NORTHERN IRELAND HUMAN RIGHTS COMMISSION

COMMENTS ON THE INCOMPATIBILITY OF THE EMERGENCY LAWS IN NORTHERN IRELAND WITH INTERNATIONAL HUMAN RIGHTS LAW

Introduction

1. In May 1999, in his *Report on the Operation in 1998 of the Northern Ireland (Emergency Provisions) Act 1996* Mr John Rowe QC, the independent adviser appointed by the Government to oversee the emergency laws, drew the Government's attention to the fact that a number of the EPA's provisions may well infringe the European Convention on Human Rights. Nevertheless, in June 1999 the Government went ahead and renewed the EPA for a further year. In July 1999 the Northern Ireland Human Rights Commission (NIHRC) met with the Secretary of State for Northern Ireland, Dr Marjorie Mowlam, to express its serious concern at the Government's action. The Commission felt that the action was particularly unfortunate in light of the United Kingdom's claims to the European Court of Human Rights in both *Brogan v UK* (1989) 11 EHRR 117 and *Brannigan v UK* (1994) 17 EHRR 539 regarding the value in having an independent adviser as an additional safeguard against abusive emergency laws.

2. The Commission's concern increased when it became clear that the Government was seriously intending to enact a new EPA, albeit on a temporary basis, to fill the 'gap' between 24 August 2000, when the current EPA expires, and the earliest date by which new permanent UK-wide legislation (as proposed in the Lloyd Report: *Inquiry into Legislation Against Terrorism*, 1996, Cm 3420) can be enacted. Given the UK Government's commitment to the maintenance of high human rights standards, this proposal came as a genuine surprise. The Commission has expressed the view in its submission on the consultation paper on *Legislation Against Terrorism* (1998; Cm 4178) that, wherever practicable, the ordinary law should be relied on to deal with all suspected terrorist offenders. Emergency powers and procedures, whether or not they involve a derogation from the ECHR, should be introduced only where it can clearly be demonstrated that the ordinary law is insufficient. A formal declaration to that effect should be required. The Commission has proposed that any such declaration should be challengeable in judicial review proceedings.

3. The Commission made it clear at its meeting with Dr Mowlam in July that the Commission will be seeking to apply this approach to the renewal or continuance of any current emergency provisions. In particular, the Commission will ensure by all means at its disposal that any emergency legislation in force in Northern Ireland is fully compatible with the ECHR. We are helped in this regard by the incorporation of the European Convention into the law of Northern Ireland by the Human Rights Act 1998. Section 22 of that Act entered into force on 9th November

4. With these concerns in mind, the Commission is actively considering the manner in which it may judicially challenge the decision to renew those provisions of the EPA which may not be compatible with the ECHR (or the decision not to order that certain of these provisions should cease to be in force). Of course, whether particular provisions of the EPA are incompatible with the ECHR is a matter of opinion until a final ruling has been made on the point by the European Court of Human Rights. After conducting its own research into the matter, this Commission is firmly of the view that there is a very serious risk that, at least in particular cases, the following provisions of the EPA 1996 and PTA 1989 may be incompatible with the Convention. We shall deal in turn with sections 13, 20, 25, 30(5), 30(A), 30A(2) and 30A(4) of the EPA and then with section 14 of the PTA.

EPA, section 13: onus of proof on possession of proscribed articles

5. Section 13 of the EPA could well be incompatible with Article 6(2) of the ECHR. Article 6(2) gives individuals charged with criminal offences the right to be presumed innocent until proven guilty in accordance with law. The recent case of *R v Director of Public Prosecutions, Ex parte Kebeline and Others* demonstrates that the equivalent provisions of the Prevention of Terrorism (Temporary Provisions) Act 1989 [the PTA], sections 16A and 16B, are potentially incompatible with Article 6(2) of the ECHR, as Mr John Rowe QC recognised in his report of 11 February 1999 into the operation of the PTA during 1998. In the Divisional Court, Lord Bingham LCJ and Laws LJ granted a declaration, on the ground that section 16A was incompatible with Article 6(2), that the DPP's decision to proceed with the case [pursuant to section 19(1)(aa) of the PTA] was unlawful [(1993) 3 WLR 175]. Lord Bingham LCJ stated that 'Both sections [ss.16A and 16B] undermine in a blatant and obvious way the presumption of innocence.'

6. We acknowledge that the House of Lords, on 28 October 1999, allowed the DPP's appeal against the Divisional Court's decision. But the finding of the Divisional Court, that sections 16A and 16B each violated the ECHR, was not overturned by the Lords. The decision was based on the point that the Divisional Court did not have jurisdiction to judicially review a decision to proceed with a prosecution unless there was evidence of bad faith, dishonesty or some other exceptional circumstances. Lords Slynn and Steyn offered no view on whether section 16A of the PTA was compatible with Article 6 of the ECHR [section 16B ceased to be in question in the House of Lords because by then charges had been dropped in relation to the accused who had been charged with an offence under that section]. Lords Hope and Hobhouse seemed sceptical as to the general incompatibility of section 16A with Article 6(2), but suggested that there could be an incompatibility

> To introduce concepts of reasonable limits, balance or flexibility, as to none of which Article 6(2) says anything, may be seen as undermining or marginalising the philosophy embodied in the straightforward provision that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law…
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> On its face section 16A of the Act of 1989 enables a person to be found guilty of a very serious offence merely on reasonable grounds of suspicion. It may be highly inconvenient that this should not be permissible…but at best it is doubtful whether Article 6(2) can be watered down to an extent that would leave section 16A unscathed.

7. It is true that Lord Cooke also said that "one cannot exclude the possibility…that the European Court of Human Rights, whose jurisprudence in the field is not yet extensively developed, may be prepared to treat terrorism as a special subject". However, the degree to which allowance for the doctrine of margin of appreciation could determine the balance to be on the side of finding 16A and 16B *not* incompatible with Article 6(2) is open to serious question, particularly in light of the radically different political situation that now prevails in Northern Ireland compared to previous years. In general, the Court seeks to find a balance between protection of the individual versus the general interest of the community [cf. *Sporrong and Lönnroth v. Sweden* (1982) 5 EHRR 35, 52, para. 69]. More specifically, in *John Murray v UK* (1996) 22 EHRR 29 the Court did recognise the particular nature of terrorism and the threat it poses to a democratic society. However, recognition of the circumstance does not necessarily entail the finding of a balance wherein the evidential or persuasive burden of proof can be transferred to an accused The balance between competing interests and issues of proportionality, informed by the fundamental principles underlying the ECHR, would likely tend towards greater protection of the assumption of innocence in light of the radically changing security and political environment. In the view of the NIHRC this balance does not now justify the retention of Section 13.

EPA, section 20: power to enter and search premises without warrant

8. As Mr Rowe noted in his EPA report in May 1999, there is a risk that section 20 of the EPA could be held incompatible with Article 8 the ECHR. Section 20 provides no judicial supervision of the infringement of the right of privacy. Mr Rowe's view is supported by European Court decisions. In the case of *Funke v France* (1993) 16 EHRR 297, the judges examined the conditions governing the exercise of powers as well as the extent of the powers. Section 20 requires a condition of reasonable

EPA, section 25: power to stop and question

9. The report by Mr Rowe raises the question whether the power of the police and soldiers to stop and question without reasonable suspicion may be incompatible with Article 5(1)(b) of the ECHR. In the view of the NIHRC, however, there is unlikely to be a breach of the ECHR in respect of this power since there is a clear legal obligation under the EPA to comply with a request to stop and answer certain questions.

EPA, section 30(5): onus of proof on possession of certain documents

10. There is again a risk that this provision would be held to be incompatible with the right to presumed innocence under Article 6(2). Mr Rowe recognized this, stating that the measure makes possession of a document evidence of belonging to a proscribed organization. 'Belonging' being itself an offence, the provision aids the prosecution in proving the principal element of the offence.

EPA, section 30A: inference from silence during interviews in the absence of a solicitor

11. Under the Codes of Practice issued under section 61 of the EPA, the police are empowered to waive a detainee's right of access to a solicitor for the first 48 hours of detention. Having once granted access, the police can impose further delays of up to 48 hours before allowing additional meetings. Further, the solicitor is not entitled to be present during the police interview. In *John Murray v UK* (1996) 22 EHRR 29 the European Court found that this denial of access to a solicitor, combined with the trial court's right to draw adverse inferences from silence while being questioned, violated the detainee's right under Article 6 of the ECHR. The absence of access to advice from a solicitor before a person held for questioning decides whether to exercise the right to say nothing is incompatible with the right to a fair trial.

12. In an effort to meet the requirements created by this case, the Government introduced sections 30A(4) and 30A(6), which specifically take account of whether an accused had access to a solicitor prior to questioning. The legislation states that it is only in the event that the individual has access to a solicitor, and still refrains from providing information that is material to the offence and which he or she could reasonably be expected to mention, that the court can draw inference from the silence.

13. It is unclear what would happen in the event that section 30A(4)(b) were challenged in the European Court. Mr Rowe stated in his report that 'It seems to me that this absence [of a solicitor], especially coupled with the adverse inference from silence, may amount to a breach of Article 6' (para. 22). In *Murray* the Court said:

14. The purpose of the holding centers is to permit lengthy, uninterrupted questioning – an aim that could be undermined by access to a solicitor (*Review of the Northern Ireland Emergency Provisions Act 1991*, 1995, Cmd 2706, para.130). The decision of the House of Lords *R. v Chief Constable of the RUC, Ex parte Begley* [1997] 4 All ER 833 holds that rights of access to a solicitor in court proceedings do not extend to the interview chambers. Although British law does not view access to a solicitor as an absolute right, it is likely that Article 6(3) requires a greater degree of access. Not only was the specific question left open by *Murray*, but in a previous case (*Biondo v Italy* (1990) 64 DR 5) an applicant's final appeal was rejected when his attorney was not present. In this case the Commission stated that it could not 'underestimate the importance of oral intervention of lawyers' (p.5). It could be argued that, in the UK, where the case is effectively composed during the initial proceedings and not later by an investigating magistrate, early legal advocacy is even more important (see *e.g.* B Fitzpatrick and C Walker, "Holding Centres in Northern Ireland, the Independent Commissioner and the Rights of Detainees" [(1999) EHRLR 27 at p. 33].

15. As Mr Rowe also points out, in *Murray v UK*, the court's judgment was that the defendant's 'right to silence' is not an absolute right: 'whether it is fair to draw an adverse inference from silence must be judged on the circumstances of each case' (para. 23). In *Murray* itself, the coupling of an adverse inference with lack of access to legal advice was sufficient to provide a breach of Article 6. Left unpursued in Murray was that, even when Murray got a solicitor, the solicitor could not stay in the interviews. It is conceivable that circumstances of a case could arise in which *either* lack of access to a solicitor *or* the inference gathered could alone be held in breach of the European Convention.

EPA, section 30A(2): the evidence of a police officer on membership charges

16. There is a significant risk that this provision, inserted into the EPA by the Criminal Justice (Terrorism and Conspiracy) Act 1998 in the aftermath of the Omagh bombing, could be held to be incompatible with Article 6 of the ECHR. The aim of sub-section 30A(2) is to allow the courts to rely indirectly on material on which

17. The Criminal Justice (Terrorism and Conspiracy) Act 1998 included three 'safeguards' to protect the interests of the accused. First, it required that the police officer be at or above the rank of superintendent. Although the intention here was to ensure the appropriate sense of responsibility, the practical effect is that the individual presenting his or her opinion is even further removed from the source of information and the less accountable for any discrepancies in the record. Either way, the opinion professed remains inscrutable. Second, the opinion is to be transmitted orally. Whilst this might suggest an opportunity for cross-examination, claims of public interest immunity (to protect intelligence sources) would likely suggest otherwise. Third, the oral testimony alone is not a sufficient basis on which to convict. However, coupled with an equally weak section 30A(4), discussed below, a conviction could nevertheless still be attained.

18. Article 6 of the ECHR includes provisions related to a fair trial. More specifically, Article 6(3)(d) gives an accused person the right to call and examine witnesses. Although the accused's right to cross-examine witnesses is not absolute [*Engel v. Netherlands* (1976) 1 EHRR 647], such limits as are set must be consistent with the principle of equality of arms: 'Everyone who is a party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at substantial disadvantage *vis-à-vis* his opponent' [*Kaufman v. Belgium* No. 10938/84, 50 DR 98 at 115 (1986)]. The realisation of this principle is the essential aim of Article 6(3)(d). Although the European Court has permitted evidence to be introduced without the persons whose direct evidence it is being summoned as witnesses at the trial [cf *Kostovski v. Netherlands* (1989)], in cases where the person does not appear as a witness, Articles 6(1) and 6(3)(d) would be violated by a statement admitted as central evidence against the accused without the accused having the chance to confront the witness during the preceding investigation.

19. As has been argued extensively elsewhere [see Barry McDonald, 'Counsel's Opinion Re: Criminal Justice (Terrorism and Conspiracy) Act 1998,' *Paper for the Standing Advisory Commission on Human Rights*, 24th Annual Report, Cmd 265, September 1998] the Crown will most likely rely on the evidence provided by a police officer when the other evidence proves insufficient to seal the case. Supporting this argument, on the day of the post-Omagh Bill's introduction to Parliament the Prime Minister specifically asserted, 'the basic aim [of the Bill] is to make it easier to achieve convictions for membership of the organizations concerned' (*HC Debs*, 2nd September 1998, col. 695). A trial in which great

> Not only were the latter [the informers] not heard at the trials but also their declarations were taken, whether by the police or the examining magistrate, in the absence of Mr Kostovski and his counsel. Accordingly, at no stage could they be questioned directly by him or on his behalf. It is true that the defence was able…to question one of the police officers and both of the examining magistrates who had taken the declarations. It was also able…to submit written questions…through the examining magistrate. However, the nature and scope of the questions it could put in either of these ways were considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved...If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious. (para.42)

20. In addition to the above concerns, it is conceivable that the acceptance of a police officer's testimony as evidence could be interpreted by the European Court as the surrender of judicial function to the Executive [*Beaumartin v France* (1994)]. Failure to provide all relevant information and documentation could further be found in violation of Article 6(3)(b), which requires adequate 'facilities for the preparation of…defence' [*Edwards v UK* (1992) 15 EHRR 433].

21. One of the Government's own advisers on counter-terrorist measures made this point during the debate on the Criminal Justice (Terrorism and Conspiracy) Bill. Lord Lloyd considered the European Court's response to a conviction based in large part on the statement of a police officer and said: 'Would that conviction have the slightest chance of standing up in Strasbourg? …It would not have the slightest chance. It certainly would not stand up in our courts once the Human Rights Act comes into force' (*HL Debs*, 3rd September 1998, col. 38) Other independent, government-appointed reviewers concur with Lord Lloyd. A similar

22. Most recently, in his report to Parliament in May 1999, Mr Rowe clearly stated that 'there is likely to be a breach of the Convention' with regard to section 30A. He cited a situation where a police officer may assert that an individual, who is not a witness at the trial, has related to the police that the defendant was a member of a proscribed organisation. Mr Rowe writes that in such a case, 'I think there would be a breach of Article 6(3)(d)' (para. 28). With regard to a second scenario, where the police officer's evidence consists of a bare assertion or an opinion, with no reason for the evidence, Mr Rowe writes, 'Again, in my view Article 6(3)(d) would be breached' (para. 28).

23. Section 30A(2) of the EPA has not yet been relied upon in Northern Ireland. No charges have been brought under its auspices and we understand that the police are reluctant to use the provision in court. The police have, however, threatened to use these powers in the course of questioning suspects. Examined in the light of *John Murray v UK* (1996) 22 EHRR 29, this practice in and of itself may well lead to a breach of the European Convention. Even if the court allowed for the drawing of inferences from silence (and it is very questionable whether this would be found compatible with the Convention, see the discussion below), section 30A(2) can be seen to place a higher degree of inducement for the individual to talk than was present in *Murray*. Such compulsion, depending upon the facts of the case, may well be found to be a violation of the ECHR.

24. It is worth noting that, in the Republic of Ireland, upon whose legislation the provision introduced by the 1998 Act was based, the equivalent provision has been rendered inoperative by a series of judicial decisions. Section 3(2) of the 1972 Act amending the Offences Against the State Acts 1939 and 1940 dictates that:

> Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that he believes that the accused was at a material time a member of an unlawful organization, the statement shall be evidence that he was then such a member.

In practice this clause initially served as a basis for conviction when individuals refused to recognize the court. However, when individuals thus accused began to challenge the accusation, in the absence of corroborating evidence, Irish courts held that conviction on this count alone was not possible. For instance, in *The People v. Ferguson* (1975) the Court of Criminal Appeal found that the accused had not denied the charge on oath; had he done so, the 'value and cogency to be attached to the expression of the Chief Superintendent's belief would obviously be very much

diminished.' *O'Leary v. AG* (1991 ILRM 454), *The People v. Cull* (Court of Criminal Appeal 1980) and *The People (DPP) v. McGurk* [1994] 2 IR 579) all similarly challenged the constitutionality of this provision. As a result of judicial interpretation in these cases, the practice has developed that if the individuals accused of the crime object to the charges thus laid, without corroborating evidence, the courts do not convict.

EPA, section 30A(4): inferences from silence in respect of membership charges

25. Section 30A(4), also inserted by the Criminal Justice (Terrorism and Conspiracy) Act 1998, finds a precursor in the Criminal Evidence (Northern Ireland) Order 1988, which permits the court to draw adverse inference from the silence of the accused in four situations, *viz.* if the accused fails –

(a) to mention a fact during the interview which he or she later relies on to provide a defence at the trial (article 3),
(b) to give evidence at the trial (article 4),
(c) to account for an incriminating object, substance, or mark (article 5), or
(d) to account for his or her presence at a particular location at or about the time of the offence in question (Article 6).

In any of these circumstances, the 1988 Order allows the court to draw whatever inferences 'appear proper' and to rely on such assumptions as corroboration of other evidence. Article 2(4) stipulates that such inferences cannot form the sole basis for commitment for trial, findings of a case to answer or conviction of an offence, but no further direction is provided about how much weight to accord such inferences.

26. The European Court of Human Rights first delineated a right of silence as being inherent in Article 6 of the Convention in the case of *Funke v France* (1993) 16 EHRR 297. The issue was raised again in *Saunders v UK* (1997) 23 EHRR 313, where, under sections 434 and 436 of the Companies Act 1985, there was compulsion to answer questions in a direct sense, rather than through coercion or inducement. By 16 votes to 4 the European Court held that Article 6 (1) had been breached, adding:

> …bearing in mind the concept of fairness in Article 6, the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may later be deployed in criminal proceedings in support of the prosecution case…[W]hat is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial. (para. 71)

27. In *John Murray v UK* (1996) 22 EHRR 29 the European Court of Human Rights further determined that the right to remain silent and provisions against self-incrimination are integral to fair procedure under Article 6 (para. 45). It also determined that basing conviction *solely or mainly* on the accused's silence or refusal to answer questions or give evidence was incompatible with the immunities protected by Article 6 (para. 47). Simultaneously, the Court held that such immunity should not keep the defendant's silence from being taken into account in evaluating other evidence, where the situations 'clearly call for an explanation' (para. 47). Whether the drawing of adverse inferences from silence violates the ECHR needs to be determined in light of the circumstances, with particular attention paid to the weight attached to such inferences by the courts and the degree of compulsion involved. In *Murray* the European Court determined that the weight of evidence against the accused was such that his refusal to provide a sufficient explanation was a matter of common sense, thus leaving the fair trial provisions unscathed. Simultaneously, the Court noted that it is 'of paramount importance for the rights of the defence that the accused has access to a lawyer at the initial stages of police interrogation' (para. 66).

28. Section 30A(4) closed what the Crown viewed as a loophole in the 1988 Order. The previous instrument provided that inferences could be drawn only where the accused omitted information 'relied on in his defence.' Section 30A(4) takes it one step further by referring to omission of 'a fact which is material to the offence and which he could reasonably be expected to mention.' This narrows the ability of the accused to avoid the drawing of adverse inferences from his or her silence and, as such, is an even more significant inroad into the right not to incriminate oneself.

29. It is very likely that section 30(A)(4) would be held to be incompatible with ECHR Article 6 in particular cases. Mr Rowe clearly states: 'In my view there is a risk of a breach of Article 6 [in relation to section 30A(4)]' (para. 24). He makes the point that section 30A applies only in the case of the offence of membership, with other charges remaining unaffected. However, as membership is often charged and tried along with other offences, the caution administered by the police in respect of those offences will be inappropriate to cover the accused's failure to answer questions concerning membership. Adverse inferences from silence arising in different circumstances could give rise to confusion, thus creating the possibility of an unfair trial.

30. In addition, it is open to question whether the *Murray* decision, which related to a Diplock Court, could be applied to a jury trial. One aspect emphasized in *Murray* was the fact that the inference had been drawn by a judge with considerable experience in such matters, who was acting as a tribunal of fact, and who issued decisions in a form which could be subjected to judicial scrutiny on appeal. If Diplock courts were to be abandoned, very serious consideration would need to be given to a repeal of section 30A(4). In the European Commission's consideration of *Murray*, the UK member, Nicholas Bratza, QC stated that, 'When it is a jury which must decide, without giving reasons, what adverse inferences, if any, to draw

31. It is worth noting that section 30A(4) is also inconsistent with the United Nations' International Covenant on Civil and Political Rights, which the UK has ratified. In July 1995 the UN's Human Rights Committee considered the UK's Fourth Periodic Report under the Covenant, at that time specifically addressing the Criminal Evidence (NI) Order 1988, the predecessor to the provisions imposed by the Criminal Justice (Terrorism and Conspiracy) Act 1998. The Committee asserted that the measures in question 'violate various provisions in Article 14 of the Covenant, despite a range of safegaurds built into the legislation and the rule enacted thereunder' (CCPR/C/79/Add 55, 27 July 1995, para.17).

32. As in the case of section 30A(2), the related experiences of the Republic of Ireland may prove instructive. Like section 30A(4), section 52 of Ireland's Offences Against the State (Amendment) Act 1998 obliges individuals to answer questions; it goes on to say that a failure to answer questions can result in a 6-month prison sentence. A challenge to the validity of section 52 has already been made under the ECHR: on 21 September 1999 the European Court declared the application in *Heaney and McGuinness v Ireland* admissible, stating that it considered it raised serious and complex issues under Articles 6(1), 6(2), 8 and 10 of the Convention. The Court specifically cited the applicants' appeal to the entitlement to maintain their own personal lives under Article 8 and to the correlative right not to provide information under Article 10. Apparently a second case, *Quinn v Ireland*, is to be considered alongside *Heaney and McGuinness*. As a result of these cases it is reasonable to assume that the Committee in the Republic of Ireland which is currently examining the Offences Against the State Act, under the chairmanship of Mr Justice Hederman, may recommend the repeal of section 52. The NIHRC would also contend that the Secretary of State for Northern Ireland should immediately repeal section 30(A) of the Northern Ireland (Emergency Provisions) Act 1996.

PTA section 14: power of detention

33. Under section 14(5) of the Prevention of Terrorism (Temporary Provisions) Act 1989 the Secretary of State has power to extend the period of detention of persons suspected of terrorist involvement for up to seven days. In 1988 the European Court of Human Rights held in *Brogan and Others v UK* (1989) 11 EHRR 117 that the provisions in the PTA 1984 allowing for detention beyond four days constituted a breach of Article 5(3) of the Convention: 'Everyone arrested or detained…shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial.' Concern raised by the Court focused on the lack of judicial access provided by the PTA. The court ruled that even the shortest period for which one of the four individuals had been held, four days and six hours, violated the

34. In response to the ruling the UK entered a derogation under Article 15, which allows that 'in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.' In a letter of 23 December 1988 the UK lodged a similar derogation with regard to Article 5 of the UN's International Covenant on Civil and Political Rights. Again, the Government noted the terrorist situation in the UK and defended its use of detention accordingly. In 1993 the European Court of Human Rights upheld the validity of the derogation in *Brannigan and McBride v UK* (1994) 17 EHRR 539. Other attempts to challenge the four days have also failed (*e.g.*, *McConnell v UK* (App No 14671/89) *and McGlinchey, Quinn & Barrow v UK* (App Nos 15096-8/89)).

35. The circumstances which surrounded the above cases no longer apply in Northern Ireland and therefore it is at least questionable whether the European Court would at the present time uphold the derogation. For example, in 1999 to date there have been seven deaths attributed to the Troubles (*Hansard*, 20 October 1999, vol. 336, col. 596). In view of the on-going peace process and the Government's claim that the paramilitaries have held their cease-fires, the declaration of a 'public emergency threatening the life of the nation' may no longer be valid. Aside from these considerations, the Human Rights Act 1998 signifies the UK's wish to bring domestic law into line with the European Convention. The Government has two options: either the length of detention could be altered to bring the law into line with the ECHR or judicial review could be substituted for executive authority for extensions. The effect of either of these would be to allow the UK to withdraw the derogation.

36. In his 1996 report, *Inquiry into Legislation Against Terrorism* (Cm 3420), Lord Lloyd noted that the UN Human Rights Committee called in 1995 for the UK government to take further steps to permit the early withdrawal of its derogation from the UN's International Covenant on Civil and Political Rights and to 'dismantle the apparatus of laws infringing civil liberties which were designed for periods of emergency.' He concluded that 'The existence of the emergency legislation has, itself, caused some damage to the UK's international reputation in the field of human rights' (p. 10).

The effect of incompatibility

37. The practical effect of a decision by the European Court that any of the provisions considered in this paper violate the European Convention on Human Rights would

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