

Ms Pam Morris  
Joint Committee on Human Rights  
Committee Office  
House of Commons  
7 Millbank  
LONDON SW1P 3JA

29 December 2003

Dear Ms Morris

Due to the many competing demands on its limited resources the Northern Ireland Human Rights Commission was regrettably unable to provide written evidence to the current Inquiry by the deadline, but it retains a keen interest in the subject matter, not least because it is at present reviewing a number of matters connected to recent deaths in custody within the Northern Ireland prison system. It has also developed a certain amount of expertise on Article 2 ECHR issues through casework in the domestic and European courts and through other areas of its work, and has worked on many other aspects of human rights protection in prisons and other custodial environments. We were, for example, consulted by Government in relation to the drafting of the recently submitted UK Report under the UN Convention Against Torture, and we work also on the Council of Europe instruments and protection mechanisms.

The Commission welcomes the Joint Committee's decision to examine, in particular, the numerous human rights issues around the investigative process that should follow a death in custody. The Commission would therefore like to draw the Joint Committee's attention to the attached documents, namely a copy of our intervention in the Amin case in the House of Lords in July past, with an annex. In summary, our view is that in all cases of death in custody, an independent inquiry (more than just an inquest) should be held.

We would be most grateful if you could circulate this material to the Joint Committee members, either as evidence (if they are disposed to allow so late a submission) or merely as background reading.

We are, of course, also very interested in the other focus of your Inquiry, namely the prevention of deaths and self-harm. This Commission and its sister Commission in the Republic of Ireland have been made aware of the significant over-representation of Irish prisoners among those who have died through suicide in Brixton prison in recent years, and we hope that your Inquiry will take full account of the particular situation of Irish and other minority ethnic prisoners.

The Commission regrets the absence of an agency in Northern Ireland equivalent to the Prisons Ombudsman, since we believe that access to such an independent agency would be helpful in fostering a human rights culture in prisons. We note that the Inquiry is shortly to take evidence from the Ombudsman, and also from the Chief Inspector of Prisons, who, unlike the Ombudsman, operates in Northern Ireland in much the same way as in England and Wales, albeit on a non-statutory basis. Given the very high quality of her work we see no urgent need for change in that arrangement, which we understand is to continue under the new criminal justice oversight system, but we would respectfully invite the Committee to consider whether the Ombudsman should have a statutory remit in Northern Ireland or whether an equivalent might be created within this jurisdiction.

With renewed apologies for the lateness of this communication, and with our best wishes to the Committee, and especially to its new members, for the New Year,

Yours sincerely

Ciarán Ó Maoláin  
Researcher, Legislation & Policy

*(previously sent by e-mail)*

**IN THE HOUSE OF LORDS**  
**ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)**  
**(CIVIL DIVISION)**

BETWEEN:

THE QUEEN on the application of IMTIAZ AMIN

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

---

**WRITTEN SUBMISSIONS BY THE INTERVENOR**  
**THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION**

---

1. These submissions set out the views of the intervenor on the obligations imposed by Article 2 ECHR on the Government of the United Kingdom in the context of the deaths of persons held in custody.
2. No emphasis is required of the fundamental nature of the right recognised by Article 2 ECHR save to note that textually the Article does not purport to establish the right (cf. the usual formula 'everyone has the right to...') but rather requires its protection by law.
3. That protection is now acknowledged to assume two aspects; substantive and adjectival and it is the second with which this appeal is concerned. Central to the resolution of this appeal is the extent to which the state is obliged to provide an effective official investigation into the deaths of persons in custody.
4. In certain jurisdictions to enter custody implies a descent to a Hobbesian state of nature where brutality and violent death are common. It is a fundamental principle of the modern common law that persons sent to prison in the United Kingdom retain all civil rights save those taken away by express statutory provision or by necessary implication from the fact of imprisonment: see *Raymond v Honey* [1983] 1 AC 1.
5. Prisoners to a manifestly greater extent than the great majority of citizens are

- under the control of state officials; the living conditions including the conditions under which a prisoner associates with others are largely determined by the state.
6. It is submitted that the nature of the prisoner's relationship with the state are central to the existence of the Article 2 ECHR duty to investigate and the scope of that duty.
  7. In the context of the present appeal it is submitted that the existence of the duty to investigate is uncontentious.
  8. Once it has been established that the duty to investigate has been engaged, it is submitted that its scope should be defined by reference to the following elements identified in *Jordan v UK*:
    - (a) The State should act on its own initiative in instigating the investigation, rather than depending upon the application of the victim's family.
    - (b) Where the killing is alleged to have been carried out by State agents the investigation, to be effective, will generally have to be carried out by persons independent of those implicated in the events. This requires not only a lack of hierarchical or institutional connection, but also an actual independence in practical terms.
    - (c) The investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was justified.
    - (d) The investigation must be capable of leading to the identification and punishment of those responsible.
    - (e) The relevant authorities must take reasonable steps to secure evidence concerning the events.
    - (f) The investigation must be carried out promptly and with reasonable expedition.
    - (g) There should be a sufficient degree of public scrutiny of the investigation or its results in order to secure accountability in practice as well as theory.
    - (h) There should be a sufficient involvement of the deceased's next-of-kin in order to safeguard their legitimate interests.
  9. It is submitted that the above factors represent the minimum elements to be expected of the State in the investigation of killings. The Northern Ireland Human Rights Commission accepts that it is not practicable to lay down a rigid set of conditions to be followed, governing the compatibility of any particular investigation as much will turn on the specifics of each case. However lack of

adherence to the minimum standards set out above will render an investigation ineffective and inadequate.

10. In this case the Court of Appeal, at paragraphs 62 and 63 of its judgement, dealing with the elements of publicity and family participation laid stress on a flexible approach dependent upon the facts of the individual case:-

*“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.”*

11. Against that approach it is submitted that the relationship of a prisoner with the state calls for no lesser Article 2 protection than that extended where a state agent is credibly accused of murder or manslaughter. The killing of a prisoner in circumstances where the state may have been negligent raises no less amount (and in certain circumstances perhaps more) concern regarding the death than where the state directly causes the death by the imposition of lethal force.

12. Accordingly it is submitted that the Court of Appeal was wrong to hold in the context of the death of a prisoner through the negligence of the state (paragraph 63) “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”.

13. There is nothing in *Jordan v UK* or in *Edwards v UK* to support such a bifurcated approach. In *Jordan* at paragraph 105 the European Court of Human Rights observed:

*“The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life, and in those cases involving State agencies or bodies, to ensure their accountability for deaths occurring under their responsibility.”*

14. Publicity and participation are essential to accountability as the Court emphasised in *Jordan* at paragraph 109:-

*“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.”*

15. Within the general principle set out above there is clearly some room for flexibility. It is however necessary to have in place a structure capable of being deployed in a manner compliant with Article 2. It may be that a provision such as section 7 of the Prison Act (NI) 1953 might with adjustment be a useful model.
16. Attention is respectfully drawn to the following recent cases from Northern Ireland, which it is submitted, offer some further discussion of the issues.

*In the Matter of an Application by Hugh Jordan for Judicial Review [2003] NIQB 1*

Mr. Jordan was also the Applicant in the case of *Jordan v UK*. This latest application focused on the failure of the Director of Public Prosecutions to provide reasons as to why the police officer responsible for shooting and killing his son, Pearse, would not be subject to prosecution. The Applicant contended that the DPP should have provided those reasons, in light of the European Court of Human Rights decision in *Jordan v UK*. The Respondent argued that the *Jordan v UK* decision should not be followed as it had failed to take account of relevant international law and practice, particularly in relation to the need for prosecutors to keep matters confidential in the interests of justice. Furthermore the Respondent argued that the relevant acts in this case occurred prior to the commencement of the provisions of the Human Rights Act 1998 on 2<sup>nd</sup> October 2000.

At paragraph 11 of his judgement Kerr J quotes from the *Jordan v UK* decision:

“123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

124. In this case, Pearse Jordan was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however was not the case.”

At paragraph 12 of the judgement Kerr J stated:

“.. it is clearly implicit in the court’s decision that the DPP will not be required to give reasons for deciding not to prosecute in every case. The conclusion that such an explanation was required to satisfy the requirements of article 2 in the *Jordan* case arose because of several factors that pertain in this case. They are (i) doubts about the lack of independence of the police investigation; (ii) the absence of the opportunity for public scrutiny; (iii) there was no other forum in which the reasons that the death occurred were to be examined; (iv) there was therefore “no reasoned decision available to reassure a concerned public that the rule of law had been respected”.

In the event Kerr J dismissed the application for judicial review, but only on the basis of the retrospectivity issue. At paragraph 25 he stated,

“But for the question of retrospectivity ... I can find no reason not to follow the decision of the European Court, finding myself in complete agreement with the reasoning that underlies it. In particular I do not consider that the fact that the inquest has not been completed is a reason that the DPP should be absolved of the need to give reasons. The possibility that the inquest may, at some unspecified future time, supply an answer to the unresolved questions surrounding the death of Pearse Jordan cannot relieve the DPP of his duty to explain the reasons for deciding not to prosecute if that will “reassure a concerned public that the rule of law had been respected.”

17. It is submitted that the above comments indicate a willingness to adopt the requirements of *Jordan v UK* as guiding principles against which the state’s Article 2 investigation can be assessed, and that it in particular stresses the importance of accountability and public scrutiny to a level necessary to ensure the effectiveness of the investigation.

18. *In the Matter of an Application by Jonathon McKerr for Judicial Review* [2003] NICA

1

In this case the Appellant was also the Applicant in the case of *McKerr v UK* (Application Number 28883/95) in the European Court of Human Rights. This case, involved as it did many of the same issues, was conducted simultaneously with *Jordan v UK*, *Kelly & Others v UK* and *Shanaghan v UK*. The European Court held that the state had failed to discharge its Article 2 investigation obligation in this case. The Applicant was awarded £10,000 compensation as just satisfaction, and the Court’s decision became final on 4<sup>th</sup> August 2001. The following January the Appellant issued judicial review proceedings in respect of the state’s failure to carry out an appropriate investigation. The Application was refused at first instance and the Appellant appealed.

The Respondent argued that the payment of the just satisfaction sum removed the Appellant’s status as a victim and he could not therefore complain of an ongoing failure to provide the necessary investigation. The Court of Appeal rejected this

argument and, at paragraph 13 of Carswell LCJ's judgement, granted a declaration that there was a continuing breach of Article 2, which required to be addressed by the State.

19. Although McKerr is now under appeal to your Lordships' House it is submitted that the Court of Appeal's decision is illuminating as a working-out of the *Jordan* principles.

20. *In the Matter of an Application by David Wright for Judicial Review* [2003] NIQB 17

The Applicant's son, Billy Wright, was the leader of a loyalist paramilitary organisation, the LVF. In December 1997, while a serving prisoner in HMP Maze, he was shot and killed by three INLA prisoners. These individuals were prosecuted and convicted of murder in October 1998. They did not give evidence at the trial and it was not disclosed as to how they were able to obtain the equipment used to gain access through a fence, to assemble an improvised gun, and to make their way to where the deceased was. An inquest was held but failed to reveal the full circumstances of the events leading to his killing and it did not consider the suspicion of collusion. A prison service inquiry did not comment on the precise circumstances or persons involved due to the ongoing police investigation. Furthermore this investigation failed to interview all prison officers who might have been able to provide relevant information.

The Applicant and the Human Rights Commission wrote to the Police, seeking provision of the police investigation file. This was refused on the grounds that it was confidential to the police and the DPP.

The Applicant sought judicial review of this decision. At paragraph 20 of his judgement Kerr J held that,

“A decision on whether the police file requires to be disclosed must be taken in the context of what is necessary for the full and effective inquiry into the death of Mr. Wright... it is not necessarily the case that the police file be disclosed to (the Applicant) in order that an effective investigation of his son's death is undertaken.

However on the facts of this case Kerr J, at paragraph 15, also held that,

“I am satisfied that an article 2 compliant investigation into the death of Mr. Wright has not yet taken place. Such an investigation would have to address directly such issues (among others) as:- how the murderers were able to penetrate the forecourt area unobserved; how they were able to obtain the materials to manufacture the weapons used; how they knew that Mr. Wright would be in the prison van at the time the murder took place and whether there was any evidence of collusion on the part of members of prison staff. None of the inquiries so far held has provided a satisfactory answer to these questions.”



It is submitted that this case provides yet another example of what is submitted is the proper application of to the *Jordan* principles to the assessment of the State's discharge of the Article 2 investigation obligation.

21. The Human Rights Commission notes that the Billy Wright case is one of several controversial cases of killings in the Northern Ireland, where state involvement or collusion is alleged, currently being considered by retired Canadian Judge Peter Cory as to whether further inquiries are required. At paragraph 21 Kerr J commented that if Judge Cory were to recommend that the Wright killing should have a further inquiry, it would be at that stage that it would be appropriate to determine whether the police file should be disclosed.
22. It is further submitted that the other aspects of state investigation in the *Amin* case were insufficient. The police investigation and subsequent criminal proceedings were unable to give rise to accountable scrutiny of the potential failings in the systems and policies employed by the Prison Service both at Feltham YOI and more generally. The CRE inquiry was not to be sufficiently public and it was primarily designed to consider racism within the Prison Service. The inquest was opened, adjourned and not reconvened in light of the prosecution and conviction of the killer for murder.
23. The Human Rights Commission notes the recommendations of the Fundamental Review of Death Certification and Investigation in England, Wales and Northern Ireland June 2003, and finds much merit in many of its recommendations. In particular the Commission respectfully refers your Lordships to the recommendation that public judicial inquests should be mandatory for deaths occurring while in custody (unless certified that the death was beyond reasonable doubt by natural causes) and traumatic deaths occurring possibly as a result of police or other law enforcement operations. [Page 80, paragraphs 1 & 2, and page 206, paragraphs 14, 16 & 17.]
24. Consonantly with its role as intervenor the Northern Ireland Human Rights Commission
  - (i) hopes to afford such further assistance in oral submissions as the case requires, and
  - (ii) offers no submissions on the disposition of this appeal insofar as this turns on the resolution of disputed facts but prays that the principles supported by the Commission may find expression in the decision of Your Lordships' House.

Signature of intervenor

Brice Dickson  
Chief Commissioner  
Northern Ireland Human Rights Commission  
Temple Court  
39 North Street  
BELFAST  
BT1 1NA

Signature of Counsel

John F Larkin QC

Peter Coll BL.

1. *In the Matter of an Application by Hugh Jordan for Judicial Review* [2003] NIQB 1

Mr. Jordan was also the Applicant in the case of *Jordan v UK*. This latest application focused on the failure of the Director of Public Prosecutions to provide reasons as to why the police officer responsible for shooting and killing his son, Pearse, would not be subject to prosecution. The Applicant contended that the DPP should have provided those reasons, in light of the European Court of Human Rights decision in *Jordan v UK*. The Respondent argued that the *Jordan v UK* decision should not be followed as it had failed to take account of relevant international law and practice, particularly in relation to the need for prosecutors to keep matters confidential in the interests of justice. Furthermore the Respondent argued that the relevant acts in this case occurred prior to the commencement of the provisions of the Human Rights Act 1998 on 2<sup>nd</sup> October 2000.

At paragraph 11 of his judgement Kerr J quotes from the *Jordan v UK* decision:

*“123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.*

*124. In this case, Pearse Jordan was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however was not the case.”*

At paragraph 12 of the judgement Kerr J stated:

*“.. it is clearly implicit in the court’s decision that the DPP will not be required to give reasons for deciding not to prosecute in every case. The conclusion that such an explanation was required to satisfy the requirements of article 2 in the Jordan case arose because of several factors that pertain in this case. They are (i) doubts about the lack of independence of the police investigation; (ii) the absence of the opportunity for public scrutiny; (iii) there was no other forum in which the reasons that the death occurred were to be examined; (iv) there was therefore “no*

*reasoned decision available to reassure a concerned public that the rule of law had been respected”.*

In the event Kerr J dismissed the application for judicial review, but only on the basis of the retrospectivity issue. At paragraph 25 he stated,

*“But for the question of retrospectivity ... I can find no reason not to follow the decision of the European Court, finding myself in complete agreement with the reasoning that underlies it. In particular I do not consider that the fact that the inquest has not been completed is a reason that the DPP should be absolved of the need to give reasons. The possibility that the inquest may, at some unspecified future time, supply an answer to the unresolved questions surrounding the death of Pearse Jordan cannot relieve the DPP of his duty to explain the reasons for deciding not to prosecute if that will “reassure a concerned public that the rule of law had been respected.”*

2. It is submitted that Kerr J in his judgement accepted that *Jordan* has consequences for the nature of the State’s investigation under Article 2 and that the guiding principles of *Jordan* should be adopted as the requirements against which the state’s Article 2 investigation can be assessed. In particular this case stresses the importance of accountability and public scrutiny to a level necessary to ensure the effectiveness of the investigation.
3. *In the Matter of an Application by Jonathan McKerr for Judicial Review* [2003] NICA 1

In this case the Appellant was also the Applicant in the case of *McKerr v UK* (Application Number 28883/95) in the European Court of Human Rights. This case, involving as it did many of the same issues, was conducted simultaneously with *Jordan v UK*, *Kelly & Others v UK* and *Shanaghan v UK*. The European Court held that the state had failed to discharge its Article 2 investigation obligation in this case. The Applicant was awarded £10,000 compensation as just satisfaction, and the Court’s decision became final on 4<sup>th</sup> August 2001. The following January the Appellant issued judicial review proceedings in respect of the state’s failure to carry out an appropriate investigation. The Application was refused at first instance and the Appellant appealed.

4. The Respondent argued that the payment of the just satisfaction sum removed the Appellant’s status as a victim and he could not therefore complain of an ongoing failure to provide the necessary investigation. The Court of Appeal rejected this argument and, at paragraph 13 of Carswell LCJ’s judgement, granted a declaration that there was a continuing breach of Article 2, which required to be addressed by the State.
5. It is notable that the circumstances of this killing had lead to a criminal trial, prior to the cases before the European Court and latterly the Court of Appeal, in which

three state agents were acquitted. Both Courts in holding that there was a continuing breach of Article 2 were in effect holding that the criminal trial did not suffice.

6. Although McKerr is now under appeal to your Lordships' House it is submitted that the Court of Appeal's decision is illuminating as a working-out of the *Jordan* principles.
7. *In the Matter of an Application by David Wright for Judicial Review* [2003] NIQB 17

The Applicant's son, Billy Wright, was the leader of a loyalist paramilitary organisation, the LVF. In December 1997, while a serving prisoner in HMP Maze, he was shot and killed by three INLA prisoners. These individuals were prosecuted and convicted of murder in October 1998. They did not give evidence at the trial and it was not disclosed as to how they were able to obtain the equipment used to gain access through a fence, to assemble an improvised gun, and to make their way to where the deceased was. An inquest was held but failed to reveal the full circumstances of the events leading to his killing and it did not consider the suspicion of collusion. A prison service inquiry did not comment on the precise circumstances or persons involved due to the ongoing police investigation. Furthermore this investigation failed to interview all prison officers who might have been able to provide relevant information.

8. The Applicant and the Human Rights Commission wrote to the Police, seeking provision of the police investigation file. This was refused on the grounds that it was confidential to the police and the DPP.
9. The Applicant sought judicial review of this decision. At paragraph 20 of his judgement Kerr J held that,

*"A decision on whether the police file requires to be disclosed must be taken in the context of what is necessary for the full and effective inquiry into the death of Mr. Wright... it is not necessarily the case that the police file be disclosed to (the Applicant) in order that an effective investigation of his son's death is undertaken.*

10. However on the facts of this case Kerr J, at paragraph 15, also held that,

*"I am satisfied that an article 2 compliant investigation into the death of Mr. Wright has not yet taken place. Such an investigation would have to address directly such issues (among others) as:- how the murderers were able to penetrate the forecourt area unobserved; how they were able to obtain the materials to manufacture the weapons used; how they knew that Mr. Wright would be in the prison van at the time the murder took place and whether there was any evidence of collusion on the part of members of prison staff. None of the inquiries so far held has provided a satisfactory answer to these questions."*

11. It is submitted that this case provides yet another example of what is submitted is the proper application of to the *Jordan* principles to the assessment of the State's discharge of the Article 2 investigation obligation.
12. The Human Rights Commission notes that the Billy Wright case is one of several controversial cases of killings in the Northern Ireland, where state involvement or collusion is alleged, currently being considered by retired Canadian Judge Peter Cory with a view to recommending whether public inquiries are required. At paragraph 21 Kerr J commented that if Judge Cory were to recommend that the Wright killing should have a further inquiry, it would be at that stage that it would be appropriate to determine whether the police file should be disclosed.