepted that some cases would call for more intense scrutiny than others. But he argued that *Jordan* and *Edwards* specified an irreducible, minimum, standard of review, however achieved and whether by a single means of investigation or several. That irreducible minimum could be met only by an appropriate level of publicity and an appropriate level of participation by the next of kin. In this case there had been neither. The appellant's legal argument was broadly supported by the Northern Ireland Human Rights Commission, which was granted leave to intervene.

29. Mr Crow, for the Secretary of State, supported the reasoning and the decision of the Court of Appeal. The Strasbourg jurisprudence had laid down principles but not rules which could never be departed from. A member state's duty to investigate was shaped by the facts and circumstances of the particular case. There was no single model of investigation which must be applied in all cases. It was for the state to decide what form of investigation would be appropriate in a given case. Public scrutiny and family participation were not separate requirements. Here, the Prison Service had accepted responsibility for the death. A civil action could be begun with an assured prospect of success. The criminal culpability of Stewart and prison staff had been investigated by the police. There had been a contested criminal trial. There had been a detailed investigation by Mr Butt, leading to a full report, severe criticism of the régime at Feltham and many recommendations. There had been a full report by the CRE, which had been published. The family of the deceased had not taken advantage of the opportunities offered to them to participate. There was no reason to think that any further enquiry would uncover any facts not already known or lead to any improvements not already in train.

Conclusions

30. A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 at 767

> "There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life".

Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.

31. The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom*, page 13. It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

32. Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in

selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the Court, particularly in *Jordan* and *Edwards,* has laid down minimum standards which must be met, whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and Convention standards.

33. There was in this case no inquest. The coroner's decision not to resume the inquest is not the subject of review, and may well have been justified for the reasons she has given. But it is very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation, as established by *McCann*. It would overcome the problems exposed by this appeal if effect were given to the recommendations made in "Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003" (Cm 5831) (June 2003), and no doubt that report is receiving urgent official attention.

34. The police investigations into the criminal culpability of Stewart and the Prison Service were, very properly, conducted in private and without participation by the family. The Advice Report on which counsel based his advice not to prosecute the Prison Service or any of its members was produced in evidence during these proceedings but not before. It is written in an objective and independent spirit, but it raises many unanswered questions and cannot discharge the state's investigative duty.

35. The trial of Stewart for murder was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. It involved little exploration, such as would occur in some murder trials, of wider issues concerning the death.

36. There is no reason to doubt that Mr Butt set about his task in a conscientious and professional way. He explored the facts, exposed weaknesses in the Feltham régime and recommended changes which, it is understood, have been and are being implemented. It is however plain that as a serving official in the Prison Service he did not enjoy institutional or hierarchical independence. His investigation was conducted in private. His report was not published. The family were not able to play any effective part in his investigation and would not have been able to do so even if they had accepted the limited offer made to them.

37. The CRE report, which was not before the judge or the Court of Appeal, brings additional facts to light (although some of these, such as the discovery of a handmade wooden dagger under Stewart's pillow after the murder, raise many further questions). The report has been published. But the CRE inquiry, conducted under the Race Relations Act 1976, was necessarily confined to race-related issues and this case raises other issues also (as did *Edwards*, where there was no race issue). Save for a single day devoted to policy issues, the inquiry was conducted in private. The family were not able to play any effective part in it and would not have been able to do so even if they had taken advantage of the limited opportunity they were offered. Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in *Edwards'* case, but even that was held inadequate to satisfy article 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence.

38. I consider that the judge was right to reach the conclusion and make the order which he did. For the foregoing reasons, and those given by my noble and learned friends Lord Slynn of Hadley, Lord Steyn and Lord Hope of Craighead, I would accordingly allow the appeal and restore his order.

39. I cannot accept the submission of Mr Crow that any further inquiry is unlikely to unearth new and significant facts. The papers before the House raise questions which any legal representative of the family would properly wish to pursue and the discovery of further new facts of significance may well be probable. But it is true that there are factual areas - for example, the killing itself, and the cause of death - which have already been fully explored and of which little or no further

examination is required. Many of the factual findings made by Mr Butt and the CRE can no doubt be taken as read. It will be very important for the investigator to take a firm grip on the inquiry so as to concentrate the evidence and focus the cross-examination on issues justifying further exploration. Reliance should be placed on written statements and submissions so far as may properly be done at a hearing required to be held in public. All those professionally engaged, for any party, should bear in mind their professional duty to ensure that the investigation of this tragic and unnecessary death is conducted in a focused and disciplined way.

LORD SLYNN OF HADLEY

My Lords,

40. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. He has set out in detail the facts and the relevant passages of the opinions of the Commission and the judgments of the Court of Human Rights in Strasbourg. These judgments clearly recognise that Article 2 of the Convention is to be read as including not only a duty not to take life, but in some circumstances to take steps to prevent life being taken and as part of that duty an obligation to investigate the circumstances surrounding the death.

41. The duty to investigate is partly one owed to the next of kin of the deceased as representing the deceased: it is partly to others who may in similar circumstances be vulnerable and whose lives may need to be protected. The significance of this duty to those detained in prison, not least where prisons are crowded and prisoners often dangerous, is obvious. It does not seem to me to be possible to say that there is a clear dividing line between those cases where an agent of the state kills and those cases where an agent of the state or the system is such that a killing may take place. The result of "an incident waiting to happen" may just as much as an actual killing require detailed and profound investigation, though in some cases the procedure to be adopted may be justifiably different.

42. The European Court of Human Rights and the Commission have clearly recognised that

> "The nature and degree of scrutiny which satisfies [the] minimum threshold [of a public and independent scrutiny] must, in the Commission's view, depend on the circumstances of the particular case".

(*McCann v United Kingdom* (1995) 21 EHRR 97, para 193.)

> "What form of investigation will achieve those purposes may vary in different circumstances".

(*Jordan v United Kingdom* (2001) 37 EHRR 52, para 105.) See also *Edwards v United Kingdom* (2002) 35 EHRR 487.

43. Such investigation must however be by an independent person, and be "effective" to satisfy the relevant duty. (*Edwards* at paras 69-73). There must be a sufficient element of public scrutiny and the next of kin or the family must be involved to an appropriate extent. (*Jordan v United Kingdom* (2001) 37 EHRR 52).

44. Even though there may be room for flexibility in the procedures adopted by different Member States, the European Court of Human Rights has insisted on a minimum threshold. In my opinion, even if the United Kingdom courts are only to take account of the Strasbourg Court decisions and are not strictly bound by them (section 2 of the Human Rights Act 1998), where the Court has laid down principles and, as here a minimum threshold requirement, United Kingdom courts should follow what the Court has said. If they do not do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.

45. It seems to me that in the present case the judge did, but the Court of Appeal did not, give sufficient effect to the judgments of the Strasbourg Court.

46. There were here a number of inquiries of different kinds which went some way to fulfil the minimum threshold duty but for the reasons given by Lord Bingham there were features of each stage of the inquiry which did not achieve the minimum threshold.

47. I do not for my part criticise those who held the inquiries, such as Mr Butt, since they were carrying out specific tasks no doubt in the way they were intended to do. Nor is it necessarily wrong to show that, if not in one compendious inquiry, through different inquiries, the overall test has been satisfied. But here in my opinion, even looking at all the inquiries, the test overall has not been satisfied either as to the degree of public scrutiny or as to the participation of the next of kin and the relatives.

48. One is left with a profound sense of unease that this investigation did not adequately investigate the matter in an acceptable way. For example, although it may be accepted that on 8 February Stewart was placed in cell 38 with the deceased because there was no other place available, there is no real explanation as to why it was necessary to keep him there from 8 February to 21 March 2000 in view of all the circumstances.

49. I would therefore allow the appeal for the reasons given by Lord Bingham as briefly supplemented in this speech.

LORD STEYN

My Lords,

50. In my view the Court of Appeal approached the Strasbourg jurisprudence, and in particular the decision in *Edwards v United Kingdom* (2002) 35 EHRR 487 in the wrong way. The Court of Appeal observed ([2003] QB 581, 607- 608, para 62):

> ". . . this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. . . . What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state has laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards's* case are perfectly consistent with this."

The Court of Appeal plainly thought that in the case of acts by state agents causing death in custody there is a more exacting and rigorous duty to investigate than in cases of negligent omissions leading to death in custody. That cases in the former category may be a greater affront to the public conscience than cases in the latter category can readily be accepted. But the investigation of cases of negligence resulting in the death of prisoners may often be more complex and may require more elaborate investigation. Systemic failures also affect more prisoners. The European Court of Human Rights has interpreted article 2 of the European Convention on Human Rights as imposing minimum standards which must be met in all cases. And in the decision in *Edwards* the European Court of Human Rights applied the same minimum standards to a case of omissions as it had previously applied in *Jordan v United Kingdom* (2001) 37 EHRR 52 to acts by state agents. The distinction drawn by the Court of Appeal infected its analysis of the Strasbourg decisions. Relying

on this distinction the Court of Appeal in effect departed from the requirements as explained in *Edwards.* Given the crucial public importance of investigating all deaths in custody properly, I consider that full effect must be given to the Strasbourg jurisprudence. I prefer the decisions of Jackson J *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399 and Hooper J in the instant case to the judgment of the Court of Appeal.

51. If the Court of Appeal had applied the Strasbourg jurisprudence correctly, I consider it unlikely that the Court of Appeal would have concluded (contrary to the view of the trial judge) that the procedural obligation to investigate was in any event discharged in this case. The Butt inquiry does not have the quality of institutional or hierarchical independence. The CRE inquiry, the report of which has now become available, was largely conducted in private and the focus was on race-related issues. That leaves only the police investigation and the criminal trial. On that basis it is obvious, and conceded, that there was no adequate enquiry.

52. The Court of Appeal posed the question: What would be the benefit of a further enquiry? The investigations conducted so far do not, either singly or together, meet the minimum standards required to satisfy article 2. But, in any event, it is vital that procedure and the merits should be kept strictly apart otherwise the merits may be judged unfairly: Wade and Forsyth, *Administrative Law,* 8th ed (2000), 501-503. In *John v Rees* [1970] Ch 345, 402, Megarry J observed about the argument that "it will make no difference":

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

This observation is apposite to the assumption that, although there has not been an adequate enquiry, it may be refused because nothing useful is likely to turn up. That judgment cannot fairly be made until there has been an enquiry.

53. For the reasons given by Lord Bingham of Cornhill, as well as my brief reasons, I would also allow the appeal and restore the order of Hooper J.

LORD HOPE OF CRAIGHEAD

My Lords,

54. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them, and for the reasons which they have given I too would allow the appeal and restore the order of Hooper J. I should like however to add a few words by way of a supplement to Lord Bingham's review of the domestic law on the investigation of deaths in prison.

55. There is no coroner in Scotland. The system in Scotland for the investigation of sudden deaths depends instead on the sheriff and the public prosecutor. To a large extent the question whether an investigation is needed is left to the discretion of the procurator fiscal of the area where the death occurred. In the performance of that function he is answerable to the Lord Advocate. But in some cases the holding of a public inquiry is mandatory, and it has for a long time been recognised in Scotland that it is in the public interest for a public inquiry to be held into the death of a person who at the time of the death was being held in legal custody. Section 53 of the Prisons (Scotland) Act 1877 (40 & 41 Vict, c 53), to which Lord Bingham has referred, was replaced by section 25 of the Prisons (Scotland) Act 1952 (15 & 16 Geo 6 & 1 Eliz 2, c 61). In the event of the death of a prisoner it was the duty of the governor under that section to give immediate notice to the procurator fiscal in whose area the prison was situated and, where practicable, to the prisoner's nearest relative. It was the duty of the procurator fiscal then to hold a public inquiry into the death

before the sheriff and, where practicable, to allow sufficient time for the prisoner's next of kin to attend the inquiry.

56. The legislation on this subject was consolidated and amended by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. It comprised the Fatal Accidents Inquiry (Scotland) Act 1895 (58 & 59 Vict, c 36), which provided for a compulsory inquiry into any death resulting from an accident sustained during industrial employment or occupation, the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1906 (6 Edw 7, c 35), which gave the Lord Advocate discretion to order an inquiry into any sudden or suspicious death where he considered this to be expedient in the public interest, and section 25 of the Prisons (Scotland) Act 1952. The system which was introduced by the 1895 Act was for an investigation to be held in public by a sheriff and jury, whose verdict set forth when and where the accident and the death took place and the cause of death: section 4(7). Section 2 of the 1906 Act required the jury's verdict to deal also with the cause of the accident, the person if any who was responsible for it, the precautions if any by which it might have been avoided and any other facts disclosed by the evidence which in the opinion of the jury were relevant to the inquiry. In practice, the verdict of the jury was usually dictated by the sheriff and in many cases the jury simply returned a formal verdict.

57. As the law in Scotland now stands, following the amendments introduced by the 1976 Act, juries are no longer used for these inquiries. The system instead is for the procurator fiscal to investigate the circumstances of the death, and for the inquiry (known as a fatal accident inquiry or, more colloquially, an FAI) to be held in public by the sheriff. It is held at a time and place which has been intimated to the nearest known relative and of which public notice has also been given. It is the duty of the procurator fiscal to adduce evidence at the inquiry as to the circumstances, and it is the sheriff's task to make a determination setting out the circumstances so far as they have been established to his satisfaction by the evidence.

58. The statute provides that the circumstances which are to be set out in the sheriff's determination must include (a) where and when the death and any accident resulting in the death took place, (b) the cause or causes of the death and any such accident, (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided, (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death and (e) any other facts which are relevant to the circumstances of the death. The holding of an FAI in the case of the death of a person who, at the time of his death, was in legal custody is mandatory: 1976 Act, section 1(1)(a)(ii). For the purposes of that provision he is in legal custody if he is detained in a prison, remand centre or young offenders institution, in a police station, police cell or other similar place or is being taken to or from any such place: section 1(4). The procurator has power to compel witnesses to give him information which is within his knowledge regarding any matter relevant to the investigation: section 2(2). The inquiry is open to the public: section 4(4). The rules of evidence, the procedure and the powers of the sheriff to deal with contempt of court and to enforce the attendance of witnesses at the inquiry are as nearly as possible the same as those which he has when he is sitting in an ordinary civil cause: section 4(7).

59. An example of the flexibility of this system and its ability to deal with complex and difficult issues is provided by the fatal accident inquiry which was held in 1996 by Sheriff Sir Stephen Young in Paisley Sheriff Court into the crash of the RAF Chinook helicopter into the Mull of Kintyre on 2 June 1994 which killed all those who were on board the aircraft. The evidence for the Crown was presented by counsel. The families of the two pilots were separately represented, as were the families of all the deceased other than the pilots and the manufacturer of the helicopter. The inquiry involved the hearing of evidence and submissions over some 16 days, and the sheriff's determination which extended to 123 pages contained a detailed and careful analysis of the evidence: see *Report from the Select Committee on Chinook ZD 576* (HL Paper 25 (iii), Session 2001-2002) (31 January 2002), paras 19 -21.

60. I mention these details because there is no doubt that the procedure which would have had to have been followed under the 1976 Act if at the time of his death the deceased had been in legal custody in Scotland satisfies the procedural obligation to carry out an effective investigation which is imposed on the United Kingdom by article 2 of the Convention. In *Edwards v United Kingdom* (2002) 35 EHRR 487, 515, para 83 the European Court said:

> "The government argued that the publication of the report secured the requisite degree of public scrutiny. The court has indicated that publicity of proceedings or the results may satisfy the requirements of article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as theory of the state agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible…"

The circumstances which have resulted in the death of a prisoner while he is in custody are capable of being given the widest exposure by this system, which is conducted in the public interest by the public prosecutor. The fact that it involves a public hearing in which the prisoner's next of kin are entitled to participate provides an ample opportunity for the circumstances to be subjected to public scrutiny, and the sheriff's determination is an effective vehicle for ensuring that those whom the evidence shows are responsible for deaths occurring under their responsibility are made accountable.

61. The Court of Appeal [2003] QB 581, 607, para 61, described the procedural duty to investigate as no more or less than an adjectival duty. They observed that, as this duty was by definition not expressly provided for in the Convention, it must be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive Convention rights. At pp 607 -608, para 62 they added that this issue could not be satisfactorily resolved by a process of reasoning which stuck like glue to the Strasbourg texts. What was needed was a flexible approach, responsive to the dictates of the facts case by case. I would not quarrel with these propositions. But I disagree with the conclusion which the Court drew from them. This was that an allegation of negligence leading to death in custody bears a different quality from a case where it is said that the prisoner's death resulted from the laying of lethal hands on him by the state.

62. In my opinion failures by the prison service which lead to a prisoner's death at the hands of another prisoner are no less demanding of investigation, and of "the widest exposure possible", than lethal acts which state agents have deliberately perpetrated. Indeed there is a strong case for saying that an even more rigorous investigation is needed if those who are responsible for such failures are to be identified and made accountable and the right to life is to be protected by subjecting the system itself to effective public scrutiny. Some form of effective investigation is, of course, needed when prisoners have been killed as a result of force by, inter alios, agents of the state: *McCann v United Kingdom* (1995) 21 EHRR 97, 163, para 161. But, as the words "inter alios" indicate, the obligation to safeguard the lives of prisoners is not confined to those who are at risk of the acts of state agents. It extends with equal force to all those whose lives are at risk from the criminal acts of another individual: *Osman v United Kingdom* (1998) 29 EHRR 245, 305, para 115.

63. The Court has made it clear that a fatal accident inquiry according to the Scottish model is not the only option. The choice of method is essentially a matter for decision by each contracting state within its own domestic legal order. The court also accepts that the form of investigation which will achieve the purposes of the Convention may vary in different circumstances: *Edwards v United Kingdom*, 35 EHRR 487, 511, para 69. Mr O'Connor said that in principle a coroner's inquest would satisfy the requirements of article 2. But he submitted that there must at best be a considerable

doubt as to whether it would do so in this case in the light of its unusual facts and circumstances.

64. For reasons which she has explained in her affidavit HM Coroner for West London, in the exercise of her discretion, declined to reconvene the inquest into Zahid Mubarek's death which was formally opened and then adjourned to await the prosecution of Robert Stewart for murder. As she pointed out, a number of practical problems are posed by the workload and availability of the coroner which would have made it very difficult for her to commit the time and resources that would have been needed to conduct the investigation that is required in this case. She accepts that the conditions of the office would be no answer if it was plain that the holding of an inquest was the appropriate remedy. But there are other, more fundamental, reasons for not taking this course. These are to found in the legal restraints which are provided by the Coroners Act 1988 and the Coroners Rules 1984. The coroner is restricted to a simple short verdict. She cannot make recommendations, and many of the issues which still need to be investigated in public as indicated in Hooper J's judgment would be beyond the scope of her inquest.

65. I agree that the various investigatory processes into Mr Mubarek's killing which have been conducted so far fall well short of providing the effective public scrutiny that is needed in a case of this kind. Substantial changes in the existing system for the investigation of deaths by coroners have been proposed: *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* (Cm 5831) (June 2003). But they will require legislation, and it must be assumed that these changes will not be applied retrospectively to deaths which have already occurred. The only alternative in these circumstances is for the Secretary of State to order the holding of an independent public inquiry into the circumstances which led to Mr Mubarek's death. Subject to the observations at the end of Lord Bingham's speech with which I am in full agreement and to the fact that the person who conducts it will lack the powers which could only be given by statute, I suggest that the conduct and scope of this inquiry should be as close to the Scottish model as possible.

LORD HUTTON

My Lords,

66. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons which he gives I too would allow this appeal.

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

Neutral Citation Number: [2003] EWCA (Civ) 1739
Case No: C3/2003/0993

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
Moses J

Royal Courts of Justice
Strand, London, WC2A 2LL
2nd December 2003

B e f o r e :

LORD JUSTICE BROOKE
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE LONGMORE
and
SIR MARTIN NOURSE

Between:

The Queen on the application of CHRISTINE DAVIES	**Claimant/ Appellant**
- and –	
HM DEPUTY CORONER FOR BIRMINGHAM	**Defendant/Respondent**

Nicholas Blake QC & Paula Sparks (instructed by Jonas Roy Bloom) for the Appellant
Richard M Barraclough QC (instructed by Solicitor, Birmingham City Council) for the Respondent
Hearing date : 4th November 2003

HTML VERSION OF JUDGMENT

Lord Justice Brooke :

1. This is an appeal by the claimant, who is the mother of Darren Davies, against an order of Moses J on 11th February 2003 whereby he dismissed her application for judicial review of a coroner's inquisition held into the death of her son in HMP Prison, Winson Green, Birmingham on 5th March 2001. After a five-day inquest, the coroner's jury returned a verdict of accidental death on 1st February 2002. The cause of death was recorded as cardiac arrest due to metabolic imbalance due to repeated vomiting.

2. On 1st March 2001 the claimant's son Darren, who was then 23, was admitted to Winson Green prison. He was seen on his admission by Dr Rahman at about 7pm, who noted in a health screen record that he had taken heroin the day before. At the inquest his mother confirmed that this was correct. He was complaining on admission of aches and pains. Dr Rahman prescribed detoxification drug treatment, to be taken over a period of four days.

3. On the following day, 2nd March, Darren attended at 8 am at the treatment hatch on his wing (C Wing) for his second dose, but the card which recorded the treatment prescribed to him had been placed in the tray designated for A Wing. For this reason the drug could not be prescribed, and he did not ask for the dose again after his card had been sent to C wing. Although there was a sick parade on C Wing between 9.30 and 11.30 am that morning he did not attend it. The evidence showed that he was being seen for categorisation that morning, and that he had also had visits from the prison chaplain and a drugs nurse, which might be the reason why he did not attend.

4. At about lunch-time that day he was moved to B wing. That wing held its sick parade on a different day. Although there was a nurse at the treatment hatch on B Wing on the way to the dining hall, he did not ever ask for a further detoxification treatment dose. While he was in B wing, he rarely left his cell. He shared it with Mr Collins, who gave evidence at the inquest.

5. Darren's sister told the inquest that she had rung the prison on the Friday to ask whether her brother had the medication he was to receive. The nurse who answered her telephone call told her that she was not in any position to check whether he had received his dose or not. She added that 80% of prisoners were on a detoxification programme, and the staff could not check on every one.

6. Mr Collins described to the inquest how Darren's symptoms worsened. He could not take water, and when he tried to do so, he was sick straight away and suffered from pain. On the Friday night Mr Davies rang the buzzer, and Mr Collins thought that a prison officer gave him paracetamol. He seemed to be in a lot of pain. Mr Collins described how Darren called for help on the Saturday evening by pressing the buzzer in the cell once or twice (he could not remember which). When the buzzer was rung at 9.15 pm that evening, a prison officer advised Darren to see a nurse the following day. Mr Collins added that this officer told Darren "you got on your boat, you ride it", meaning that it was his own fault for having taken drugs.

7. Mr Collins said that on the following day, Sunday 4th March, Darren felt worse. He did not get out of his bed, or out of his cell for exercise. He complained of a bad chest. He could not move his fingers, which were clamped up. Dr Ralli, a prison officer from another prison who furnished an independent report, told the inquest that by now Darren was very unwell with vomiting and diarrhoea, and with no food or fluid intake, and that his internal metabolic and electrolyte systems were becoming abnormal. Mr Collins would clean up the cell when Darren dirtied it, so that it did not smell and they would not get into trouble for dirtying the cell. As a result the prison staff were not aware of the diarrhoea and vomiting.

8. Darren was worse on Sunday evening. He was still vomiting and was now too weak to go to the lavatory. He had

spasms in his elbows and fingers. When the buzzer was pressed at about 8 pm, a prison officer called and advised him to see a doctor in the morning. At 9.20 pm a night agency nurse called Nurse Spencer attended. She advised Mr Collins to make sure that Darren went for treatment on the Monday morning. Nurse Spencer was not a general nurse: she had particular skills in the mental health field. Darren complained to her of stiffness in his arm joints, and she noted that his hands were in a strange position. She manipulated his joints and gave him two paracetamol tablets. She did not take a history from him. As she was leaving the cell, Mr Collins told her that Darren had been feeling poorly. When she returned to the prison's health centre, she checked his record. She also ascertained that the health centre was full.

9. On the Monday morning, 5th March, the buzzer was pressed at 6.15 am. Darren had fallen off his bed. Two prison officers and Nurse Spencer lifted him back onto it. Nurse Spencer told him that a doctor would see him. Mr Collins told the inquest that Darren had been sick, and that he had cleaned up the vomit. Prison Officer Biddle for his part told the inquest that he had visited the cell on both the Sunday night and on the Monday morning. On the Sunday night Darren's wrists were rigid and in an unnatural position. On the Monday morning they were more flexible. Darren was told he was going to be referred to a doctor that morning.

10. At 7.10 am, less than an hour later, the cell buzzer was pressed again. By this time Darren was unconscious and not breathing. Steps were then taken to try to revive him. An ambulance was called, but he died despite the attempts of a paramedic to resuscitate him.

11. Prison Officer Fitzgerald told the inquest that she recalled two calls on the Sunday night. On the first occasion she advised Darren to see the doctor in the morning. One and a half hours later he was still in pain, so that the nurse was called. His arms were hurting and in a cramped position, and Prison Officer Fitzgerald remembers Mr Collins saying that Darren had been sick. On the Monday he had fallen on the floor, and Prison Officer Fitzgerald described how he was lifted onto a bed. She ascribed his symptoms to drugs.

12. Nurse Spencer told the inquest how she had attended on Sunday night, when she manipulated Darren, gave him paracetamol, and advised him to attend the health care centre the next day. This was not the first time she had seen spasms being suffered by someone withdrawing from drugs. The following morning she saw no evidence of dehydration. Darren's lips were not sticking together, and she did not find his symptoms particularly unusual. Nor did she think it odd that he had failed to follow up the prescription he had been given for the detoxification programme.

13. When she saw him on the Monday morning he was stretched out, but his hands were more supple. He was coherent in talking, and complained of discomfort in his joints. His blood pressure and his pulse were normal. She saw no evidence of diarrhoea or vomiting, and she smelt none of the effects of those symptoms. She ascribed his symptoms to drug withdrawal. She said she had no concerns, other than that she wanted him to see a doctor that morning. If she had thought that it was necessary to call out a doctor, she could have done so easily.

14. Four doctors expressed their opinions as to the cause of Darren's death. Dr Tapp, a pathologist instructed by Darren's family, said in a written report that he died of dehydration, consistent with someone suffering from significant diarrhoea and vomiting. The cause might never be ascertained, but it was unlikely to be drug withdrawal. He suffered from the symptoms of acute enteritis. Dr Ralli for his part said that the cramps from which Darren suffered in his upper limbs, and particularly in his hands, were unusual. Dr Khan, who was an expert on the effects of opiate withdrawal, described Darren's symptoms as being most unusual, particularly those of very severe dehydration. Dr Acland, the Home Office pathologist, concurred in the unusual nature of the cause of death. He took the view that Darren had died from the complications of dehydration.

15. In his written report Dr Ralli made the following comments on clinical issues:

> (1) After Darren's reception assessment at which a treatment plan was established, the onus was placed on him to seek his treatments and to seek further help if required.
>
> (2) Nobody checked to see why he did not attend for treatment, or attend reporting sick, or collect

his meals.

(3) Practices are in place for those considered to be at risk (diabetics and those on heart medicines) if they do not receive their treatment to be followed up; but these practices do not seem to extend to drug users. Given all the recognised risks (especially from self-harm) amongst drug users on coming into prison, this matter needs to be reviewed.

(4) If his case had been followed up, and if he had taken the treatment prescribed for him, this may have prevented his deterioration.

(5) Darren's presentation on the Sunday night was unusual. The nurse did not elicit all the available information about the vomiting and diarrhoea, or about the absence of food or fluid intake, or about the fact that he had not taken any of his prescribed medicine.

(6) She should have discussed the case with the duty doctor.

(7) She should have been able to move him to an area for closer health care supervision. HMP Birmingham does not possess such a resource, since in-patients are not monitored by health care staff through the night.

(8) Darren's collapse in the early hours was also very unusual. Again, there should have been discussion with the duty doctor, and arrangements for closer monitoring.

16. The coroner ruled that Dr Ralli's last three points should not be given in evidence to the jury. However, the evidence relating to the unusual nature of Darren's presentation on Sunday night (Point 5), and the fact that the nurse did not elicit all the available information, were both before the jury. When Nurse Spencer gave evidence, she said that if there was a history of profuse vomiting, you would want to examine the person, and perhaps do some blood tests. Dr Ralli himself commented in his oral evidence on the desirability of treatment, having regard to the unusual nature of the presentation.

17. Mr Pascoe, a prison governor who gave independent evidence, told the inquest about the lack of machinery for follow-up after an initial assessment, although he also spoke approvingly of the speed at which people had arrived at the scene. He described the nurse's decision as an exercise of professional medical judgment. The assistant governor at Birmingham, Mr Price, described the detoxification programme and the quality of the nurses. He said that a doctor was on call 24 hours a day, and that the prison hospital was only two minutes away. Dr Rahman had earlier told the inquest that between 75% and 80% of people going to prison have some sort of drug problem. The dose he had prescribed was intended to ease the symptoms of drug withdrawal, but it was not mandatory

18. The coroner then summed the case up to the jury who in due course returned a verdict of accidental death.

19. The claimant's case is that the coroner failed properly to direct the jury as to the meaning of neglect, failed to admit the evidence from Dr Ralli which reflected his views as to the quality of care afforded to Darren, and failed adequately to leave to the jury the issue as to whether the system for his care on and after admission was defective.

20. Particular complaint was made of the fact that the coroner wrongly emphasised the rarity of a verdict that neglect had contributed to the cause of death. He also failed to explain that there were circumstances in which Nurse Spencer's failure to seek assistance could amount to neglect, notwithstanding her decision, as a matter of judgment, that such assistance was unnecessary. And he failed to leave to the jury any issues relating to a systemic failure in the prison's arrangements for caring for a prisoner who needed medication for drug withdrawal.

21. The relevant principles of law were conveniently brought together by the judge in the second main section of his judgment. Before the Human Rights Act 1998 came into force, the meaning of a verdict of "neglect" was

explained by Sir Thomas Bingham MR in *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1, 24. He emphasised the nature of the fact-finding enquiry to be conducted by a coroner, and then set out certain principles. He expressed the third of these principles in these terms:

> "It is not the function of a coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. This principle is expressed in rule 42 of the Rules of 1984. The rule does, however, treat criminal and civil liability differently: whereas a verdict must not be framed so as to appear to determine any question of criminal liability *on the part of a named person*, thereby legitimating a verdict of unlawful killing provided no one is named, the prohibition on returning a verdict so as to appear to determine any question of civil liability is unqualified, applying whether anyone is named or not."

22. He expressed the ninth principle as follows:

> "Neglect in this context means a gross failure to provide adequate nourishment or liquid, or provide or procure basic medical attention or shelter or warmth for someone in a dependent position (because of youth, age, illness or incarceration) who cannot provide it for himself. Failure to provide medical attention for a dependent person whose physical condition is such as to show that he obviously needs it may amount to neglect. So it may be if it is the dependent person's mental condition which obviously calls for medical attention (as it would, for example, if a mental nurse observed that a patient had a propensity to swallow razor blades and failed to report this propensity to a doctor, in a case where the patient had no intention to cause himself injury, but did thereafter swallow razor blades with fatal results). In both cases the crucial consideration will be what the dependent person's condition, whether physical or mental, appeared to be."

23. His twelfth principle was in these terms:

> "Neither neglect nor self-neglect should ever form any part of any verdict unless a clear and direct causal connection is established between the conduct so described and the cause of death."

24. In *R (Amin and Middleton) v Home Secretary* [2002] EWCA Civ 390; [2003] QB 581 this court considered the impact of Article 2 of the European Convention on Human Rights on these matters. After mentioning the effect of the decision of the European Court of Human Rights in *Osman v United Kingdom* [1998] 29 EHRR 245, 305-306 Lord Woolf CJ, giving the judgment of the court, said that without a duty to investigate the substantive right conferred by Article 2 would or might in some cases be rendered ineffective. He described (at para 32) the duty to investigate as 'adjectival'. He later said (at para 62):

> "62. What is required (by way of investigation) will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state has laid on lethal hands. The procedural obligation promotes interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach responsive to the dictates of the facts case by case."

For the House of Lords' opinions on this passage, see para 52 below.

25. On the appeal in the case of *Middleton*, Lord Woolf considered the judgment of Stanley Burnton J at first instance who had granted a declaration to the effect that the restrictions on the verdict at the inquest had been inadequate to meet the procedural obligations contained in Article 2 of the European Convention on Human Rights. Lord Woolf referred to the decision in *Jamieson* in these terms (at para 87):

> "87. A verdict of neglect can perform different functions. In particular, in the present context, it can identify a failure in the system adopted by the Prison Service to reduce the incidence of suicide by

inmates. Alternatively, it may do no more than identify a failure of an individual prison officer to perform his duties properly. We offer two illustrations, which demonstrate the distinction we have in mind. On the one hand, the system adopted by a prison may be unsatisfactory in that it allows a prisoner who is a known suicide risk to occupy a cell by himself or does not require that prisoner to be kept under observation. On the other hand, the system may be perfectly satisfactory but the prison officer responsible for keeping observation may fall asleep on duty.

88. For the purpose of vindicating the right protected by article 2 *it is more important to identify defects in the system* than individual acts of negligence. The identification of defects in the system can result in it being changed so that suicides in the future are avoided. A finding of individual negligence is unlikely to lead to that result. If the facts have been investigated at the inquest, the evidence given for this purpose should usually enable the relatives to initiate civil proceedings against those responsible without the verdict identifying individuals by name. The shortcomings of civil proceedings in meeting the requirements of article 2 do not in general prevent actions in the domestic courts for damages from providing an effective remedy in cases of alleged unlawful conduct or negligence by public authorities.

89. In contrast with the position where there is individual negligence, *not to allow a jury to return a verdict of neglect in relation to a defect in the system* could detract substantially from the salutary effect of the verdict. A finding of neglect can bring home to the relevant authority the need for action to be taken to change the system, and thus contribute to the avoidance of suicides in the future. The inability to bring in a verdict of neglect (without identifying any individual as being involved) in our judgment significantly detracts, in some cases, from the capacity of the investigation to meet the obligations arising under article 2." (Emphasis added)

26. A little later Lord Woolf said (at para 91):

"91. In a situation where a coroner knows that it is the inquest which is in practice the way the state is fulfilling the adjectival obligation under article 2, it is for the coroner to construe the Rules in the manner required by section 6(2)(b) [of the Human Rights Act 1998]. Rule 42 can and should, contrary to *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, when necessary be construed (in relation to both criminal and civil proceedings) only as preventing an individual being named, with the result that a finding of system neglect of the type we have indicated will not contravene that rule. If the coroner is acting in accordance with the rule for this purpose he will not be offending in this respect section 6(1).

92. For a coroner to take into account today the effect of the Human Rights Act 1998 on the interpretation of the Rules is not to overrule *Jamieson's* case by the back door. In general the decision continues to apply to inquests, but when it is necessary so as to vindicate article 2 to give in effect a verdict of neglect, it is permissible to do so. The requirements are in fact specific to the particular inquest being conducted, and will only apply where in the judgment of the coroner a finding of the jury on neglect could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into at the inquest."

27. Moses J said that it was possible to derive from that judgment the proposition that a verdict of system neglect might be appropriate in order to identify defects in the system and prevent their recurrence. Such an identification of the defects in the system was to be contrasted with an identification of negligent acts by an individual.

28. He reminded himself that a gross failure, in accordance with the *Jamieson* test, might be found even where an individual had purported to make a clinical decision or diagnosis. Gross failures were not limited to those cases where an individual had failed to take any action at all. In *Cleo Scott v HM Coroner for Inner West London* [2001] EWHC Admin 105 at [28] – [29] Keene LJ said:

"…He was put in his cell on his own. No observations at specific intervals were required.

> All this seems to have flowed from the views formed by the medical practitioners at the prison, but that in itself, while relevant, cannot rule out neglect.
>
> There have been a number of cases where there had been medical attention but where neglect remained a possible element in a verdict ... Omissions on the part of medical practitioners are capable of forming part of the total picture which amounts to neglect."

29. In *R (Nicholls) v Coroner for City of Liverpool* [2001] EWHC Admin 922 the Divisional Court was concerned with the alleged failure of a police forensic medical examiner properly to recognise the fact that the deceased had swallowed drugs, believed to be heroin. The court plainly thought that his failure could amount to neglect. Sullivan J, with whom Rose LJ agreed, said (at para 52):

> "Notwithstanding [Counsel's] submission that neglect and negligence are two different 'animals', there is, in reality, no precise dividing line between 'a gross failure to provide ... basic medical attention' and a 'failure to provide ... medical attention'. The difference is bound to be one of degree, highly dependent on the facts of the particular case."

30. The first of the criticisms of the coroner's summing up before Moses J was that he placed undue emphasis on the rarity of a verdict of neglect. He said:

> "But you must understand that it is nothing at all to do with negligence. It is very unusual and will only arise in a very, very, small percentage of cases, but in view of the circumstances of this case, it was appropriate that you are given the option."

A little later he emphasised again the rarity of the verdict, quoting a textbook writer as saying that such cases would be very few and far between.

31. Moses J said that he probably meant no more than to emphasise the contrast between simple negligence and the need to identify gross failure, which, he emphasised on more than one occasion, had an extremely "narrow meaning", But he added that to the extent that the coroner did comment upon the rarity of such a verdict, he was, in his view, wrong. To comment on the rarity of the verdict did not assist in defining neglect to the jury. He did not, however, consider that the reference to the unusual nature of such a verdict was of itself a ground for disturbing the verdict of the jury. He said that the coroner's error was not, in its context, when the summing-up was read as a whole, such a misdirection as to vitiate the jury's ultimate conclusion, even if it was not likely to assist them in understanding the concept of neglect.

32. The judge considered that two other defects in the summing-up were more serious. The coroner had failed to make clear to the jury that Nurse Spencer's failure to seek assistance was at least capable of constituting neglect, even though she had exercised her judgment in deciding that it was unnecessary to call for any assistance. He had never made it clear to the jury whether an exercise of her judgment could or could not constitute neglect. At the outset of the summing-up he had said:

> "You have to establish the facts. For example, did someone make a decision? Yes or no. It is not your province to determine whether that decision was right or wrong."

33. He later said of the meaning of "neglect":

> "It is a very, very, narrow definition indeed. First of all there has got to be a gross failure which really means a total and complete failure; to provide adequate nourishment, liquid, et cetera, so it really means doing absolutely nothing. It doesn't mean doing your incompetent best, if that be the situation. It means doing absolutely nothing. It's far more than an error of judgment, if an error of judgment there has been. There's got to be a total and complete failure."

34. The judge considered that this passage suggested that, since Nurse Spencer did something (in that she attended

Darren and formed a conclusion), it was not open to the jury to find neglect. A little later, however, the coroner appeared to say the opposite. He told the jury:

> "An error of judgment by an individual, being an individual qualified to make that judgment, as to the appropriate medical attention needed by Mr Davies would not amount to a gross failure unless it can be said that their plan was plainly wrong and they would not have allowed the plan ... followed the plan if they were to stop and think about it in the cold light of day."

35. The judge remarked that whatever one's criticism as to the clarity of that direction, it did at least appear that at that point the coroner was directing the jury that it was open to them to find neglect, notwithstanding the exercise of judgment. Later, however, the coroner appeared to revert to his earlier direction that the jury were not concerned with whether the assessment was right or wrong, when he said:

> "So Nurse Spencer made her clinical assessment. Whether or not that assessment was right or wrong, as we've said more than once, we're not concerned with. She made that assessment."

36. The judge said that, reading the directions as a whole, it could not have been made clear to the jury, as it ought to have been, that it was open to them to find neglect, notwithstanding the nurse's apparent exercise of judgment to the effect that it was unnecessary to seek assistance for the deceased. He said he was far from saying that a verdict of neglect would have been correct. This would depend in part upon the somewhat confused evidence as to how much the nurse had been told. But her failure to seek assistance was capable of constituting neglect, even though she exercised a clinical judgment as to whether such assistance was necessary: see, for instance Keene LJ in *Cleo Scott* (see para 28 above) This was not made clear to the jury.

37. The judge also criticised the coroner for failing to leave to the jury any issue as to systemic defects. The coroner did not have the benefit of this court's decision in *Amin* and *Middleton*, which was decided very shortly afterwards, but there was an issue before the inquest as to whether, when inmates on admission were withdrawing from drugs and required medication, the system for following up their cases was defective. Dr Ralli had commented on certain defects in the system, and his comments had been taken up by Mr Pascoe and Mr Price. Those criticisms led to the coroner writing a letter to the prison (see para 41 below), but the identification of the defects in the system of which witnesses had given evidence, and the question whether such defects constituted neglect, were not laid before the jury.

38. Finally, the judge considered the coroner's failure to place Dr Ralli's evidence in full before the jury. The coroner's decision was based on his view that this evidence was unnecessary in the light of Nurse Spencer's decision not to seek a doctor's help. He thought that it was irrelevant to consider what might have happened if she had reached a different view as to Darren's condition.

39. The judge said that Dr Ralli's evidence might be regarded as constituting implicit criticism, especially in the light of his emphasis on the unusualness of Darren's condition, but he did not think that that ruling by the coroner had led to any defect in the conduct of the inquest. Dr Ralli had stopped short of saying what a reasonable nurse would have done in the exercise of reasonable care. The judge contrasted that situation with the situation in *Nicholls* (see para 29 above), where a doctor had stated that the death was entirely preventable by steps which would have been exercised by any doctor acting to a reasonable standard. No such evidence was contained in Dr Ralli's report. In those circumstances, the judge did not consider that the jury was wrongly deprived of the opportunity to consider the last three points in Dr Ralli's criticisms.

40. The judge's overall conclusion was that the coroner's directions were deficient in that he had failed to explain to the jury the circumstances in which it was open to them to find that Nurse Spencer's conduct amounted to neglect, and that he had also failed to leave it open to them to find that there were system defects which constituted neglect.

41. The judge then considered what, if any, remedy he should provide. He said he ought not to quash the verdict or to order a fresh inquest unless it was necessary and desirable in the interests of justice to do so: see Lord Woolf MR in *R v Inner South Coroner's Court, ex Douglas Williams* [1999] 1 All ER 344, 347. The judge

acknowledged how distressing, anxious and important a matter this was for Darren's relatives. But in this case a very full enquiry took place, with an abundance of evidence as to the system in place at the prison, as well as to the events leading up to Darren's death. The evidence given at the inquest had led the coroner to write to the governor of the prison shortly after the inquest was over. He wrote of his concern as to the lack of involvement of the drugs team in Darren's rehabilitation because the drugs team only worked on weekdays. He acknowledged that a new procedure had been set in place, but his letter continued:

> "I am still concerned however that a prisoner who may be suffering from withdrawal symptoms may slip through the net because the prison officer or nurse at the Treatment Hatch may not recognise the signs or symptoms. Therefore, the sooner a new prisoner can be seen, assessed and taken under the wing of the Drugs Team the better, and although I appreciate that there are staffing and costs implications, I wonder whether a procedure could be introduced to ensure that a prisoner who arrives on a Thursday or Friday is dealt with in the same way as a prisoner who arrives earlier in the week."

42. The judge said that in this way recommendations were made that were relevant to Darren's tragic death. It was therefore difficult to see what more would be gained from another inquest, seeing that evidence was given so fully on the last occasion and recommendations as to improvements in the system had been made. In those circumstances he declined to quash the verdict or order a fresh inquest.

43. We are deciding this appeal during a transitional period before two decisions of this court in these matters are considered on appeal in the House of Lords. I will now summarise the effect of those decisions.

44. *R (Middleton) v West Somerset Coroner* was heard in this court at the same time as *R (Amin) v Home Secretary* [2002] EWCA Civ 390; [2003] QB 581. The deceased hanged himself in prison, and his family were critical of the Prison Service because it knew he was a suicide risk, and it should have put him on a suicide watch. At the inquest the jury was directed that it could not return a verdict of neglect. In the circumstances they found that the deceased had killed himself while the balance of his mind was disturbed. But they also handed the coroner a note containing four factual conclusions which indicated that the Prison Service had failed in its duty of care for the deceased. On the family's application for judicial review, Stanley Burnton J ([2001] EWHC Admin 1043; [2002] Lloyds Med LR 107) held that the note was a private communication between the jury and the coroner, and that it would have been inconsistent with the private nature of the note for it to be incorporated in the inquisition. He granted a declaration that by reason of the restrictions on the verdict at the inquest into the deceased's death, that inquest was inadequate to meet the procedural obligation contained in ECHR Article 2.

45. The judge expressed his concerns (at para 54) in these terms:

> "…[W]here there has been neglect on the part of the State, and that neglect was a substantial contributory cause of the death, my view is that a formal and public finding of neglect on the part of the State is in general necessary in order to satisfy [the requirements of Article 2]. A formal public finding is likely to be very much more effective in prompting action to prevent a recurrence of breach of Article 2 than a private communication from the Coroner pursuant to Rule 43, particularly given the prohibition on the Coroner announcing publicly the content of his concerns at the inquest. As Lord Woolf MR said in *R v Inner South London Coroner, ex parte Douglas-Williams* [1999] 1 All ER 344, 349:
>
> > '… where someone dies in custody, … an inquest can provide the family with the only opportunity they will have of ascertaining what happened. In addition, … an inquest's verdict can have a significant part to play in avoiding the repetition of inappropriate conduct and in encouraging beneficial change.'
>
> In a democracy, the defects of the workings of the State should be open to public scrutiny and, where appropriate, to adverse public findings."

46. On the Home Secretary's appeal in that case this court could see no reason why in a case of systemic neglect a

coroner's jury should not return a verdict of neglect without infringing Rule 42 of the Coroners Rules 1984. I have already quoted, at paras 22 and 23 above, what Lord Woolf CJ said in paragraphs 89 and 92 of his judgment. In para 83 he had said that the issue the court had to decide was whether the requirements of Article 2 were achieved by applying the Coroners' Rules in accordance with the guidance in *Jamieson's* case, and if not, whether the application of the Rules could be modified so as to take into account the requirements of Article 2, if those requirements included permitting the jury to inquire into and return a verdict of "neglect" in a broader range of circumstances than contemplated by the approach laid down in *Jamieson's* case. Although the court did not determine the issue in precisely these terms, it is reasonably clear that it decided in favour of the second alternative, so long as the identified neglect was systemic.

47. *R (Sacker) v HM Coroner for West Yorkshire* [2003] EWCA Civ 217; [2003] Lloyd's Med R 326 was another case in which the deceased had hanged herself in prison and her family was critical of the Prison Service. It was alleged that procedures for handling a prisoner at risk of self harm had not been followed. At the inquest the coroner ruled that the issue of neglect should not be left to the jury. He exercised his right, however, under Rule 43 of the 1984 Rules to write to the Director-General of the Prison Service expressing his grave concern about certain aspects of the case, and requiring assurance for the future.

48. This court heard the substantive application for judicial review and decided, following *Amin*, that the jury ought to have been given an opportunity to add a rider amounting to neglect. The failure to give it amounted to a defect which required the inquisition to be quashed. In a judgment with which Mummery and Latham LJJ agreed, Pill LJ, however, expressed (at para 24) his reservations as to the appropriateness of the course the law had taken by its promotion of the neglect verdict at inquests as the means of vindicating Article 2. He was concerned about the limitation of the inquiry permitted to a coroner and his jury by the combination of Rules 36, 40 and 43, and he respectfully questioned (at para 25) whether, given present procedures, an inquest was the appropriate forum in which to consider an issue of systemic neglect for the purpose of vindicating article 2 in cases like this. He thought that the coroner's action under Rule 43 appeared, in present circumstances, to be a stronger affirmation of the right to life, with its requirement of effective investigation into a death, particularly as the coroner's jury were ill-equipped, given the context in which they operated, to identify and particularise the systemic neglect which they believed to be present, or even to decide whether they should particularise it.

49. It is obvious that the law is in an unsettled state, and I am conscious of the anxieties expressed about the decision in *Middleton* not only by Pill LJ but also by the editor of *Jervis on Coroners* (12th Edition, 2003) at paras 12.93 – 12.94 and 13.44. When the case of *Amin* reached the House of Lords [2003] UKHL 51 Lord Bingham of Cornhill expressed (at para 33) the confident expectation that the recommendations made in Command Paper 5831 (June 2003) on the overhaul of inquest procedure in England and Wales were receiving urgent attention. Lord Hope of Craighead, for his part, identified (at paras 54-60) the marked superiority of the Scottish system of investigating the deaths of a person in custody to the English arrangements. It is now crystal clear that the English coronial system, as at present constituted, is an inadequate vehicle in every case for the procedural obligations imposed on this country by ECHR Article 2. The difficulties exposed in the present case and the anxieties expressed by the editor of the leading text-book on coronial law, show vividly that both law and procedure are in serious need of reform.

50. However that may be, we saw no advantage in postponing the hearing of this appeal for six months or more before the decisions of the House of Lords on the *Middleton* and *Sacker* appeals were known. Nor, given the relative imminence of those appeals, did we see any merit in exploring the question whether *Middleton* was indeed decided *per incuriam*, as the Editor of *Jervis* suggests. Suffice it to say that the members of this court in *Middleton* would have been very well aware that the word "neglect" in coronial law was not to be equated with common law negligence. Indeed, Lord Woolf quoted at para 78 Lord Bingham's ninth conclusion in the case of *Jamieson*, and at para 90 the sixth of the West London coroner's submissions to his own court, each of which made this distinction very clear.

51. What the court in *Middleton* was anxious to achieve was the possibility of an inquest jury being able to enter a verdict which included a finding of systemic neglect in a broader range of circumstances than those contemplated by the approach laid down in *Jamieson's* case, provided that no individual was named, if there was

realistically no other way in which this country in the present state of the law might fulfil its Article 2 procedural obligations. The facts disclosed at the inquest might lead, as has often happened in the past, to charges of negligence being made in the civil courts. What this court decided was that a finding by a coroner's jury of systemic neglect did not determine any question of civil liability. It was therefore permissible notwithstanding Rule 42.

52. In *Amin* the House of Lords was not directly concerned with the adequacy of our inquest procedures for Article 2 purposes, because the coroner in that case had decided not to hold an inquest. But it, too, was a case involving a death in custody, and the House of Lords robustly rejected the Court of Appeal's distinction between different classes of such cases. This point of view is most vividly reflected in the speech of Lord Steyn (at para 50), with which Lord Hope agreed (at para 54). Lord Bingham, with whom the other four members of the House agreed, expressed a similar conclusion at paras 30-31:

> "30. The state owes a particular duty to those involuntarily in its custody … Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.
>
> 31. The state's duty to investigate … can fairly be described as procedural … But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, … effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

53. It follows from all this that as the law now stands:

> (i) There must be a full and effective inquiry into the death at the coroner's inquest if this is realistically the only occasion on which the state will perform its procedural duty;
>
> (ii) It is open to a jury to return a verdict incorporating a finding of neglect in a broader range of circumstances than those contemplated by the approach laid down in *Jamieson's* case if the verdict relates to systemic neglect;
>
> (iii) A letter written by a coroner pursuant to Rule 43 is not an adequate substitute, for Article 2 purposes, for a verdict by the jury in cases where a verdict of neglect is available on the evidence.

54. Before I turn back to the facts of the present case, it is worth considering a very recent decision of the European Court of Human Rights in *McGlinchey v UK (Appln No 50390/99)*. Ms McGlinchey, like Mr Davies, was suffering heroin-withdrawal symptoms when she was admitted to prison. A week later she suffered a very major breakdown in her health and had to be admitted to hospital where she died three weeks later. The court at Strasbourg by a majority held that her treatment during her first week in prison amounted to inhuman and degrading treatment contrary to ECHR Article 3.

55. Unlike the present case, Ms McGlinchey's case did not arise from a situation in which a prisoner was not seen by a doctor at all after her initial reception into prison. She was screened by a nurse on entry, and was seen by a doctor on her first, second and fourth full days in prison. There followed a weekend when a locum doctor attended the prison but did not see her. Her breakdown, like Mr Davies's, occurred on a Monday, following a weekend. The Strasbourg court found that her condition was regularly monitored by medical and nursing staff, and that they took steps to respond to her withdrawal symptoms. The court's censure seems to have been concentrated (see para 57 of the judgment) on the events of the weekend when she did not see a doctor at all, and when the nursing staff wrongly thought that her condition was improving (although she had lost a further 3 kilograms in weight in three days and was continuing to vomit) so that they did not summon a doctor or arrange for her admission to hospital.

56. Sir Nicolas Bratza dissented from this conclusion on the facts ("not without some hesitation"), but the judgment of the majority shows the concern now felt by the Strasbourg Court that prisoners who are evidently ill should be afforded an appropriate standard of medical care. The fact that the nurses on weekend duty at the prison hospital honestly believed that it was unnecessary to summon a doctor did not suffice to exculpate the United Kingdom from a finding that ECHR Article 3 had been violated.

57. Mr Blake QC, who appeared for Mrs Davies on the appeal, showed us the passages in the transcript of Dr Ralli's evidence in which the coroner stopped him from giving evidence he would otherwise have given to the jury. I have already shown how his report disclosed his view that Nurse Spencer should have discussed the case with the duty doctor, and that she should have been able to move Darren to an area for closer supervision. He was also critical of the arrangements in the prison hospital in this respect, because in-patients were not monitored there by health care staff through the night. Because of the coroner's ruling, the jury did not hear any of this evidence.

58. The significance of this prohibited evidence can be more effectively gauged against the background of evidence which the jury did receive. Dr Ralli explained to the jury that whenever there is a death in prison, a senior investigator from another prison establishment will conduct an investigation, and if medical issues are raised, a doctor or other healthcare professional will join the investigator's team. He was performing this role in Darren Davies's case.

59. The jury heard that in 2000 the Chief Inspector of Prisons had recommended that there should be three nurses on night duty at the prison each night, and that the Governor of the prison had considered this report and decided that it was perfectly satisfactory to have only one. The coroner told the jury that this evidence was not relevant, because Nurse Spencer had attended Darren quickly on each occasion when she was summoned.

60. Whether this issue would have been pursued if Dr Ralli had been allowed to give the prohibited evidence it is impossible to say. The jury was told by Dr Rahman that although the City hospital was just round the corner, a doctor on call might take an hour to get to the prison. Dr Ralli told the jury that in his own prison there were two nurses or healthcare staff on duty at night, so that if one of them had come away from a scene which was a bit unusual, the first thing they would do would be to discuss the matter and look at the prisoner's notes together. He added that in Darren's case, the presentation had been unusual on each occasion when Nurse Spencer visited him, yet she still decided on her own initiative that no immediate action was needed.

61. The way the matter was left to the jury was that they were not instructed to consider a verdict of systemic neglect at all. Mr Pascoe, the lead investigator, was content to tell the jury that Nurse Spencer's decision was one of "medical/professional judgment", and the coroner in due course was to give the jury the confused directions (see paras 32-36 above) to which I have already referred. There were just over 900 prisoners locked up in the prison at this time, of whom 75-80%, according to Dr Rahman, had some kind of drug problem, yet the jury were not invited to consider the adequacy of a system of basic medical care which left decisions as to whether the attendance of a doctor was required to a single nurse, who did not take a full history from the patient before forming her judgment, and did not have the opportunity of discussing the case with a professional colleague. Even if she had thought that Darren required closer observation, there was no room for him in the prison's health care centre, and in any event (as Dr Ralli would have told the jury if he had been allowed to do so) his condition would not have been monitored by health care staff there through the night even if he had been moved there.

62. I have sympathy for the coroner because he gave his rulings before the decision of this court in *Middleton* elevated the importance of a verdict of systemic neglect in a case like this. I have sympathy for Moses J, too, because he was not able to consider the speeches in the House of Lords in the case of *Amin* or the judgment of the Strasbourg court in the case of *McGlinchey*. There had been a very thorough inquiry conducted over five days, and it followed a very thorough Prison Service investigation. It is understandable why the judge considered, on the law as it then stood, that it was not necessary and desirable to hold a further inquest.

63. As the law now stands, however, I do not consider that this judgment can stand. It is not a case in which any of the other procedures from the time to time suggested by the Strasbourg court would have been appropriate for

ECHR Article 2 procedural purposes. Disciplinary procedures against Nurse Spencer (or anyone else) could not have been in question. With no dependency claim and with formidable problems on causation, nobody would seriously contemplate bringing a civil claim against the prison on behalf of Darren's estate. It is the inquest, and the inquest alone, that has to carry the burden of fulfilling this country's Convention obligations, and an inquest which did not canvas the issue of systemic neglect properly or at all did not perform that function.

64. For these reasons, I would allow this appeal and quash the inquisition.

65. Unless an inquiry is set up that performs the same function as an inquest but has more appropriate powers (see section 17A of the Coroners Act 1988) the coroner must now hold a new inquest (see section 8(1)(c)), the inquisition on the previous inquest having been quashed. It seems to me that it will be essential that he holds an early case management conference at which consideration can be given as to the best way to manage the giving of oral evidence, now that so many of the facts have already been fully investigated. The cause of death was agreed at the first inquest. The scope of the new inquiry is to determine whether systemic neglect was a contributory cause, and the evidence should be primarily directed at that issue. In that way the purpose of the new inquest (or inquiry), as identified by Lord Bingham in *Amin* (see para 52 above), can be most effectively fulfilled, and Darren's family can feel that there has been a public investigation, as required by Convention law, which has been directed to the central issue in the case, and has not been diverted from it by an incorrect ruling and by errors in the coroner's directions in the first inquest.

Lord Justice Longmore:

66. Moses J, while expressing sympathy with him in the difficulties of his task, found that the coroner's summing-up to the jury was defective in the following three respects:-

> (1) he told the jury that a verdict of "neglect" in answer to the question "how did Mr Davies come by his death?" was very rare;
>
> (2) he failed to leave to the jury the question whether the conduct of Nurse Spencer constituted neglect which contributed to the death of Mr Davies;
>
> (3) he failed to leave to the jury the question whether any systemic failure on the part of the Prison Service constituted neglect which contributed to the death of Mr Davies.

There is no appeal from these decisions.

67. Mr Nicholas Blake QC submitted that the judge should also have held that the coroner was in error in excluding from the jury's consideration the 6th – 8th points made by Dr Ralli in his independent report. In my view, Mr Blake's submission on that matter is correct because those points would have been relevant if the jury were to be permitted to consider a verdict stating the cause of death to which neglect had contributed. This is a small point in the overall picture because it is unlikely that the judge's ultimate conclusion would have been any different if he had found that the summing-up was defective in this respect also.

68. The judge decided that, despite the defects in the summing-up which he had identified, it was not necessary or desirable in the interests of justice to quash the verdict of the jury and to order a fresh inquest. He pointed out that the coroner had conducted a very full enquiry as to what had occurred to Darren Davies in custody and that the jury had heard an abundance of evidence as to the prison system. He noted that the coroner was satisfied that new nursing and drug team procedures had been put in place since the death of Mr Davies and that he had made a positive recommendation to the prison governor at Winson Green that procedures be introduced so as to ensure that a prisoner who arrived on Thursday or Friday (thus close to the week-end) would be dealt with in the same way as a prisoner who arrived earlier in the week. In the light of this, the judge concluded that there was nothing to be gained from another inquest.

69. The judge had the benefit of the decision of this court in R (Amin) v Home Secretary [2003] QB 581 in which this court declined to order an independent public inquiry into a death in prison because all the facts required to

be exposed to the public had come into (or would shortly come into) the public domain. He did not have the advantage of the speeches of the House of Lords in the same case in which the decision of this court was reversed on 16th October 2003, [2003] UKHL 51, [2003] 3 WLR 1169.

70. The House of Lords was shocked to think that a death in custody should not be the subject of the most rigorous public examination. My Lord has quoted paragraph 31 of the speech of Lord Bingham of Cornhill at page 1185C, but it worth repeating:-

> "The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred . . . It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, . . . effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

71. If Amin had been decided in the House of Lords before Moses J came to give his decision in the present case, I do not believe that he would have decided that nothing could be gained from a further inquest in this case. While the coroner may have been right to say that a free-standing verdict of "death by neglect" in the abstract is not a verdict commonly seen, a verdict of "death caused by dehydration (or cardiac arrest) contributed to by neglect" is a verdict which the jury should have had the option of considering. If one of the purposes of an inquest is that culpable conduct should be "exposed and brought to public notice", that will not satisfactorily be done merely by the hearing of "very full" evidence of what occurred, a verdict of accidental death and a recommendation by the coroner to the prison governor. The jury must be given a proper opportunity to say, if they think it right to do so on the evidence which they have heard, that the death was contributed to by neglect, in the somewhat special sense of "neglect" in this area of law.

72. As to that meaning of "neglect", I have nothing to add to what has been said (paras 22, 28-9) by Brooke LJ with whose judgment I respectfully agree.

73. I would allow this appeal and make the order proposed by my Lord.

Sir Martin Nourse:

74. I agree with both judgments.

The following is the judgment handed down by the court or a transcript of the judgment provided to the court by an official shorthandwriter. It may differ (usually only in minor respects) from the report of the judgment at the citation shown.

If you are not redirected in five seconds, click here to proceed to the report.

Judgments - In re McKerr (AP) (Respondent) (Northern Ireland)

HOUSE OF LORDS

SESSION 2003-04
[2004] UKHL 12
on appeal from: [2003] NICA 1

OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE
In re McKerr (AP) (Respondent) (Northern Ireland)
ON
THURSDAY 11 MARCH 2004

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Steyn

Lord Hoffmann

Lord Rodger of Earlsferry

Lord Brown of Eaton-under-Heywood

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE
In re McKerr (AP) (Respondent) (Northern Ireland)
[2004] UKHL 12

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. This is a test case. It arises out of the absence of adequate public investigations into some fatal shootings in Northern Ireland over 20 years ago. This particular case relates to the death of Mr Gervaise McKerr. His son Jonathan seeks an order compelling the Secretary of State for Northern Ireland to hold an effective investigation into the circumstances of his father's death. He bases his claim primarily on the provisions of the Human Rights Act 1998 even though his father died many years before the Act came into force. He also advances a claim based on the common law.

The deaths

2. Gervaise McKerr died on 11 November 1982. He was driving a Ford Escort car in East Lurgan with two passengers, Eugene Toman and Sean Burns. All three men were shot dead by members of a unit of the Royal Ulster Constabulary. Many of the facts surrounding the deaths are disputed. But it seems clear that the men were not armed and that over 100 rounds were fired at the car.

3. This was not an isolated incident. Two further fatal shooting incidents occurred soon afterwards, both involving the RUC in County Armagh. On 24 November 1982 Michael Tighe was shot dead and Martin McAuley seriously wounded. On 12 December 1982 Peter Grew and Roderick Carroll were shot and killed. These six fatal shootings occurred amid allegations that some members of the RUC were operating a shoot-to-kill policy against suspected terrorists.

4. Currently nine cases, including proceedings brought by the next of kin of Eugene Toman and Sean Burns, are pending in the courts of Northern Ireland awaiting the outcome of this appeal. In addition numerous requests have been made to the police and the Director of Public Prosecutions of Northern Ireland for new investigations into deaths involving the police or security forces many years ago. This surge of activity has been prompted by four judgments given by the European Court of Human Rights in May 2001 and the government's response to them.

The investigations

5. The issues arising on this appeal before your Lordships are points of law. But I must first summarise briefly the protracted history of the steps taken by the United Kingdom authorities to investigate the circumstances of the death of Gervaise McKerr. A fuller record can be found in the judgment of the European Court of Human Rights in *McKerr v United Kingdom* (2002) 34 EHRR 20, paras 11-61. The history extends over twelve years, from November 1982 to September 1994, and falls essentially into three parts. First, criminal proceedings: one police officer was charged with the murder of Eugene Toman, a passenger in the car when the shooting occurred, and two other police officers were charged with aiding, abetting, counselling and procuring the officer to commit that offence. The trial took place between 29 May 1984 and 5 June 1984. At the end of the trial all three officers were acquitted on the direction of the judge.

6. Second, a police investigation was conducted, initially by John Stalker, then Deputy Chief Constable of the Greater Manchester Police Force, and thereafter by Colin Sampson, Chief Constable of the West Yorkshire Police. An interim report was followed by a lengthy final report presented in three sections, in October 1986, March 1987 and April 1987. On 25 January 1988 the Attorney General made a statement in Parliament in which he said that in the public interest no prosecutions would result from the Stalker/Sampson reports.

7. Third, at the conclusion of the criminal trial an inquest was opened by the Armagh coroner on 4 June 1984. It

was subsequently adjourned to await completion of the Stalker/Sampson investigation and because of two sets of judicial review proceedings. Both sets of proceedings came to your Lordships' House: see *McKerr v Armagh Coroner* [1990] 1 WLR 649 and *R v Attorney General for Northern Ireland, ex p Devine* [1992] 1 WLR 262. The inquest resumed in May 1992 but was adjourned again later in the same month. On 31 January 1994 the inquest was closed and the jury discharged. The inquest was re-opened on 22 March 1994. The coroner said the public had a proper interest in knowing whether any further relevant evidence had come to light. On 5 May 1994 the Secretary of State issued a public interest immunity certificate stating that disclosure of the Stalker/Sampson report would cause serious damage to the public interest. On 8 September 1994 the coroner abandoned the re-opened inquest. He could no longer hope to achieve his purpose in re-opening the inquest.

The application to Strasbourg

8. Meanwhile on 7 March 1993 Gervaise McKerr's widow lodged an application with the European Court of Human Rights. After her death the application was continued by Mr Jonathan McKerr. The applicant invoked article 2 of the Convention. He alleged that his father had been unjustifiably killed and that there had been no effective investigation into the circumstances of his death. This application proceeded simultaneously with three others, two of which concerned deaths at the hands of the security forces and the third an allegation of police complicity in a murder by paramilitaries.

9. The court gave its judgment in all four cases on 4 May 2001. In the McKerr case the court made no finding on the lawfulness or proportionality of the use of lethal force which killed Gervaise McKerr. Nor did the court reach any conclusions on the circumstances, including Gervaise McKerr's own activities, which led up to the killing. But the court found that the various investigatory proceedings disclosed a number of shortcomings. These included: lack of independence of the investigation carried out by the RUC; lack of public scrutiny and information to the victim's family concerning the independent (Stalker/Sampson) investigation, including lack of reasons for the failure to prosecute any police officer for perverting or attempting to pervert the course of justice; the inquest procedure did not allow verdicts or findings which might play an effective role in securing prosecutions in respect of any criminal which might be disclosed; no advance disclosure of witness statements at the inquest; the PII certificate had the effect of preventing the inquest examining matters relevant to outstanding issues; the police officers who shot Gervaise McKerr could not be compelled to attend the inquest as witnesses; the inquest proceedings did not start promptly, and neither they nor the Stalker/Sampson investigation proceeded with reasonable expedition.

10. The court held unanimously that article 2 of the Convention had been violated by failure to comply with the obligation, implicit in article 2, to hold an effective official investigation when an individual has been killed by the use of force: see (2002) 34 EHRR 20, paras 157-161. The court awarded Mr Jonathan McKerr £10,000 as just satisfaction in respect of the frustration, distress and anxiety he must have suffered. A finding of violation was not sufficient compensation.

11. The government duly paid the sum awarded. In response to the judgment the United Kingdom also presented a package of proposals to the committee of ministers of the Council of Europe. Under article 46(2) of the Convention the committee of ministers has responsibility for supervising execution of the judgment of the court. This includes considering what are the practicable steps a state should be required to take in order to make good the violations found by the court: see *Finucane v United Kingdom* (2003) 37 EHRR 29, para 89. The government's package did not include any proposal to carry out a further investigation into the death of Gervaise McKerr. The government's stance is that, subject to any ruling of the courts, it does not propose to take any steps to hold a further investigation. The committee of ministers has not yet ruled on the adequacy of the government's proposals as an effective implementation of article 2.

The present proceedings

12. Mr Jonathan McKerr was not disposed to accept this as an adequate governmental response to the judgment of the European Court of Human Rights. The government ought to fulfil its obligation under article 2 of the Convention and remedy the deficiencies in the investigations so far undertaken into his father's death. Armed

with the rights newly afforded him by the Human Rights Act, Mr McKerr sought the assistance of the court in compelling the government to conduct an effective investigation, in the form of a further coroner's inquest. On 30 January 2002 he commenced these judicial review proceedings. The relief claimed comprises (a) declarations that the Secretary of State's continuing failure to provide an article 2 compliant investigation is unlawful and in breach of section 6 of the Human Rights Act 1998 and article 2 of the Convention, (b) a mandatory order compelling the Secretary of State to conduct an article 2 compliant investigation and (c) damages.

13. On 26 July 2002 Campbell LJ dismissed the application. The Human Rights Act 1998 did not have retrospective effect. But the obligation to hold a proper investigation into a pre-Act death continued until either the obligation was fulfilled or a competent court vindicated the right in some other way. In the present case the continuing obligation to hold an investigation compliant with article 2 came to an end when the European Court of Human Rights made a finding of violation of article 2 and ordered payment of just satisfaction to Mr Jonathan McKerr.

14. Mr Jonathan McKerr appealed, and on 10 January 2003 the Court of Appeal allowed the appeal. Carswell LCJ delivered the judgment of himself and McCollum LJ and Coghlin J. The court agreed with Campbell LJ that the obligation to hold an investigation which complied with the requirements of article 2 was a continuing one. Counsel for the Secretary of State did not seek to uphold the judge's view that payment of compensation automatically brought the article 2 obligation to an end. Counsel contended that once just satisfaction had been awarded and paid, Mr Jonathan McKerr was no longer a 'victim' within section 7 of the Human Rights Act 1998 and accordingly he could not complain of any breach of the continuing obligation. The Court of Appeal rejected this argument. The court made a declaration that the government has failed to carry out an investigation complying with article 2. The court considered it inappropriate to grant any other relief because the committee of ministers had not yet ruled on the proposals made to them by the United Kingdom government. From that decision the Secretary of State appealed to your Lordships' House.

Retrospectivity

15. The primary contention advanced by the Attorney General on behalf of the Secretary of State was not advanced in the courts below. In short, the Attorney General submitted to your Lordships' House that section 6 of the Human Rights Act 1998 is not applicable to deaths occurring before the Act came into force on 2 October 2000. I shall consider this submission first.

16. It is now settled, as a general proposition, that the Human Rights Act is not retrospective. The Act itself treats section 22(4) as an exception. This general proposition, however, raises almost as many questions as it answers. Past events have continuing effects. For instance, agreements made before the Human Rights Act came into force will often generate obligations requiring performance after 2 October 2000. Some of the problems to which this gives rise were considered by your Lordships' House, in the context of sections 3 and 4 of the Act, in *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2003] 3 WLR 568.

17. In the present case the question of retrospectivity arises in the context of section 6 of the Act and article 2 of the Convention. It arises in this way. Section 6 of the Act creates a new cause of action by rendering certain conduct by public authorities unlawful. Section 7(1)(a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by section 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation into the death of Gervaise McKerr is unlawful within the meaning of section 6(1), these proceedings brought by his son fall squarely within section 7; if not, not.

18. So the key question is whether the government's failure to hold a further investigation in this case is conduct which is prohibited by section 6(1). Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a 'Convention right' as defined in the statute. An act includes a failure to act. The relevant Convention right is article 2. Article 2 of the Convention concerns the most fundamental right of all: the right to life. The sanctity of life is a principle which finds expression in all civilised societies throughout the world. Article 2 provides:

> '(1) 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.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a)in defence of any person from unlawful violence;

(b)in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c)in action lawfully taken for the purpose of quelling riot or insurrection.'

19. This article expressly imposes a positive obligation on the state to protect everyone's life. The state must take appropriate steps to safeguard the lives of those within its bounds. But the state's obligation does not stop there. The European Court of Human Rights has held that by implication article 2 also requires there should be some form of effective official investigation when individuals have been killed as a result of the use of force: see *McCann v United Kingdom* (1996) 21 EHRR 97 (the 'death on the Rock' case), and *McKerr v United Kingdom* (2002) 34 EHRR 20, para 111. The European Court of Human Rights has described this as a 'procedural' obligation imposed by article 2. The purpose of the investigation is to secure that domestic laws protecting the right to life are effectively implemented and, in cases involving state agencies, to ensure those responsible for deaths are made properly accountable: see *Jordan v United Kingdom* (2003) 37 EHRR 2, para 105. The requisites of an investigation, if it is to fulfil this procedural obligation inherent in article 2, were considered recently by your Lordships' House in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2003] 3 WLR 1169.

20. Thus article 2 may be violated by an unlawful killing. The application of section 6(1) of the Human Rights Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.

21. The position is not so clear where the violation comprises a failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?

22. In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the article 2 obligation to investigate must have occurred post-Act.

23. I think this is the preferable interpretation of section 6 in the context of article 2. This interpretation has the effect, for the transitional purpose now under consideration, of treating all the obligations arising under article 2 as parts of a single whole. Parliament cannot be taken to have intended that the Act should apply differently to the primary obligation (to protect life) and a consequential obligation (to investigate a death). For this reason I consider these judicial review proceedings are misconceived so far as they are sought to be founded on the enabling power in section 7 of the Human Rights Act.

24. I refer briefly to the court decisions on this point. There have been several cases where everyone concerned appears to have assumed that section 6 of the Human Rights Act could apply to a failure to investigate a death which took place before the Act came into force. These include two decisions of your Lordships' House: *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169 and *R (Middleton) v Coroner for the*

Western District of Somerset [2004] UKHL 10. In none of these cases, so it seems, was this point the subject of argument. So they do not assist.

25. In other cases, where the point has arisen for decision, differences in judicial view have emerged. In *R (Wright) v Secretary of State for the Home Department* [2001] LLR (Med) 478, a case concerning a death in prison in 1996, Jackson J held the claimants were entitled to a remedy under the Act in respect of the Secretary of State's 'continuing breach of the procedural obligations under articles 2 and 3' of the Convention: see paragraph 67. In *R (Khan) v Secretary of State for Health* [2003] EWHC 1414 (Admin) Silber J reached a contrary conclusion. He regarded the time of death as the governing factor. There the death occurred in October 1999. In *Hurst v Coroner for the Northern District of London* [2003] EWHC 1721 (Admin), which concerned a death in May 2000, the Divisional Court disagreed with Silber J. The relevant time was when the decision was made in relation to the article 2 duty. At that time 'article 2 was part of English law': paragraph 20. This decision of the Divisional Court was followed by the Court of Appeal when the *Khan* case reached that court: see [2003] EWCA Civ 1129. The Human Rights Act had been in force for nearly two years when, in July 2002, the Secretary of State first denied the parents of the dead child the relief they were seeking: paragraph 85.

26. Having had the advantage of much fuller arguments I respectfully consider that some of these courts, including the Divisional Court in the *Hurst* case and the Court of Appeal in the *Khan* case, fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the Convention and (2) rights created by the Human Rights Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the Human Rights Act 1998 and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the Human Rights Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the Human Rights Act, depends upon the proper interpretation of that Act. It by no means follows that the continuing existence of a right arising under the Convention in respect of an act occurring before the Human Rights Act came into force will be mirrored by a corresponding right created by the Human Rights Act. Whether it finds reflection in this way in the Human Rights Act depends upon the proper interpretation of the Human Rights Act.

The 'victim' point

27. Had I reached the contrary conclusion I would not have accepted the Secretary of State's argument that Mr Jonathan McKerr had no standing to bring these proceedings because he ceased to be a 'victim' within the meaning of section 7 of the Human Rights Act once he had been paid the amount of money awarded by the European Court of Human Rights as just satisfaction. Mr McKerr was awarded this amount for his frustration, distress and anxiety over the years. All too obviously he is still not in the position intended to be achieved by fulfilment of the obligation to hold an effective investigation into his father's death. Crucial questions remain unanswered. As already noted, the European Court of Human Rights did not itself decide whether Gervaise McKerr had been killed by the use of unnecessary or disproportionate force. Nor did the court decide whether Gervaise McKerr had been the victim of a shoot-to-kill policy operated by some members of the Royal Ulster Constabulary.

An overriding common law right?

28. Before your Lordships' House Mr Treacy advanced a further basis for Mr McKerr's judicial review proceedings. He submitted that the right to an effective official investigation is as much a feature of the common law as it is of the European Convention. The rationale which underlies the procedural obligation under article 2 must also underpin the common law. He relied heavily upon an observation made by Lord Bingham of Cornhill in *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169, 1185, para 30:

> 'A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it.'

29. This submission, I note in passing, is not being used as a foundation for a challenge to the lawfulness of the conduct of the coroner inquiring into Gervaise McKerr's death. For many centuries coroners' inquests, with their inquisitorial process, have been a primary means employed in Northern Ireland as well as England and Wales for investigating violent or unnatural deaths or other deaths requiring investigation. The law provides, in the form of judicial review, a means whereby the lawfulness of coroners' decisions can be challenged. In an appropriate case a court may review a coroner's premature closure of an inquest.

30. That is not the route being followed in this case. In these proceedings Mr McKerr is not challenging any decision of the Armagh coroner. This is perhaps hardly surprising, given the years which have elapsed since the coroner closed his inquest into Gervaise McKerr's death. Nor is Mr McKerr asking the House to interpret the statutory provisions relating to coroners in a way which would make them compliant with the investigative requirements of article 2.

31. Instead, counsel propounded a separate overriding common law right corresponding to the procedural right implicit in article 2 of the Convention. He submitted that the Secretary of State is, or should be, subject to a common law obligation to arrange for an effective investigation into Gervaise McKerr's death. This obligation would be satisfied by holding a coroner's inquest which complies with the requirements of article 2. In the absence of such a right the common law would afford less protection to the right of life than the Convention. Under section 6 of the Human Rights Act the court, as a public authority, is obliged to develop the common law in a manner consistent with Convention rights and Strasbourg jurisprudence.

32. I have grave reservations about the appropriateness of the common law now fashioning a free standing positive obligation of this far reaching character. Such a development would be far removed from the normal way the common law proceeds. But I need not pursue this wider question. The submission fails for more straightforward, orthodox reasons. The effect of counsel's submission, if accepted, would be that the court would create an overriding common law obligation on the state, corresponding to article 2 of the Convention, in an area of the law for which Parliament has long legislated. The courts have always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. Rightly so, because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament. *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976 is a recent instance where the House rejected a submission having this effect.

33. The argument in the present case suffers from the same flaw. The suggested new common law right is sought as a means of supplementing, or overriding, the statutory provisions relating to the holding of coroners' inquests. That is not an appropriate role for the common law.

34. This view is confirmed by another feature of the case. As already emphasised, by enacting the Human Rights Act 1998 Parliament created domestic law rights corresponding to rights arising under the Convention. When doing so Parliament chose not to give the legislation retroactive effect. In relation to article 2 the intention of Parliament, as interpreted above, was not to create an investigative right in respect of deaths occurring before the Act came into force. The common law right urged on behalf of Mr McKerr would accord ill with this legislative intention. The effect of the propounded right would be to impose positive human rights obligations on the state as a matter of domestic law in advance of the date on which a corresponding positive obligation arose under the Human Rights Act.

35. These considerations point ineluctably to the conclusion that the suggested common law right cannot properly be fashioned by the courts. I would allow this appeal and dismiss these proceedings.

LORD STEYN

My Lords,

36. The deliberate killing of individuals under suspicion of subversive activities by agents of the state is something that one associates with lawless totalitarian regimes. That is not to say that in liberal democracies such events cannot occur. The difference between totalitarian states and democracies lie in their response to a serious

allegation that such targeted killings took place. It would be antithetical to the nature of a totalitarian state to permit such killings to be investigated. On the other hand, in modern times liberal democracies have progressively become ready to undertake investigations in such cases. In the domain of the European Convention on Human Rights Article 2 spells out a fundamental right to life, and by the jurisprudence of the European Court of Human Rights, a fundamental right of the family of a person killed by agents of the state to demand that the state must promptly and effectively investigate the circumstances in which the death occurred.

37. In a period of about a month between November and December 1982, in three separate incidents, six men were shot and killed by police officers of a special mobile support unit of the Royal Ulster Constabulary. The killings took place in Armagh. None of the men killed were armed. One man was shot in the back. There were two trials but none of the police officers were convicted. The present case relates to Gervaise McKerr who was shot and killed, with others, on 11 November 1982. A criminal trial of three police officers resulted in their acquittal. Gervaise McKerr's family wanted a proper and effective inquest into the circumstances of his death. The government strongly resisted an investigation.

38. On 7 March 1993 an application was lodged with the E.Ct.H.R. alleging various breaches of the E.C.H.R. On 4 May 2001 the E.Ct.H.R. unanimously found that there had been a failure to comply with the procedural obligation implied in Article 2 to investigate promptly and effectively a case where an individual had been killed as a result of the use of force: *McKerr v United Kingdom* (2002) 34 EHRR 20.

39. The E. Ct. H.R. identified the following concerns in its decision:

> "136 . . . the scope of the criminal trial was restricted to the criminal responsibility of the three officers. The applicant, relying *inter alia* on the Minnesota Protocol, argued that the trial was not capable of addressing wider concerns about other aspects of official involvement in the killings. One of these aspects was the deliberate instructions of a senior officer to the suspects to conceal information from the investigating officers, which raised doubts as to what other information or obstruction might have occurred. Another was the fact that there had been two other incidents in Armagh within a month in which police officers from the special mobile support units had used lethal force, killing Michael Tighe on 24 November 1992 and Seamus Grew and Roddy Carroll on 12 December 1992, all of whom had been unarmed. A prosecution had occurred concerning the latter incident and had also resulted in an acquittal. It was alleged that police officers involved in these incidents had similarly been instructed to conceal evidence.
>
> 137 The Court considers that there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require a wider examination. Serious concerns arose from these three incidents as to whether police counter-terrorism procedures involved an excessive use of force, whether deliberately or as an inevitable by-product of the tactics that were used. The deliberate concealment of evidence also cast doubts on the effectiveness of investigations in uncovering what had occurred. In other words, the aims of reassuring the public and the members of the family as to the lawfulness of the killings had not been met adequately by the criminal trial. In this case therefore, the Court finds that Article 2 required a procedure whereby these elements could be examined and doubts confirmed, or laid to rest. It considers below whether the authorities adequately addressed these concerns."

The court concluded that the concerns had not been adequately addressed and listed the shortcomings of the procedures adopted: para 157. The question whether there had been a policy to kill individuals suspected of subversion activities was unresolved. The court concluded that there had been a violation of the procedural obligation. The court made an award of £10,000 by way of compensation. This sum has been paid.

40. The supervision of the judgment in the present case is being conducted by the Committee of Ministers pursuant to Article 46 of the E.C.H.R. The outcome is not yet known.

41. Reinforced by the judgment in Strasbourg, and twenty-one years after the death of his father, Mr Jonathan McKerr wants an effective investigation of the circumstances in which his father died. Despite the judgment of

the E.Ct.H.R., the Secretary of State refuses to permit such an investigation. The Court of Appeal of Northern Ireland found in favour of the son. The court concluded (para 13):

> "We accordingly consider that the appellant's claim is well founded, that there is continuing breach of Article 2(1) which requires to be addressed by the respondent Government. Since, however, the Committee of Ministers has not yet ruled on the proposals made to them by the Government in respect of the four cases heard by the E.Ct.H.R., we would not regard it as appropriate to do more than make a declaration. In these circumstances we propose to allow the appeal and make a declaration that the respondent Government has failed to carry out an investigation which complies with the requirements of Article 2 of the Convention, but not to grant any other relief."

Still resisting any investigation the Government challenges the decision of the Court of Appeal.

42. Mr McKerr's case is crucially dependent on the applicability of section 6(1) of the Human Rights Act 1998. It provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

The relevant Convention right is Article 2. It provides expressly that everyone's right to life shall be protected by law. By necessary implication it places an independent procedural obligation on the state to investigate promptly and effectively cases where agents of the state cause death by the use of force. The existence of this implied obligation under Article 2 was first spelt out by the E.Ct.H.R. in *McCann and Others v The United Kingdom* (1995) 21 EHRR 97: for a review of the subsequent European jurisprudence see Lester and Pannick, *Human Rights Law and Practice*, 2nd ed, 2004, 4.2.31-4.2.39 and Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004, 27-40. In order to have a cause of action under the 1998 Act, Mr McKerr must however have the status of being a "victim" within the meaning of section 7(1).

43. On the facts of the present case, and because Mr McKerr has received compensation, the Government argues that he lacks the standing of being a victim. On this simple ground it is said that the door of the court is closed to him. In my view this argument is wrong. But for the receipt of compensation Mr McKerr was unquestionably a victim. After all, he is a son questioning why his father was killed by agents of the state. The E.Ct.H.R. made the award of compensation on the basis that, due to the violation of the procedural obligation, the son "suffered feelings of frustration, distress and anxiety": para 181. In other words, the failure to carry out an investigation promptly and effectively caused the son mental suffering and for that an award of compensation was made. The procedural obligation remains unfulfilled. The state has never conducted a proper investigation into the death of Mr McKerr's father. The compensation was plainly not intended by the E.Ct.H.R. to be the price which, if paid, relieved the Government of its unfulfilled procedural obligation even in circumstances where such an obligation was still capable of being fulfilled. Nothing in the judgment of the E.Ct.H.R. supports such an implausible idea. I would reject this argument.

44. It is now necessary to turn to the principal issues. They are formulated in the Agreed Statement of Facts and Issues as follows:

> "(1) … has the Secretary of State acted or failed to act on or after 2 October 2000 in a way which is incompatible with the Respondent's Article 2 Convention rights contrary to Section 6(1) of the Human Rights Act 1998 (the retrospectivity issue)?"
>
> "(2) Does the common law now impose an obligation upon the United Kingdom Government to hold an effective official investigation into the circumstances of the Respondent's father's death irrespective of the Human Rights Act 1998 (the common law issue)?"

Before I consider these legal issues it is necessary to consider a separate and anterior point which, if meritorious, makes it unnecessary to consider these important points of law.

45. On behalf of the Government the Attorney-General placed before the House in written and oral submissions an argument that an effective enquiry is as a matter of fact no longer possible. He referred the House to the decision of the E.Ct.H.R. in *Finucane v United Kingdom* (2003) 37 EHRR 29, and in particular to paragraph 89 of the decision of the court which reads as follows:

> "As regards the applicant's views concerning provision of an effective investigation, the Court has not previously given any indication that a Government should, as a response to such a finding of a breach of Article 2, hold a fresh investigation into the death concerned and has on occasion expressly declined to do so. Nor does it consider it appropriate to do so in the present case. It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or by way of providing transparency and accountability to the wider public. The lapse of time, the effect on evidence and the availability of witnesses, may inevitably render such an investigation an unsatisfactory or inconclusive exercise, which fails to establish important facts or put to rest doubts and suspicions. Even in disappearance cases, where it might be argued that more is at stake since the relatives suffer from the ongoing uncertainty about the exact fate of the victim or the location of the body, the Court has refused to issue any declaration that a new investigation should be launched. It rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may practicably be required by way of compliance in each case."

The Attorney-General submitted that in this case an effective enquiry is no longer possible. He submitted that there cannot be a continuing duty to do something when it is impossible to do it. If this premise is right, I would accept that it would be the end of the matter under domestic law. The domestic court, in this case the House of Lords, would not make an order designed to ensure that a plainly useless enquiry is embarked on. This would be a sufficient basis for allowing the appeal of the Government. The question is whether this submission is right. It having been advanced I must deal with it.

46. One would have expected an affidavit from the state explaining why an investigation is impossible. To such an affidavit I would have paid the closest attention. There is no affidavit. The strategy has been to steer clear of the facts. The observations of the Attorney-General that an enquiry is no longer possible, unsupported by evidence, have no more weight before the House than that of any other advocate or litigant in this case who is parti pris. In any event, counsel for Mr McKerr pointed out that the fruits of police investigations are still in existence; the transcripts of the criminal trials are available; and there is available the Stalker/Sampson report consisting of 3609 pages in twenty separate volumes including one album of maps and photographs. If an inquest were to be held, it would be up to the coroner to read the latter report and consider whether it should be put in evidence. So far neither the coroner in Northern Ireland nor any judge considering the matter has read the report. In Northern Ireland judicial review proceedings it was held that the report is irrelevant. How one can say, in advance of studying it, that it is not relevant I do not understand. The E.Ct.H.R. was clearly sceptical. So am I.

47. A subtext of the Attorney General's submission was the suggestion that there are legal impediments to holding an enquiry. So far as the Attorney-General said that witnesses would not be compellable, this problem has been removed by legislation: Coroners (Practice and Procedure) (Amendment Rules (Northern Ireland) 2002. In the domestic legal system there is also no impediment to making an order that the inquest should be re-opened: *Leckey and Greer, Coroners' Law and Practice in Northern Ireland,* 1998, 15-02; *In re McCaughey and Another* (Unreported) 20 January 2004, per Weatherup J., N.I.

48. I am not persuaded that on the basis of materials available an effective investigation of sensible scope is impossible.

49. The critical question in this case is, however, whether the court has jurisdiction to make an order designed to lead to the investigation of a death which occurred before the 1998 Act came into force.

50. The retrospectivity issue now arises. Mr McKerr's case is founded on section 6 of the 1998 Act. Leaving aside proceedings taken at the instigation of a public authority, which are not under consideration, it is now settled law

that section 6 is not retrospective: section 22(4) of the 1998 Act; *R v Lambert* [2002] 2 AC 545; *R v Kansal (No. 2)* [2002] 2 AC 69; *Wilson v First County Trust Ltd (No. 2)* [2003] 3 WLR 568 (HL). Mr McKerr's father was killed in 1982. The 1998 Act came into force on 2 October 2000. The Court of Appeal held that there is a continuing breach of Article 2 which requires to be addressed by the Government: para 13. In my view the Attorney-General has demonstrated that this reasoning cannot be sustained. The Government may have been in breach of its obligations under international law before 2 October 2000 to set up a prompt and effective investigation. But those treaty obligations created no rights under domestic law, not even after the right to petition to Strasbourg was created by the United Kingdom Government in 1966. The very purpose of the 1998 Act was "to bring home rights" which were previously justiciable only in Strasbourg: The Government White Paper, October 1997 (Cm 3782). That appears, in any event, to be the consequence of the rule enunciated by the House of Lords in the *International Tin Council* case that an unincorporated treaty can create no rights or obligations in domestic law: *J. H. Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 AC 418. As Lord Hoffmann has pointed out this rule has been affirmed by the House in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 and in *R v Lyons* [2003] 1 AC 976, and in particular in the leading judgment of Lord Hoffmann in the latter case: para 27. The later decisions rest, however, on the pivot of the *International Tin Council* decision.

51. Since the *International Tin Council* decision is regularly cited in our courts, a brief reference to its reception in subsequent jurisprudential analysis may not be out of place. In doing so I acknowledge that the point has not been the subject of argument. A comprehensive re-examination must await another day. But distinguished commentators have criticised what has been called the narrowness of the decision in the House of Lords: see the criticism of Sir Robert Jennings in his 1989 F.A. Mann Lecture ((1990) 39 ICLQ 513, at 524-526); and of Dame Rosalyn Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law", in *Developing Human Rights Jurisprudence,* 1993, Vol. 5, 16-23. The latter writer observed (at 20):

> " … international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract, but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international instrument, partly because relatively 'new' rights may also be included, and partly because the treaty may involve procedural undertaking for the States Parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such - and even were these rights not already secure through a separate domestic historic provenance - they would be part of the common law by virtue of being rules of general international law."

There is also growing support for the view that human rights treaties enjoy a special status: Murray Hunt, Using Human Rights Law in English Courts, 1998, pp 26-28. Commenting on *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 Mr Justice Collins commented that "it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases": *Foreign Relations and the Judiciary* 2002, 51 ICLQ 485, at 497. That is not to say that the actual decision in the *International Tin Council* case was wrong. On the contrary, the critics would accept the principled analysis of Kerr LJ in the Court of Appeal that the issue of the liability of member states under international law is justiciable in the national court, and that under international law the member states were not liable for the debts of the international organisation: see Mr Justice Lawrence Collins, *op cit,* at 497.

52. The rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future.

53. That brings me to the common law issue. In a careful and helpful argument Mr Treacy Q.C. invited the House to hold that the common law should be developed to recognise a substantive right to life, coupled with a procedural

right co-extensive with that enunciated in 1995 in *McCann*. He pointed out that, unlike cases such as *Lyons* where there was what he called a legislative "block" in play, there is none in the present case. This argument has considerable force. The fact that there is no authority for such a development is not in itself fatal. In *R v Chief Constable R.U.C. ex parte Begley* [1997] 1 WLR 1475, Lord Browne-Wilkinson, in giving the unanimous opinion of the House, observed (at 1480):

> "It is true that the House has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament."

Before embarking on such a course the House would have to take into account that, by and large, the law regarding inquests has been developed in Northern Ireland by statute: see *Leckey and Greer, Coroner's Law and Practice in Northern Ireland,* 1998, passim. Moreover, the House would have to confront another difficulty. It must be sound principle for a supreme court to develop the law only when it has been demonstrated that the just disposal of cases compellingly requires it. Given that the right to life is comprehensively protected under Article 2 of the Convention as incorporated in our law by the 1998 Act, why is there now a need to create a parallel right to life under the common law? Given that the procedural obligation under Article 2 is comprehensively protected under our law, as held by the House of Lords in *R (Amin) v Secretary of State of the Home Department* [2003] 3 WLR 1169, why is there now a need to create a parallel right under the common law?

54. At a late stage of the appeal before the House I did wonder whether customary international law may have a direct role to play in the argument about the development of the common law. The idea was suggested to me by a valuable article: Andrew J Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution,* 1994, 43 ICLQ 537. The writer stated the following propositions [538]:

> "First, that treaties may generate rules of customary international law: the accepted view that unenacted treaties 'cannot be a source of rights and obligations' in England is thus effectively sidestepped, since it is not the treaty itself which is the source of rights. Second, that the numerous human rights treaties and other instruments, of which the European Convention is but one, have given or, at least, may give rise to rules of customary international human rights law. Third, that customary international law forms part of the common law of England. If these three be accepted, it follows that, to the extent that the content of any right encompassed in the European Convention is the same as its content in customary international law, the right in question will be recognised in English law as a part thereof."

Along these lines there may be an argument that the right to life has long been recognised in customary international law, which in the absence of a contrary statute has been part of English law since before the 1998 Act came into force. One has to remember, however, that the procedural obligation recognised in *McCann* only dates from 1995, i.e. thirteen years after the deceased was shot and after the inquest in Northern Ireland was closed. It may be unrealistic to suggest that the procedural obligation was already part of customary international law at a time material to these proceedings. The point has not been in issue in the present case. It has not been researched, and it was not the subject of adversarial argument. It may have to be considered in a future case. The impact of evolving customary international law on our domestic legal system is a subject of increasing importance.

55. I conclude that the common law development has not been made out.

56. I would allow the appeal and dismiss the application for judicial review.

LORD HOFFMANN

My Lords,

57. On 11th November 1982 a member or members of a unit of the Royal Ulster Constabulary shot and killed Gervaise McKerr while he was driving a car in East Lurgan. They also killed his two passengers. The ensuing

investigation into the deaths was protracted and unsatisfactory. Three policemen were tried for murder in 1984 but the judge ruled that the evidence adduced by the prosecution did not raise a case to answer. There was a suspicion that important evidence had been suppressed. The coroner opened an inquest but adjourned it while officers from English police forces conducted further investigations. In 1986-87 they delivered reports to the DPP. In 1988 the Attorney-General announced that he had considered all the available material and decided that it would not be in the public interest to initiate further criminal proceedings. The inquest resumed but the coroner was unable to obtain access to much of the evidence he required. Finally in 1994 the Secretary of State issued a public interest immunity certificate preventing disclosure of the reports of the independent police investigations. At that point the coroner abandoned the inquest, saying that the reasons for which it had been held were no longer achievable.

58. Mr McKerr's mother (and after her death, his son) petitioned the European Commission of Human Rights in 1993, alleging that the United Kingdom was in breach of Article 2 of the Convention: "Everyone's right to life shall be protected by law". In *McCann v United Kingdom* (1996) 21 EHRR 97 the Strasbourg court held (at paragraph 161) that this requires the State to provide?

> "some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."

59. In Mr McKerr's case, the Strasbourg court decided on 4 May 2001 that the United Kingdom had not complied with this obligation: *McKerr v United Kingdom* (2002) 34 EHRR 20. The shortcomings were summarised in paragraph 157 of the judgment: the police officers who investigated were not independent from the officers implicated; there was no public scrutiny or involvement of the victim's family in the investigation or the decision of the DPP not to prosecute; the abandonment of the inquest prevented any findings which could have played an effective role in securing a prosecution for any criminal offence disclosed; statements by witnesses who appeared at the inquest were not disclosed in advance to the family; the PII certificate deprived the inquest of relevant evidence; the police officers who shot Mr McKerr were not compellable witnesses; the police investigation was too slow; the inquest did not commence promptly and then went on too long.

60. The Court accordingly found a violation of article 2 and awarded the applicant non-pecuniary damages of £10,000 for "feelings of frustration, distress and anxiety" caused by the inadequacy of the investigation. This sum has been paid. Pursuant to article 46(2) of the Convention, the judgment was sent to the Committee of Ministers which is charged with supervision of its execution. It has, in accordance with its rules, invited the United Kingdom government to inform the Committee of the measures which it has taken in consequence of the judgment. The government has supplied information about legal and administrative changes which have been made but does not propose to hold a fresh investigation into Mr McKerr's killing. The Committee has not yet decided whether the measures notified by the government amount to compliance with the judgment and with the State's duty under article 52 to satisfy the Committee that its internal law enables the rights under the Convention to be effectively implemented.

61. Mr McKerr's son was dissatisfied with this outcome and on 30 January 2002 commenced judicial review proceedings against the Secretary of State for Northern Ireland seeking a declaration that "in breach of section 6 of the Human Rights Act 1998 and article 2 of the European Convention", he had failed to provide an "article 2 compliant" investigation and an order of mandamus to compel him to provide such an investigation. The principal ground was stated to be that as the Strasbourg court had found a breach of article 2, it was a breach of section 6 of the 1998 Act for the Secretary of State not to hold an investigation which complied with that article.

62. Section 6 says that it is unlawful for a public authority (such as the Secretary of State) to "act in a way which is incompatible with a Convention right". Section 1(1) defines "Convention rights" as "the rights and fundamental freedoms set out in" certain articles of the Convention which section 1(3) says are set out in Schedule 1.

63. So Mr McKerr says (1) the Convention gives him the right to an effective investigation (2) the Strasbourg court has decided that the United Kingdom has not provided him with one (3) he therefore has a continuing right to such an investigation and (4) the Secretary of State, in refusing to provide one, is acting in breach of his

Convention rights. Campbell LJ did not accept stage (3) of this reasoning because he said that the obligation to provide an investigation was discharged by the declaration and order for payment of compensation made by the Strasbourg court. The Court of Appeal, in a judgment given by Carswell LJ, accepted all four stages of the reasoning and made a declaration that the Government had "failed to carry out an investigation which complies with the requirements of article 2."

64. In my opinion the reasoning which the Court of Appeal accepted does not sufficiently distinguish between the obligations under international law which the United Kingdom (as a State) accepted by accession to the Convention and the duties under domestic law which were imposed upon public authorities in the United Kingdom by section 6 of the 1998 Act. These obligations belong to different legal systems; they have different sources, are owed by different parties, have different contents and different mechanisms for enforcement.

65. It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law. *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 and *R v Lyons* [2003] 1 AC 976 are two instances of its affirmation in your Lordships' House. That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.

66. This last point is demonstrated by the provision in section 2(1) that a court determining a question which has arisen in connection with a Convention right must "take into account" any judgment of the Strasbourg court. Under the Convention, the United Kingdom is bound to accept a judgment of the Strasbourg court as binding: Article 46(1). But a court adjudicating in litigation in the United Kingdom about a domestic "Convention right" is not bound by a decision of the Strasbourg court. It must take it into account.

67. If one keeps the distinction between international and domestic obligations firmly in mind, the fallacy in the respondent's reasoning becomes apparent. It can be illustrated by reference to a passage in the judgment of Jackson J in *R (Wright) v Secretary of State for the Home Department* [2001] Lloyd's Rep (Med) 478. Mr Wright was a prisoner who died after an asthma attack in 1996. The judge found that the investigation into his death did not comply with articles 2 and 3. He then considered whether this gave rise to any rights enforceable in judicial review proceedings:

> "The [Home Secretary] came under an obligation pursuant to articles 2 and 3 of the Convention to set up an effective official investigation. [He] never discharged that obligation. [His] breach of that obligation was not actionable in the English courts before 2 October 2000… Can the claimants now claim any remedy pursuant to sections 6, 7 and 8 of the Act for the continuing breach of articles 2 and 3 since 2 October 2000?"

68. After rejecting a floodgates argument, the judge decided that he could. But the fallacy of the reasoning lies in the notion of a "continuing breach" of articles 2 and 3. The judge was concerned with the rights of the claimants in domestic law. Before 2 October 2000, there could not have been any breach of a human rights provision in domestic law because the Act had not come into force. So there could be no continuing breach. There may have been a breach of article 2 as a matter of international law and this may have "continued" after 1 October 2000, although, for the reasons given by my noble and learned friend Lord Brown of Eaton-under-Heywood, I think it unlikely. But that is irrelevant to whether the claimants had rights in domestic law, for which there can be no source other than the 1998 Act. The Act did not transmute international law obligations into domestic ones. It created new domestic human rights. The simple question is whether as a matter of construction, those rights applied to deaths which occurred before the Act came into force.

69. Your Lordships' House have decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by article 2 can have had no application to a person who died before the Act came into

force. His killing may have been a crime, a tort, a breach of international law but it could not have been a breach of section 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one could have to go back into history and carry out investigations. In *R (Wright) v Secretary of State for the Home Department* Jackson J. was prepared to accept the possibility of investigations into breaches of article 2 "during the 50-year period between the UK's accession to the Convention and the coming into force of the [1998 Act]". But that was because he regarded an international law right under the Convention as a necessary (and sufficient) springboard for a domestic claim on the basis of a "continuing breach". In my opinion, however, the international law obligation is irrelevant. Either the Act applies to deaths before 2 October 2000 or it does not. If it does, there is no reason why the date of accession to the Convention should matter. It would in principle be necessary to investigate the deaths by state action of the Princes in the Tower.

70. I therefore agree with the opinion of Silber J in *R (Khan) v Secretary of State for Health* [2003] EWHC 1414 (Admin) that the duty to investigate under article 2 did not arise in domestic law in respect of deaths before 2 October 2002. In the Court of Appeal in that case ([2003] EWCA Civ 1129), Brooke LJ, giving the judgment of the Court, disagreed. He said "we do not believe the court at Strasbourg would look at the matter in this way." I daresay it would not. But that is because the court would be concerned with the international obligations of the United Kingdom and not with the extent to which the 1998 Act was retrospective.

71. Mr Treacy QC, who appeared for the respondent, said that courts could deal with applications for investigations into past deaths in a pragmatic way. If an inquiry would no longer serve any purpose, they would refuse one. That was a question of remedy rather than the existence of the right. Likewise in the *Khan* case, Brooke LJ said "If this decision causes practical difficulties in other cases, the solution to those difficulties will have to be worked out on a case by case basis." I do not think it appropriate for human rights to be reduced to a matter of broad judicial discretion in this way. In my opinion Parliament intended section 6 of the 1998 Act to be enforced, but enforced only in respect of breaches occurring after it came into force.

72. Mr Treacy submitted in the alternative that, independently of the 1998 Act, the common law had created a right to an investigation which made it unlawful for the Secretary of State to refuse to order one. In my opinion this is an impossible contention. It is true that in *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169 Lord Bingham of Cornhill said (at p. 1185) that "a profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention." It is perfectly true that the sanctity of life is a value which has directed the development of the common law and the enactment of many statutes which are intended to protect life, provide for the investigation of unnatural deaths and secure the detection and punishment of those who unlawfully kill. A number of statutes concerned with inquests into deaths in England and Wales are mentioned by Lord Bingham in paragraphs 16 and 17 of his judgment and there are similar statutes applicable to Northern Ireland. Some of the grounds upon which the Strasbourg court found that the investigative procedures in Mr McKerr's case did not satisfy article 2 (for example, the rule by which a person suspected of causing the death was not a compellable witness and the limited nature of the verdicts which could be returned by the coroner's jury) were deficiencies in these statutory provisions. But no successful challenge to the legality of the various investigative procedures (the criminal trial, the police inquiries, the inquest) was made at the time and it is far too late to make such a challenge now. Nor is any attempt being made to invoke domestic law procedures to quash the decision of the coroner to abandon the inquest or require another to be held.

73. Instead, the respondent, in this part of the argument, asserts a broad common law principle equivalent to article 2 against which the whole of the complex set of rules which governed the earlier investigations can be tested and by which they can be found wanting and be ordered to be rerun under different rules. My Lords, in my opinion there is no such overarching principle and I venture to suggest that the very notion of such a principle, capable of overriding detailed statutory and common law rules, is alien to the traditions of the common law. The common law develops from case to case in harmony with statute. Its principles are generalisations from detailed rules, not abstract propositions from which those rules are deduced. Still less does it provide a solvent for any difficulties which may exist in the rules enacted by Parliament. It is in this respect quite different from the general

statements which have now been enacted by the 1998 Act and to which the House gave effect in *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169.

74. I would allow the appeal and dismiss the application for judicial review.

LORD RODGER OF EARLSFERRY

My Lords,

75. My Lords, I too would allow the appeal, for the reasons given by my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Brown of Eaton-under-Heywood. I merely wish to add a short comment on the application of the Human Rights Act 1998 ("the Act") in relation to the death of Gervaise McKerr.

76. Ever since the European Convention on Human Rights and Fundamental Freedoms came into effect in international law, the United Kingdom has been bound by its terms. The position under international law did not change in any way on 2 October 2000: that was a significant day in terms of the domestic legal systems of the United Kingdom, but not in terms of international law. Both before and after that date, the obligation on the United Kingdom under article 1 of the Convention was to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention. Similarly, both before and after that date, the United Kingdom aimed to secure the enjoyment of those rights and freedoms by means of a raft of common law and statutory provisions in its domestic law. If the rights and remedies available in our domestic law proved to be insufficient for this purpose in any given case, then the European Court of Human Rights would find that the United Kingdom had failed to secure the right or freedom and so was in violation of its international law obligation under the Convention. The only difference that the commencement of the Act made - and it was, of course, a significant difference - was to increase the range of provisions available in our domestic law to ensure that people within the jurisdiction enjoyed those rights and freedoms. On the international plane this meant that the United Kingdom should be better placed to fulfil its obligation under article 1 of the Convention.

77. Over the years, Parliament has passed many Acts, and public authorities have taken many steps, to secure that, under our domestic law, people should enjoy the rights and freedoms guaranteed by the Convention. The legislation dealt with particular situations, whether or not brought to light by a ruling from Strasbourg. In 1998 Parliament adopted a more elegant and comprehensive solution. The Act reproduces as rights in our domestic law the rights that are to be found in certain specified articles in the Convention and in two of the Protocols: section 1(1) - (3). It then makes it unlawful for public authorities to act or to fail to act in a way which is incompatible with those rights: section 6(1) and (6). Those affected by a breach can rely on these rights; courts and tribunals can grant the relief, remedy or order that they consider just and appropriate if a public authority is found to have acted unlawfully by violating one of them: sections 7 and 8. In any given situation, therefore, a person may rely not only on all the pre-existing rights and remedies afforded by the common law and statute, but also on the relevant new domestic rights set out in schedule 1 to the Act. And, correspondingly, the courts can grant not only the remedies that would have been available to give effect to the pre-existing common law and statutory rights, but also the just and appropriate remedy to give effect to the relevant rights under the Act.

78. In the present case the respondent relies on his rights under the domestic law of Northern Ireland. In particular, he says that, by reason of the Convention right under article 2 as set out in schedule 1 to the Act ("article 2 Convention right"), he has the right to a prompt and effective investigation of his father's death. By refusing to carry out such an investigation, he says, the Secretary of State has acted, and continues to act, incompatibly with that right and so unlawfully in terms of section 6(1).

79. The respondent's father, Gervaise McKerr, was shot by an RUC officer or officers in 1982. Your Lordships' House has established that, subject to section 22(4), which does not apply in the present case, the Act does not have retroactive effect. So none of its provisions applies to the position in 1982. This means that, in the domestic law of Northern Ireland, the legal rights and duties of the people involved in the events of 1982 are not altered by the Act. In particular, Gervaise McKerr did not enjoy, and is not now to be regarded as having enjoyed, any article 2 Convention right to life under the Act. It follows that his killing, however it may have come about, is not to be regarded as having been incompatible with that Convention right or as unlawful by reason of section

6(1).

80. The respondent accepts this, but he fastens on another aspect of article 2. Where the article applies, it is interpreted as requiring the relevant public authority to carry out an effective official investigation of any death which may have resulted from the use of force by agents of the state: *McCann v United Kingdom* (1996) 21 EHRR 97, 163, para 161. This obligation is variously described as procedural or adjectival, but its purpose is to ensure that the lawfulness of the use of force by state agents resulting in death is reviewed. Without such a procedure the guarantee in article 2 would be ineffective. The Secretary of State does not dispute that interpretation of the article 2 Convention right. It follows, of course, that deaths will have to be investigated even though, as it turns out, the killing was lawful and not in breach of that right. To that extent the right to an investigation can properly be regarded as freestanding.

81. What the respondent claims, however, is an article 2 Convention right under the Act to have his father's death investigated even though, as he accepts, the killing did not violate, and is not to be regarded as having violated, any article 2 Convention right under the Act. Such a claim is fatally flawed and must be rejected.

82. Like Lord Brown I am doubtful whether, even in international law terms, there was by October 2000 any continuing breach of the relatives' right to an effective investigation of Gervaise McKerr's death under article 2 of the Convention. But, even supposing that there was, that continuing breach of an international obligation was not turned into a continuing breach of an article 2 Convention right in domestic law when the Act came into force. Any breach that there was remained a breach in international law and nothing more. The respondent relies on the Act as part of the domestic law of Northern Ireland. Under the Act the right to an investigation, deriving from an article 2 Convention right, presupposes that the killing could have been in violation of that selfsame Convention right. So, when the respondent's father was killed in 1982, his relatives had no right to an investigation under the Act. Moreover, since the Act is not retroactive, they are not now to be regarded as having had such a right in 1982 or at any time after that. Conversely, the Secretary of State is not to be regarded as having been in breach, or continuing breach, of such a right either in 1982 or at any time after that.

83. What the respondent is really saying, therefore, is that, when the Act came into force, it conferred on him a right under article 2 to have his father's death investigated even though his killing was not, and is not to be regarded as having been, in breach of any article 2 Convention right under the Act. Therefore, the respondent is not asking the courts to apply the Act according to its terms, but to amend them so as to fit this case. That cannot be done. If Parliament had intended the rights under article 2 to be split up, with the Act applying differently to the different aspects, then it would have provided for this expressly. The potential objections are obvious. It would be curious to give a right, under the Act, to an investigation of a killing to which the Act did not apply. If there were to be such a right to an investigation, how far back would it go? Speculation is fruitless: what matters is that Parliament could have made, but did not make, any such transitional provision. The obvious conclusion is that the right to an investigation under the Act is confined to deaths which, having occurred after the commencement of the Act, may be found to be unlawful under the Act. The respondent seeks to contradict the policy of Parliament.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

84. The respondent's father was one of three men shot dead in Armagh by RUC police officers from a special mobile support unit on 11 November 1982. Within a month three other men had been killed in two similar incidents. The police, it came to be alleged, were operating a shoot to kill policy.

85. Try as they might, those like the respondent concerned by these deaths have never managed to secure a fully satisfactory investigation into them.

86. The investigations in fact undertaken and the respondent's efforts to improve upon them have already been charted in the speech of my noble and learned friend Lord Nicholls. He has summarised too the judgment of the ECtHR (which became final on 4 August 2001) upon the application made by the respondent's mother on 7

March 1993 and continued by him after her death. Put shortly, the ECtHR found that the various investigations carried out, culminating in the final abandonment of the inquest on 8 September 1994, failed in a number of respects to comply with the procedural obligation implied by Article 2 of the Convention. Awarding the respondent damages of £10,000, the Court said in para 181 of its judgment:

> "[T]he Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention."

87. The central question before your Lordships is whether following that judgment the Secretary of State for Northern Ireland (the appellant) is now under an obligation enforceable in domestic law to undertake a further investigation into this killing. By letter dated 5 September 2001 the respondent's solicitors contended that such further investigation is now required "to comply with [the ECtHR's] ruling". The appellant disputes this.

88. Campbell LJ at first instance concluded that the obligation to conduct an Article 2 compliant investigation "remained unfulfilled until such an investigation was carried out or a competent court vindicated the right in some other way", but that, the respondent having received a declaration and an order for just satisfaction from the ECtHR, the obligation then came to an end. The Court of Appeal allowed the respondent's appeal. They agreed with Campbell LJ that "there is a continuing breach of Article 2" but, unlike him, concluded that it had not come to an end and that the respondent would remain a victim so long as "no domestic remedy has been afforded to [him]".

89. It was not suggested to either court below that, whatever continuing obligation there might be on the international plane to conduct some further investigation, no such duty could arise under domestic law because the Human Rights Act 1998 (the 1998 Act) is not retrospective. That now is the principal argument advanced by the Attorney General on behalf of the appellant.

90. The argument essentially comes to this. Under domestic law it only became unlawful for a public authority to act incompatibly with a Convention right on 2 October 2000. Whatever the circumstances of Mr McKerr's death, therefore, Article 2 of the Convention was not engaged by it. On the domestic plane the appellant could not be said to have breached the substantive obligations arising under Article 2. Nor, moreover, could he be said to have breached the procedural obligation to hold a sufficient inquiry into the death—an obligation which the ECtHR first found to be implicit in Article 2 in *McCann v United Kingdom* (1995) 21 EHRR 97 (the *Death on the Rock* case) and has developed in subsequent caselaw to the point now reached in this very case, *McKerr v United Kingdom* (2001) 34 EHRR 20 (and the other three Northern Ireland cases determined in parallel with it). Plainly no Article 2 obligation to investigate McKerr's death could arise under domestic law prior to 2 October 2000. But no more could it arise after that date. It is a procedural obligation properly to be regarded as secondary or ancillary or adjectival to the substantive obligation to protect life, an obligation arising directly out of the loss of a life. True it is that in *McCann*, where this procedural duty was first articulated, the ECtHR said that "where a victim dies in circumstances which are unclear . . . the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention" (para 193 of the Court's judgment), and true it is too that in the subsequent Strasbourg jurisprudence it has been described as a "freestanding" obligation. That, however, means no more than that the procedural duty arises independently of any demonstrable breach of the substantive obligations arising under Article 2. As stated in paragraph 111 of *McKerr* itself:

> "The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."

91. The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when Article 2 rights were enforceable under domestic law, i.e. on

and after 2 October 2000.

92. Such is the argument and to my mind it is irresistible. To say, as Mr Treacy QC for the respondent does, that the procedural obligation, once engaged, is a continuing one, regarded by the ECtHR here as still continuing at the date of their decision in 2001, is nothing to the point. Even were it so (and, as I shall shortly come to explain, for my part I doubt it is), that would be the position only on the international plane. It would say nothing as to whether, on the true interpretation and application of the 1998 Act, a pre-2 October 2000 death could give rise to a procedural obligation to hold an Article 2 compliant investigation enforceable under domestic law on and after 2 October 2000.

93. As for Mr Treacy's alternative contention that, irrespective of whether a right to an Article 2 compliant investigation now arises under section 6 of the 1998 Act, a duty to hold such an investigation in any event arises at common law, and indeed has remained unfulfilled ever since Mr McKerr's death, this in my opinion fails both on authority and principle. By the same token that this House in *R v Lyons* [2003] 1 AC 976, declined, by reference to a subsequent ECtHR ruling, to hold a pre-1998 Act trial, conducted in accordance with the domestic laws and standards then applicable, unsafe, so too here it would be wrong for your Lordships to condemn as contrary to the common law a series of procedures long since properly concluded in accordance with well-established domestic laws and never challenged save by reference to a substantially later ECHR decision. Nor would it be right to impute to the common law a requirement for the same form of investigation of fatalities as the ECtHR has now found implicit in Article 2. Such a fiction would be unwarranted however profound one's desire to interpret domestic law down the years consistently with our international obligations.

94. I return, as promised, to indicate why for my part I would question Mr Treacy's assertion that the ECtHR's judgment should be understood as a finding that the United Kingdom remains under an international law obligation to hold a further investigation into Mr McKerr's death. Immaterial though, for reasons already explained, the correctness of this assertion is to the determination of the appeal, it would be unfortunate if the impression were gained that it was necessarily accepted by your Lordships. The following points should be made. First, that the ECtHR, by reference to a number of identified shortcomings in the various investigative processes long since concluded in this case, found "that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision." (para 161). There is nothing in the judgment to suggest that this violation is to be regarded as a continuing one.

95. Secondly, it is plain that, 20 years on from Mr McKerr's death, no fresh inquiry could possibly comply fully with the now established requirements of an Article 2 investigation. Perhaps most obviously, the opportunity for a prompt independent investigation has been irretrievably lost; this element of a compliant inquiry would necessarily be missing.

96. Thirdly, it has now been left by the Court to the Committee of Ministers to supervise the execution of its judgment pursuant to Article 46 (2) of the Convention. That Committee may or may not sanction the United Kingdom's present proposal, which is to hold no further inquiry into Mr McKerr's death. But even if it does not, such further inquiry as may be stipulated could only be by way of partial redress or remedy for past failures. Merely because the Committee of Ministers may judge some further inquiry "effective" does not mean that it would be compliant.

97. In short, the most that is achievable now on the international plane is further redress for past non-compliance. It accordingly follows that, even were the domestic court, despite the non-retrospectivity of the 1998 Act, able to entertain Article 2 complaints in respect of pre-October 2000 deaths, the respondent would in any event be unable to establish that an Article 2 procedural obligation in respect of Mr McKerr's death arose after October 2000. The complaint would not be of a proposed post-October 2000 unlawful act (the refusal to comply with the implied procedural obligation to investigate) but rather of a pre-October 2000 breach and manifestly the respondent could have no right in domestic law to complain about that.

98. This conclusion, however, as I have already acknowledged, is not essential to the disposal of the present appeal.

It is for the reasons earlier given, which accord with those given in the speech of my noble and learned friend Lord Hoffmann, that I too would allow the appeal and dismiss the respondent's application for judicial review.

Neutral Citation Number: [2001] EWHC Admin 520
CO/4031/2000

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)

Royal Courts of Justice
Strand
London WC2
20th June 2001

B e f o r e :

MR. JUSTICE JACKSON

THE QUEEN ON THE APPLICATION OF MARGARET WRIGHT & Anor.

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Computer Aided Transcription by
Smith Bernal Reporting Limited
190 Fleet Street, London EC4A 2HG
Telephone 020 7404 1400 Fax 020 7831 8838
(Official Shorthand Writers to the Court)

MISS JESSICA SIMOR and MR. DANNY FRIEDMAN (instructed by Messrs. Liberty, London SE1 4LA) appeared on behalf of the Claimants.

MR. RHODRI THOMPSON (instructed by the Treasury Solicitor) appeared on behalf of the Defendant.

HTML VERSION OF JUDGMENT

Thursday, 21 March 2001

1. MR. JUSTICE JACKSON: This judgment is in nine parts, namely:

   Part 1: Introduction

   Part 2: The facts

   Part 3: The present proceedings

   Part 4: The nature of the obligation to investigate which arises under articles 2 and 3 of the Convention

   Part 5: Is it arguable that the treatment of Mr. Wright by the Prison Service constituted a breach of article 2 or article 3?

   Part 6: Has there been an effective official investigation into Mr. Wright's death?

   Part 7: The appropriate remedy

   Part 8: The claimants' other claims

   Part 9: Conclusion

   Part 1: Introduction

2. These proceedings concern the death in prison of a young man called Paul Wright. The claimants are his mother and his aunt. The defendant has been variously described as "the Home Office" and "the Secretary of State for the Home Department." At all material times the defendant has acted through the Prison Service.

3. Mr. Wright died in prison on 7th November 1996 as a result of a severe asthma attack. Amongst other matters, the claimants contend (i) that the treatment of Mr. Wright in the period leading up to his death constituted a breach of articles 2 and 3 of the European Convention on Human Rights ("the Convention"); (ii) that the defendant's failure since 7th November 1996 properly to investigate Mr. Wright's death is a continuing breach of the procedural obligation arising under articles 2 and 3 to enquire into possible breaches of those articles.

4. The Human Rights Act 1998 came into force on 2nd October 2000. Amongst other remedies, the claimants contend that they are entitled to redress under the Human Rights Act in respect of the defendant's continuing failure to investigate since 2nd October 2000.

5. Article 13 of the Convention, which at first sight is relevant to the issues in this case, has no direct application. This is because article 13 is not one of the articles listed in schedule 1 to the Human Rights Act 1998.

6. Before I turn in any detail to the issues arising in this case it is first necessary to outline the facts.

   Part 2: The facts

7. Mr. Wright was born on 18th May 1963. Mr. Wright had a long history of serious asthma, starting at the age of three years. Between 1967 and January 1996 he received regular and emergency medical treatment from

Airedale General Hospital and his general practitioner, who monitored his condition and adjusted his treatment as necessary. He was regularly prescribed inhaled corticosteroids, such as Becloforte, Becotide, Flixotide and Pulmicor, and courses of oral steroids as necessary. He was also loaned an electronic nebuliser on several occasions for the administration of bronchodilators at home. He was admitted to Airedale General Hospital following severe asthma attacks on single occasions in March, April and August 1995 and on two occasions in July 1995.

8. In November 1995 Mr. Wright was arrested for a number of offences. He was detained on remand at Leeds Prison on 29th January 1996. He was released on bail from 8th March to 22nd April 1996, during which period he returned to live with the first and second claimants. On 22nd April 1996 he returned to Leeds Prison on remand. On 25th July 1996 he was sentenced to three years and six months' imprisonment, which he continued to serve at Leeds Prison.

9. Because of Mr. Wright's asthmatic condition, he had regular contact with the health care centre at Leeds Prison from January 1996 onwards. The chief medical officer, who had overall responsibility for the health care centre and for the medical treatment of prisoners, was Dr. Evans. On 1st July 1996 Dr. Evans retired as senior medical officer and Dr. Carroll was appointed in his place. It appears from the records that Mr. Wright had occasional contact with the senior medical officer. However, the member of staff who dealt primarily with the treatment of Mr. Wright was Dr. Singh.

10. The medication which was given to Mr. Wright whilst in prison included the following:

    1. Prednisolone tablets were prescribed on a regular basis. Prednisolone is an oral steroid.

    2. Mr. Wright had a Ventolin inhaler and later an Atrovent inhaler, which he kept in his cell.

    3. A nebuliser was kept at the prison health care centre. On occasions this nebuliser was used to administer Ventolin to Mr. Wright following a serious asthmatic attack.

11. On the evening of 7th November 1996 Mr. Wright suffered a severe asthmatic attack, whilst he was locked in his cell. Mr. Wright told his cell mate, Vincent Moughton, that he needed a nebuliser. Mr. Moughton pressed an alarm button, which activated a light outside the cell. After a period of time which is in dispute, a prison officer came. After a further period of time, a nurse, Ms. Susan Carlisle, arrived. She found that Mr. Wright was not breathing. She summoned an ambulance. Attempts at resuscitation failed. Mr. Wright was taken to Leeds General Infirmary, where he was certified as dead.

12. An inquest into the death of Mr. Wright opened on 19th November 1996. It was then adjourned to enable further enquiries to be carried out. The adjourned hearing of the inquest took place on 29th April 1997 before Mr. Hinchliffe, one of the coroners for West Yorkshire, sitting with a jury. At this hearing the Prison Service was represented by counsel. Members of Mr. Wright's family attended but, in the absence of legal aid, they had no advocate to represent them. Mr. Wright's aunt, the second claimant, acted as spokesperson for the family. She addressed the Coroner from time to time and questioned some of the witnesses.

13. The witnesses at the inquest included Dr. Clark, the pathologist who had carried out a post-mortem examination; Dr. Carroll, senior medical officer at Leeds Prison; certain prison officers; and Staff Nurse Carlisle. Dr. Singh did not give evidence, but his written statement was read out. Mr. Vincent Moughton, who was Mr. Wright's cell mate on the fateful evening, did not give evidence. It appears that Mr. Moughton was willing to give evidence and capable of being contacted, but no one asked him to attend. Mr. Moughton's witness statement was read aloud during the inquest, immediately after the oral evidence of Dr. Carroll. However, counsel for the Prison Service objected to the admissibility of that evidence. The Coroner upheld the objection and directed the jury to disregard Mr. Moughton's statement.

14. During the inquest there was no suggestion that the medical treatment given to Mr. Wright, whilst he was in prison, might have been inadequate. There was no suggestion that the medical staff treating Mr. Wright might have lacked the necessary competence. At the conclusion of the one-day inquest the jury returned a verdict of

death by natural causes.

15. The inquest verdict did not allay the claimants' concerns about the circumstances in which Mr. Wright had died. The claimants sought legal aid to bring a claim under the Fatal Accidents Act 1976. The application for legal aid was initially unsuccessful.

16. In May 1999 the claimants read an article in the Yorkshire Evening Post concerning Dr. Singh. This article stated that Dr. Singh had been suspended from his employment at Leeds Prison following the death of an inmate. The article gave the following information about Dr. Singh's past history:

> "While previously working in the Derby area, Dr. Singh was found guilty of serious professional misconduct in September 1994 by the General Medical Council and was fined £1,500.
>
> "Since then he has been banned from working in general practice as a locum and ordered not to engage in any form of single handed general practice.
>
> "The Council made their initial ruling in 1994 after hearing that the doctor had neglected two elderly patients in Derbyshire who later died."

17. This article reinforced the claimants' concerns about the medical treatment which Mr. Wright had received in prison.

18. During 1999, the claimants succeeded in obtaining legal aid. On 5th November 1999 the claimants commenced proceedings under the Fatal Accidents Act 1976, claiming damages against the defendant in respect of Mr. Wright's death. The basis of the claim was negligent treatment of Mr. Wright's asthmatic condition. On 27th January 2000 the defendant served a defence, in which negligence was denied.

19. On 18th April 2000 the defendant admitted liability. Thereafter, the action continued for the purpose of assessing damages, and in due course damages were agreed between the parties.

20. One consequence of the defendant's admission of liability was that there would not be any court hearing to determine which specific allegations of negligence were well founded. In these circumstances, the claimants' solicitor, who is a legal officer of Liberty, pressed the defendant to set up a full, independent and open investigation into the causes of Mr. Wright's death. The defendant declined to do so.

21. On 25th August 2000 the claimants issued an application to amend their claim form and particulars of claim in the Fatal Accidents Act proceedings by adding two further claims:

> 1. A claim for bereavement damages based on the defendant's breach of articles 2, 3 and 8 of the European Convention on Human Rights in failing to provide proper care for Mr. Wright whilst in prison.
>
> 2. A claim for damages based on the defendant's continued failure
>
> > (a) to carry out an independent and impartial inquiry into Mr. Wright's death, as required by articles 2, 3 and 8 of the Convention, and
> >
> > (b) to disclose available information about that death.

22. The application to amend was heard on 12th September 2000 by Elias J. The judge disallowed the first amendment on the basis that the alleged breaches of the Convention culminating in Mr. Wright's death all occurred before the Human Rights Act 1998 came into force. Accordingly, the first proposed new claim could not succeed. Elias J. also disallowed the second amendment, but for a different reason. Elias J. regarded the second proposed new claim as having a prospect of success, because the alleged breaches would continue after 2nd October 2000. However, Elias J. regarded the second proposed new claim as unsuitable for inclusion in the

existing proceedings, because it raised public law issues.

23. In the light of this ruling the claimants accepted that their current action should be limited to damages under the Fatal Accidents Act. On 2nd November 2000 the claimants commenced a second action, namely the present proceedings for judicial review.

Part 3: The present proceedings

24. By their claim form dated 2nd November 2000, the claimants claimed judicial review in respect of:

> 1. The defendant's continuing failure to carry out a thorough, independent and public investigation into Mr. Wright's death.
>
> 2. The defendant's continuing failure to provide the family with proper information as to the reasons for Mr. Wright's death, and in particular the medical report on the basis of which the defendant conceded liability in the Fatal Accidents Act action.

25. The remedies which the claimants claimed for these failures were an appropriate mandatory order and damages.

26. On 11th December 2000 Scott Baker J., upon considering the documents, granted permission to the claimants to apply for judicial review. Following the grant of permission the Prison Service examined its records. On 5th March 2001 the Prison Service provided the following documents to the claimants' solicitor:

> 1. a copy of the inmate medical report relating to Mr. Wright;
>
> 2. a copy of the internal report into the circumstances surrounding Mr. Wright's death, prepared by Governor Davies at Leeds Prison; and
>
> 3. a synopsis of the expert report which had caused the defendant to admit liability in the Fatal Accidents Act proceedings.

27. The third of these documents was the most revealing. The expert report had been prepared by Adrian Williams, a consultant physician. The synopsis of Mr. William's report includes the following passage:

> "Mr. Wright was reported to have had asthma since the age of three and treated with inhaled medications including topical steroids with intermittent oral steroids. Control of this asthma in the year before his first confinement in January 1996, was poor as judged by the need for five admissions to hospital in 1995.

28. "On entering prison in January, his medical assessment noted (self reported?) use of Ventolin, and "Atropine' and Prednisolone with a latter addendum (by Dr. Singh) recording Uniphyline use as well. Subsequently, he was seen in the Health Care Centre on at least 26 occasions over the 10 months at intervals of 1 to 2 weeks and by at least four doctors. A peak flow was noted on five occasions (March 8 @ 650; June 19 @ 250; July 3 @ 450; August 20 @ 400; September 29 @ 360). Prescriptions for Atrovent, Salbutomal, Uniphyline and Prednizone were regularly mentioned, as was less frequently Beclamethasone (first March 8? 20 units -inhalers? - and subsequently April 22, June 19, July 12, July 23, September 9, September 13).

> "Specific reference to the poor control of his asthma, particularly at night was made by a nurse on June 15 and by Dr. Singh on August 14 and can also be inferred from the addition of pm Uniphyline to his regimen on April 22 (reaffirmed on June 19, July 12 and September 19). The medication record is also significant for the absence of Beclamethasone during an admission to the Health Care Centre on October 24, as well as the 'addition' of Atrovent on October 23 with the rationale 'to cut down on steroid use'.
>
> "Mr. Wright's final fatal asthma attack apparently began in the evening and rapidly progressed to

asphyxiation. A near-empty MDI was found at his side, reminiscent of the epidemic of fatal asthma in the era preceding the use of topical steroids.

Discussion

"Good control of Mr. Wright's asthma was noted by his mother, though in the year before his imprisonment, there were five admissions to hospital indicating poor control. His medication use during this time is unclear, and he failed to report, Beclamethasone use to prison medical staff. The poor control in the previous year was not recorded by the prison staff at that time, only being noted much later.

"The contemporaneous medical record is difficult to decipher and possibly incomplete, with few drug prescriptions, making Mr. Wright's medication use uncertain. The unmonitored use of Prednisolone is also an indictment of the overall quality of medical care and record keeping.

"He was seen frequently, albeit partly as a result of the poor control of his asthma, and by four physicians, but no consistent record of lung function was kept. The normal peak flow recorded on March 8 indicates the ability to achieve normal lung function and that of September 29 is sufficiently changed from that base line to be of concern and to trigger a change in treatment, especially given the fragile nature of his disease, known by now by his past medical history and by the frequent visits to the clinic.

"Finally, the introduction of Atrovent to reduce steroid use indicates a fundamental flaw in Dr. Singh's knowledge base.

Conclusions

"1.A competent medical practitioner would have been aware of Mr. Wright's previous poor control (five hospital admissions) and the recent use of steroids and would have realised the need for inhaled steroids at that time. Likewise, their (later) introduction and continuous use would have been adequately monitored by regular daily peak flow measurements. Compliance with these characteristics of good medical practice would probably have averted his death. Quicker treatment at the time would [have been] unlikely to have been successful since acute severe asthma is recognized to take this precipitous course. Dr. Singh's use of Beclamethasone was too little, too late and his understanding of this area seriously flawed."

29. The views of Mr. Williams, as revealed by the synopsis are quite close to the views of Dr. Rudd, who was the claimants' expert witness in the Fatal Accidents Act proceedings. Both experts consider that the prison medical staff monitored Mr. Wright's condition inadequately and prescribed inappropriate medication. In particular, both experts consider that the prison medical staff ought to have prescribed inhaled corticosteroids.

30. The disclosure which the defendant made on 5th March 2001, in conjunction with earlier disclosure given in the Fatal Accidents Act proceedings, effectively discharges whatever duty the defendant had to provide to the family available information concerning Mr. Wright's medical treatment and death. Accordingly the claimants' claim based upon a continuing failure to provide available information has been overtaken by events and is no longer pursued.

31. The relief which the claimants are seeking at trial, as formulated in paragraph 69 of their skeleton argument, is as follows:

1. A mandatory order requiring the defendant to initiate an independent investigation into the circumstances surrounding the death of the deceased. 2. A declaration that the defendant's conduct since the deceased's death constituted a lack of respect for their family and private life, contrary to article 8 of the Convention.

3. Damages for the breach of articles 2, 3 and 8 of the Convention.

32. The claim for an order that the defendant do set up an independent investigation is the aspect which has been most vigorously pursued. Accordingly, I shall deal with this aspect of the case first.

Part 4. The nature of the obligation to investigate which arises under articles 2 and 3 of the Convention

33. Article 2(1) of the Convention provides:

> "Everyone's right to life shall be protected by law."

34. Article 3 of the Convention provides:

> "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment."

35. McCann v. United Kingdom (1996) 21 EHRR 97 concerned the shooting by SAS soldiers of three members of the Provisional IRA, who were planning to plant a bomb in Gibraltar. In relation to the obligations imposed by article 2 of the Convention, the European Court of Human Rights said this at paragraph 161 of its judgment: "The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State".

36. The court went on to hold that the obligation to hold an effective official investigation had been satisfied in that case. This was because a lengthy and thorough inquest had been held, at which numerous witnesses had been called and all parties were represented. The U.K. was found to be in breach of article 2 in other respects, but these are not material to the present proceedings.

37. In Assenov v. Bulgaria [1998] 28 E.H.R.R. 652 the European Court of Human Rights held that article 3, like article 2, imposes an obligation to investigate. At paragraph 102 of its judgment the court said this:

> "The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention', requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity."

38. R. v. DPP, ex parte Manning [2001] QB 330 concerned the death of a prison inmate following the forcible search of his person for drugs. The Director of Public Prosecutions decided not to prosecute the prison officers who had forcibly searched the deceased immediately before his death. The Divisional Court quashed that decision and ordered the Director of Public Prosecutions to reconsider the matter. However, the Divisional Court regarded the coroner's inquest as satisfactory. The inquest had been lengthy. The deceased's family had been represented. The inquest verdict had been unlawful killing. In relation to article 2, Lord Bingham C.J, giving the judgment of the Divisional Court, said this at paragraph 33:

> "But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the state must always arouse concern, as recognised by section 8(1)(c), (3)(b) and (6) of the Coroners' Act 1988, and if the death resulted from violence inflicted by agents of the State that concern must be profound. The holding of an inquest in public by an independent judicial official,

> the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective enquiry: see McCann v. United Kingdom [1996] 21 EHRR 97 [at pp. 163 to 164] paragraphs 159 to 164."

39. Salman v. Turkey (European Court of Human Rights, 27th June 2000) concerned the death of a man who was held in police custody. The deceased's death appeared to have been caused by ill treatment at the hands of police officers; see paragraphs 12 and 101 of the judgment. Turkey was held to be in breach of article 2 of the Convention in two respects. First, the Turkish government had a responsibility for the death of the deceased by reason of the circumstances. Secondly, the Turkish authorities failed to carry out an effective investigation into the circumstances of the death. In relation to the obligation to investigate, the court said this:

> "104. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, mutatis mutandis, the McCann and Others v. the United Kingdom judgment of 27 September 1995 ...and the Kaya v. Turkey judgment of 19 February 1998 ...
>
> 105. In that connection, the Court points out that the obligation mentioned above is not confined to cases where it is apparent that the killing was caused by an agent of the State. The applicant and the father of the deceased lodged a formal complaint about the death with the competent investigation authorities, alleging that it was the result of torture. Moreover, the mere fact that the authorities were informed of the death in custody of Agit Salman gave rise ipso facto to an obligation under Article 2 to carry out an effective investigation into the circumstances surrounding the death (see, mutatis mutandis, the Ergi v. Turkey judgment of 28 July 1998 ... and the Yasa judgment cited above ...). This involves, where appropriate, an autopsy which provides a complete and accurate record of the possible signs of ill-treatment and injury and an objective analysis of clinical findings, including the cause of death."

40. The judgment of the Divisional Court in Manning and the judgment of the European Court of Human Rights in Salman are separated by six weeks. They appear to have been reached in isolation from one other, but they are perfectly consistent. In Manning the obligation to investigate implied by article 2 was satisfied by the holding of a thorough inquest. In Salman the obligation to investigate implied by article 2 was never satisfied.

41. Jordan v. United Kingdom (European Court of Human Rights, 4th May 2001) concerned the death of a young man in Belfast, who was shot by a police officer. Following the death, an inquest was held in accordance with the procedures of Northern Ireland. Also, the deceased's father brought a civil action for damages against the police. The Strasbourg Court held that the United Kingdom was in breach of article 2, because it had failed to hold an effective official investigation. Neither the inquest nor the civil action sufficed for this purpose. At paragraphs 106 to 109 of its judgment, the court identified the necessary features of an investigation compliant with article 2. In brief these are:

> 1. The investigation must be independent.
>
> 2. The investigation must be effective.
>
> 3. The investigation must be reasonably prompt.
>
> 4. There must be a sufficient element of public scrutiny.
>
> 5. The next of kin must be involved to the appropriate extent.

42. At paragraph 143 the court said this:

> "It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing for all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance."

43. From this review of recent decisions I derive five propositions:

> 1. Articles 2 and 3 enshrine fundamental human rights. When it is arguable that there has been a breach of either article, the state has an obligation to procure an effective official investigation.
>
> 2. The obligation to procure an effective official investigation arises by necessary implication in articles 2 and 3. Such investigation is required, in order to maximise future compliance with those articles.
>
> 3. There is no universal set of rules for the form which an effective official investigation must take. The form which the investigation takes will depend on the facts of the case and the procedures available in the particular state.
>
> 4. Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in Jordan v. United Kingdom at a paragraphs 106 to 109.
>
> 5. The holding of an inquest may or may not satisfy the implied obligation to investigate arising under article 2. This depends upon the facts of the case and the course of events at the inquest.

44. Finally, and for the sake of completeness, I should mention the European Court of Human Rights' decisions in Keenan v. United Kingdom (3rd April 2001) and Z v. United Kingdom (10th May 2001). In both of these cases the applicants alleged direct breaches of articles 2 and 3 of the Convention in respect of actions by the United Kingdom authorities, which lead to personal injury or death. In neither case did the applicants allege a breach of the procedural obligation to investigate arising under articles 2 and 3. It is probable that the reason for this omission was that in Strasbourg (unlike in this court) the applicants were entitled to claim a remedy for breach of article 13. In these circumstances, neither Keenan v. United Kingdom nor Z v. United Kingdom are directly relevant to the issues discussed in Part 4 of this judgment.

Part 5: Is it arguable that the treatment of Mr. Wright by the Prison Service constituted a breach of article 2 or article 3?

45. I have heard no oral evidence. There has been no cross-examination or testing of the experts, as would be commonplace in a clinical negligence action. If Dr. Singh or anyone else disagrees with the views of Dr. Rudd or Mr. Williams, there has been no opportunity for that disagreement to be ventilated. Accordingly, the conclusions which I have reached are provisional and might be displaced by further evidence. These provisional conclusions are as follows:

> 1. Mr. Wright was a young man who suffered from a serious asthmatic condition.
>
> 2. It appears from the expert evidence referred to in Part 3 of this judgment that the medical treatment which Mr. Wright received over a period of months during 1996 was seriously deficient. His lung function deteriorated over that period. His condition was not properly monitored. He was

given inappropriate medication. Inhaled corticosteroids were not prescribed. Mr. Wright never had a nebuliser in his cell and could only make use of a nebuliser if he was taken to the prison health centre.

3. By November 1996 Mr. Wright was exposed to the risk of a severe asthmatic attack by reason of negligent medical treatment.

4. On the night of 7th November Mr. Wright was locked in his cell with inadequate medication and inadequate apparatus. No key was available nearby for the purpose of unlocking the cell rapidly. In this situation Mr. Wright suffered an asthmatic attack.

5. Mr. Wright's position was probably hopeless from the moment his asthmatic attack began. However quickly prison officers and medical staff had responded to the alarm raised by Mr. Moughton, it is unlikely that Mr. Wright's life could have been saved.

46. A further disturbing feature of this case is the extent to which Mr. Wright's medical treatment was apparently entrusted to Dr. Singh. I have mentioned in Part 2 of this judgment the information about Dr. Singh which the claimants gleaned from a newspaper article before they began the first action. The claimants' solicitors have now carried out further investigations and have placed before me certain evidence obtained from the General Medical Council, including certain documents which were obtained during the course of the present hearing.

47. Dr. Singh is not represented in these proceedings and it would not be right for me to make any findings concerning him. Suffice it to say that by March 1996 the senior medical officer at Leeds Prison was notified of the conditions imposed upon Dr. Singh's practice by the General Medical Council. These conditions include a requirement for further training and a prohibition upon any form of single-handed general practice.

48. In the light of the facts set out above, is it arguable that the treatment of Mr. Wright by the Prison Service constituted a breach of article 2 and/or article 3 of the Convention? In addressing this question I have gained considerable assistance from the recent decision of the European Court of Human Rights in Keenan v. United Kingdom (3rd April 2001). This case concerned the suicide in prison of a young man who was serving a short prison sentence. The deceased had mental health problems. At an adjudication on the day before his death he was awarded 28 additional days in prison, together with seven days' loss of association. The court held that the United Kingdom was in breach of article 3 and article 13 of the Convention, but not in breach of article 2.

49. In relation to article 2 the court's reasons were as follows:

"98. The Court finds 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 Mark Keenan. 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 1993 that he was in a disturbed state of mind rendering an attempt at suicide likely. In these circumstances, it is not apparent that the authorities omitted any step which should reasonably have been taken, such as, for example, a 15 minute watch. There was the unfortunate circumstance that the alarm bell buzzer had been de-activated. It is unsatisfactory that it was possible for a prisoner or prison officer to interfere with this warning mechanism. However, the visual alarm was functioning and was spotted by staff, though not immediately. It has not been suggested by the applicant that this played any material role in Mark Keenan's death.

"99. The applicant argued however that the background events must be regarded as increasing the likelihood of her son committing suicide and that the authorities failed in their responsibilities by not properly assessing his unfitness for segregation and by imposing punishment on him. The applicant has criticised in particular the prison doctors' abilities, pointing out that none were psychiatrists and, in particular, that Dr. S who changed the medication ordered by Dr. Rowe, had no psychiatric training at all. She also emphasised that the infliction of disciplinary punishment on Mark Keenan

should have been foreseen as likely to increase the stresses on his fragile mental state and informed psychiatric opinion should have been sought.

"100. The Court considers that these arguments are to some extent speculative. It is not known what made Mark Keenan commit suicide. The issues raised regarding the standard of care with which Mark Keenan was treated in the days before his death fall rather to be examined under Article 3 of the Convention.

"101. The Court concludes that there has been no violation of Article 2 of the Convention in this case."

50. Sedley L.J., who was sitting as an ad hoc judge of the court, reached the same conclusion in relation to article 2 with considerable hesitation. In his concurring judgment he said:

"1. With some hesitation I have joined with the other members of the Court in finding no breach of Article 2. The essential basis of the majority's finding of a breach of Article 3 and of the unanimous finding of a breach of Article 13 is, after all, that a disturbed prisoner, known to be a suicide risk but now approaching the end of his short sentence, was administratively sentenced for a violent breach of discipline to a further substantial spell of imprisonment, the first part in punitive isolation, without the possibility of appeal or review. It is understandable that these facts were regarded by the dissenting members of the Commission as indicative of a breach of Article 2. Mr. Rozakis, for example, wrote:

'... the authorities, while they knew about the suicidal tendencies of Mark Keenan, and [while] they had in their hands reasonable means to avert the fatal incident, opted for a policy which contributed to rather than avoided his taking of his life.'

"2. Article 2 contains not a general assertion of the right to life but a specific obligation of states signatories to protect that right by law. This is why the facts which have led the court to find a breach of Article 3 might no less aptly have been regarded as demonstrating a breach of Article 2. Nevertheless, in the light of the view of the other members of the Court that a causal link is not sufficiently made out, I have not dissented."

51. In relation to article 3, the court's reasoning was as follows:

"113. In this case, the Court is struck by the lack of medical notes concerning Mark Keenan, who was an identifiable suicide risk and undergoing the additional stress that could be foreseen from segregation and, later, disciplinary punishment. From 5 May to 15 May 1993, when he died, there were no entries in his medical notes. Given that there were a number of prison doctors who were involved in caring for Mark Keenan, this shows an inadequate concern to maintain full and detailed records of his mental state and undermines the effectiveness of any monitoring or supervision process. The Court does not find the explanation of Dr. Keith -- that an absence of notes indicates that there was nothing to record -- a satisfactory answer in the light of the occurrence book entries for the same period.

"114. Further, while the prison senior medical officer consulted Mark Keenan's doctor on admission and the visiting psychiatrist, who also knew Mark Keenan, had been called to see Mark Keenan on 29 April 1993, the Court notes that there was no subsequent reference to a psychiatrist. Even though Dr. Rowe had warned on 29 April 1993 that Mark Keenan should be kept from association until his paranoid feelings had died down, the question of returning to normal location was raised with him the next day. When his condition proceeded to deteriorate, a prison doctor, unqualified in psychiatry, reverted to Mark Keenan's previous medication without reference to the psychiatrist who had originally recommended a change. The assault on the two prison officers followed. Though Mark Keenan asked the prison doctor to point out to the governor at the adjudication that the assault occurred after a change in medication, there was no reference to a psychiatrist for advice either as to

his future treatment or his fitness for adjudication and punishment.

"115. 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 a 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 finds a violation of this provision."

52. On this issue, again with some hesitation, Sedley L.J. agreed with the conclusion of the court. In his concurring judgment Sedley L.J. said:

"4. ... In the end, however, I have cast my vote in favour of a finding of a breach of Article 3 because it is evident from the fatal outcome that the stress of the punishment on this disturbed offender was greater than he ought to have been made to bear. In the light of the inadequate monitoring of his condition, the combination of the infliction and the timing of this punishment can properly be characterised as inhuman.

"5. This conclusion, it should be noted, is not dependent on a consequential death. That the same or not very different findings might have answered the question of causation under Article 2 and have been characterised as a failure of the law to protect Mark Keenan's right to life needs perhaps to be borne in mind by those with responsibility in this area of public administration."

53. Bearing in mind the decision of the Strasbourg Court in Keenan, I return now to the issues in the present case.

54. I do not have to decide whether the Prison Service actually breached article 2 or article 3 in its treatment of Mr. Wright. Mr. Wright died before the Human Rights Act 1998 came into force. The claimants cannot base any claim upon a breach of this nature. All that I have to determine, for present purposes, is whether it is arguable that during 1996 the Prison Service treated Mr. Wright in a manner which violated article 2 or article 3.

55. In my judgment, it is arguable that the Prison Service breached article 2 or article 3 in that respect.

56. I reach this conclusion for four reasons:

1. The negligent medical treatment of Mr. Wright during 1996 involved positive acts as well as omissions.

2. The medical treatment of Mr. Wright in the present case apparently involves greater culpability and over a longer period than the medical treatment of the deceased in Keenan. There were causation problems in Keenan (see paragraph 100 of the judgment) which do not exist in the present case. In Keenan a direct breach of article 2 was nearly established and, on Sedley L.J.'s analysis, such a breach could have been found. In the present case, a fortiori, it is arguable that the treatment of Mr. Wright constituted a breach of article 2.

3. In the minutes leading up to his death Mr. Wright must have endured considerable pain and suffering. To leave a sick man locked in his cell and exposed to the risk of such pain and suffering might arguably be characterised as inhuman treatment.

4. Since a breach of article 3 was found in Keenan, a fortiori it is arguable there was breach of article 3 in the present case.

57. For all these reasons, my answer to the question posed in Part 5 of this judgment is "Yes".

Part 6: Has there been an effective official investigation into Mr. Wright's death?

58. Because it is arguable that the treatment of Mr. Wright during 1996 constituted a breach of article 2 or article 3 of the Convention, the defendant came under a duty to procure an effective official investigation into the circumstances of Mr. Wright's death. See Part 4 of this judgment.

59. Has such an investigation taken place? The defendant contends that it has and relies upon two matters, first the inquest and secondly the civil action. The claimants maintain that neither of those legal proceedings were sufficient.

60. I deal first with the inquest. In my view, the inquest did not constitute an effective official investigation. I reach this conclusion for five reasons.

> 1. Vincent Moughton was not called as a witness, although he was available and willing to attend. The jury were directed to disregard his written statement.
>
> 2. There was no consideration at the inquest of the shortcomings in the medical treatment given to Mr. Wright. No independent expert reviewed the adequacy of this treatment.
>
> 3. The restrictions under which Dr. Singh was practising were not disclosed. There was no investigation as to whether Dr. Singh played an excessive and unsupervised role in Mr. Wright's treatment.
>
> 4. The claimants were not represented at the inquest. Although the second claimant spoke up for the family at the inquest and asked some questions, she did not have the requisite advocacy skills and there was no proper exploration of the issues which quite properly concerned the family.
>
> 5. By reason of the factors mentioned in reasons 1 to 4, the inquest did not comply with the requirements enumerated by the European Court of Human Rights in Jordan v. United Kingdom.

61. I turn next to the civil action. In my judgment the civil action did not constitute an effective official investigation, because liability was admitted at an early stage. There never was a hearing at which evidence concerning the circumstances of Mr. Wright's death was adduced or tested. I do not of course criticise the defendant's admission of liability in April 2000. On the contrary, I commend it. The civil proceedings in this case are irrelevant to the defendant's procedural obligations under articles 2 and 3 of the Convention. I am reinforced in this conclusion by paragraph 141 of the European Court of Human Rights judgment in Jordan v. United Kingdom.

62. For all these reasons, my answer to the question posed in Part 6 of this judgment is "No".

63. Although I have reached this conclusion largely on the basis of recent Strasbourg jurisprudence, it does not, in my view, involve any radical departure from established English law. Our courts have always recognised the particular need for a thorough inquest when a person dies in custody. See In re Rapier, Decd. [1988] Q.B. 26, R. v. Southwark Coroner, ex parte Hicks [1987] 1 WLR 1624, R. v. Coroner for North Humberside and Scunthorpe, ex parte Jamieson [1995] Q.B. 1 at pages 18-19 and 26 and R. v. DPP, ex parte Manning [2001] QB 330 at paragraph 33.

Part 7: The appropriate remedy.

64. For reasons set out in Parts 4, 5 and 6 above, in November 1996 the defendant came under an obligation pursuant to articles 2 and 3 of the Convention to set up an effective official investigation into the circumstances of Mr. Wright's death. The defendant never discharged that obligation. The defendant's breach of that obligation was not actionable in the English courts before 2nd October 2000, when the Human Rights Act 1998 came into

force.

65. Can the claimants now claim any remedy pursuant to sections 6, 7 and 8 of the Act for the continuing breach of articles 2 and 3 since 2nd October 2000? I was at first troubled by a "floodgates" argument. If the claimants are right, it might be said that the defendant is under a duty to set up effective official investigations into all manner of possible breaches of article 2 or article 3 during the 50-year period between the U.K.'s accession to the Convention and the coming into force of the Human Rights Act 1998. On reflection, however, this fear, even if relevant, is unsound. In the great majority of cases it would not be a proper exercise of the court's discretion to order an investigation into events which have become past history.

66. The present case, however, has special features. On 2nd October 2000, Mr. Wright's death was in no sense a closed chapter. The Fatal Accidents Act action was still in progress. An amended defence identifying the particulars of negligence which were admitted was not served until 6th November 2000. The synopsis of the defendant's expert evidence, on the basis of which liability was admitted, was not served until 5th March 2001. In short, on 2nd October 2000 when the Human Rights Act 1998 came into force, the circumstances in which Mr. Wright had died were still the subject of active debate and progressive revelation.

67. In the circumstances of this case, the claimants are entitled to a remedy pursuant to sections 6, 7 and 8 of the Human Rights Act 1998 in respect of defendant's continuing breach of the procedural obligations under articles 2 and 3. The proper remedy is an order that the defendant do set up an independent investigation into the circumstances of Mr. Wright's death. As counsel for both parties accept, the order which this court makes should not be unduly detailed or prescriptive. The precise form of the investigation should be left to the defendant's discretion.

68. I am acutely conscious that any form of inquiry which the Secretary of State may set up will consume costs and resources, which might otherwise be used directly in the operation of the prison medical service. I am also conscious of the duplication of costs for the defendant and of stress for the claimants, which arises from first having an inquest and then having an independent investigation into the circumstances of Mr. Wright's death. If this unsatisfactory situation is to be avoided in the future, steps should be taken to ensure that, in every case where article 2 of the Convention may be engaged, the coroner's inquest complies with the procedural obligations arising under that article.

Part 8: The claimants' other claims

69. The claimants have advanced an alternative claim for an independent inquiry based upon section 4 of the Prison Act 1952 and the Prison Rules. I have not found this argument convincing. However, it is not necessary to explore this aspect of the case, since the claimants have succeeded on the primary limb of their case based upon the Convention.

70. The claimants have also advanced a claim for damages and a declaration for breach of article 8 of the Convention. This claim is based upon the defendant's conduct since 2nd October 2000. The claimants contend that the defendant's conduct during this period, seen against the background of earlier conduct, constitutes a continuing lack of respect for the claimants' private and family life.

71. I do not accept this submission. The claimants cannot bring a claim under section 7 of the Human Rights Act 1998 in respect of the defendant's conduct prior to 2nd October 2000. The defendant's conduct since 2nd October 2000 does not constitute a lack of respect for the claimants' private and family life. On 24th October 2000 the defendant sent an apology to the claimants for Mr. Wright's death, together with certain factual information. On 15th November 2000 the defendant settled the claimants' claim under the Fatal Accidents Act 1976 by agreeing to pay a substantial sum in damages. On 5th March 2001 the defendant provided to the claimants a synopsis of the expert evidence which had caused the defendant to admit liability.

72. In my judgment, the defendant's conduct since 2nd October 2000 does not involve any breach of article 8 of the Convention. Accordingly, this head of claim is dismissed.

Part 9: Conclusion

73. For the reasons set out above, the claimants succeed on the primary issue, but fail on their other claims. I will hear counsels' submissions as to the wording of the order which this court should make in respect of the setting up of an independent investigation into the circumstances of Mr. Wright's death.

74. Finally, I thank counsel for both parties for their clear submissions and their considerable assistance in this case.

MISS SIMOR: My Lord, thank you for that judgment. I am trying to locate the relevant paragraph of the skeleton setting out the five points that we say the order should include in relation to the scope of the inquiry.

MR. JUSTICE JACKSON: Yes. I do not propose to enumerate five detailed points that the scope of the inquiry should include. I propose, in view of what the European Court of Human Rights has said about giving general guidance only, to make an order in simple terms, requiring the holding of an independent investigation.

MISS SIMOR: My Lord, our only concern is that the inquiry should not be confined to the pure question of how Mr. Wright died but rather include the question of the appointment, retention and lack of supervision of Dr. Singh, and be allowed also to examine the other deaths that took place, particularly Stephen Wilkinson's death. We are conscious of the costs and I am not suggesting that it should be a long inquiry. It may well be that this inquiry could take a fortnight or less, but our concern is that the fundamental question of how a doctor of Dr. Singh's competence was actually appointed and retained should be examined, and the other consequences of that.

MR. JUSTICE JACKSON: Miss Simor, it is apparent from the terms of my judgment that the question whether Dr. Singh had an excessive role in the treatment of Mr. Wright and the question whether Dr. Singh was inadequately supervised form part of the circumstances relating to Mr. Wright's death needing to be investigated. Presumably the inquiry, when it is set up, will have regard to the terms of my judgment. I am not making any order in respect of investigating Mr. Wilkinson's death, which is not an issue in these proceedings.

MISS SIMOR: Then, my Lord, we would ask for an order that the Home Secretary initiate a non-statutory public inquiry into the circumstances surrounding the death of Paul Wright, including the appointment, supervision and retention of Dr. Singh.

MR. JUSTICE JACKSON: Mr. Thompson?

MR. THOMPSON: My Lord, I inevitably come at this question from a different angle. Those instructing me have obviously actively been considering since last week's hearing what steps they could take in the event that your Lordship gave a judgment such as that which your Lordship has given. At the moment there is discussion with the Director General of the Prison Service. What is envisaged is, given that the focus of the concern is really the health issues that have arisen and the way in which Dr. Singh came to be appointed and supervised and the nature of the treatment that was given to Mr. Wright, that it would be appropriate for an investigation to be undertaken, probably by the regional health authority, and I think those instructing me would be grateful for some indication from your Lordship as to whether that is the type of inquiry your Lordship has in mind, though obviously we bear in mind both the approach in Jordan and the indication from your Lordship that it is essentially a matter for the Secretary of State to consider the judgment and to give effect to it.

MR. JUSTICE JACKSON: I take the view that the inquiry should be one in public, not in private, because the inquest which was in public did not deal with the real issues. I take the view that the family should be represented. I do not know if those indications are of any assistance to you.

MR. THOMPSON: I am sure that those behind me have taken them very much on board, my Lord.

MR. JUSTICE JACKSON: Mr. Thompson, bearing in mind that I must allow a proper margin for the Secretary of State, acting through the Prison Service, to exercise his discretion in relation to the details of the inquiry, would it be an appropriate course for me to leave the precise wording of the order until both sides have had an opportunity to consider the judgment for a few minutes -- or perhaps a few hours -- and to take instructions and

to see what agreement can be reached in the light of my judgment? I have given what I hope is reasonable assistance to the parties. If you cannot reach agreement between you as to the wording of the order, I will of course adjudicate. But at this stage I would prefer not to be unduly prescriptive.

MR. THOMPSON: My Lord, yes. I heard what Miss Simon said, and those words were taken down, and those instructing me have not had a chance to consider the judgment or the form of words. I would be grateful, before anything is written in stone, to have some input, but I leave it to your Lordship to decide what to do and what sort of timetable ----

MR. JUSTICE JACKSON: During the hearing I pressed both counsel as to the appropriate wording of an order, should the claimant succeed in principle, and both counsel (and particularly you, Mr.Thompson) were anxious that the form of wording should be left over for discussion after the substantive judgment.

I think the best course is that there should be a period for reflection before the final wording of the order is determined. I do not know whether you would like to come back at the end of this afternoon when I have dealt with the other matters in my list or whether that leaves you not quite enough time.

MR. THOMPSON: I suspect, given the nature of my client, that that may not be enough.

MR. JUSTICE JACKSON: How much time would you like,Mr. Thompson?

MR. THOMPSON: I did a similar case and the Court of Appeal there adjourned the matter for precisely one week, and then heard representations. As it happened, it was dealt with by agreement, but they adjourned it for a week.

MR. JUSTICE JACKSON: Yes, I would very much hope that this matter can be dealt with by agreement. It seems to me that I have dealt with the main issues between the parties.

Miss Simor, what do you say to the proposal that I should adjourn for one week the formulation of the order in order to see whether agreement can be reached and, if not, so that I can hear submissions of both sides when they have considered the judgment in more detail?

MISS SIMOR: My Lord, of course we are happy to have the defendant to have input concerning the order, but a week seems rather extended. Perhaps we could say Friday? Or Monday? We can probably agree by Friday, I would have thought.

MR. JUSTICE JACKSON: Yes. I am not in this court on Friday. I am here tomorrow and elsewhere on Friday and back next week.

MISS SIMOR: It does not seem to me that the order needs to be particularly precise -- or proscriptive, as your Lordship has said. The order can be wide in scope and, provided the defendant complies with the five requirements set up in Jordan, we will be happy with the investigation. It does not seem to me that we need to prescribe the exact nature of the inquiry in the order itself.

MR. JUSTICE JACKSON: Right. I propose to adjourn for a period of one week the formulation of the order consequential upon my judgment in order to give both parties the opportunity to consider the judgment. I hope and expect that agreement will be reached between the parties as to the wording of the order and that the hearing in one week's time will be a mere formality, not occupying further the resources of this court. If there is genuine disagreement, then I will resolve this disagreement at the hearing next week. In the event of genuine disagreement, I would appreciate a short skeleton from each side. But I stress that, with competent and responsible representation on both sides, I do not expect further debate to be necessary in this case.

MISS SIMOR: My Lord, is this an appropriate moment to apply for costs in this case?

MR. THOMPSON: I cannot oppose that. However, there is one other application.

MR. JUSTICE JACKSON: Shall I deal with costs first? The claimants are to have the costs of this action.

MR. THOMPSON: I am instructed to seek leave to appeal in this matter. I think it essentially goes to Parts 4, 5 and 6 of the judgment. I have had to consider that as the judgment was delivered, but those instructing me would want to present the matter in some detail. It was to some extent explored at last week's hearing -- the question of whether or not the Jordan conditions apply in all cases rather than (inaudible). The cases reported in the Court of Human Rights are very recent and they have mostly been, I think it is fair to say, on a very limited range of facts. My submission would be that -- your Lordship I do not think mentioned the Z judgment and the passage I took your Lordship to which at least indicated that in some circumstances civil proceedings were a sufficient form of remedy. I think it is in that area, if the matter is to be taken further on appeal, that the question of law has not been resolved and I would seek leave on that basis.

MR. JUSTICE JACKSON: Miss Simor?

MISS SIMOR: Obviously we oppose leave. It has occurred to me that if leave is being sought, perhaps the time for the terms of the order to be agreed needs to be shortened because of the terms of the appeal. If we have a week for the order and there is an appeal after that, we are again postponing the issue.

MR. JUSTICE JACKSON: That is a problem for the appellant. I take the view that this case raises difficult points upon which there are, and indeed have been addressed to me, formidable arguments on both sides. I also consider that the issues are important. Therefore I grant leave to appeal.

In relation to the hearing next week, if, as I expect, counsel reach agreement as to the wording of the order, all that need happen is that the agreed wording can be sent to me and I will initial it. The matter does not need to be relisted. Thank you both again.
