



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**COMMENTS ON THE UK GOVERNMENT'S PACKAGE OF
MEASURES INTENDED TO ADDRESS THE ISSUES RAISED BY
THE EUROPEAN COURT OF HUMAN RIGHTS IN ITS
ARTICLE 2 JUDGMENTS OF 4 MAY 2001**

Introduction

1 The Northern Ireland Human Rights Commission (NIHRC) is a statutory body established by section 68 of the Northern Ireland Act 1998 as a result of the Belfast (Good Friday) Agreement of 10 April 1998. Although it has a sub-national jurisdiction it complies in almost every respect with the UN's Paris Principles on national human rights institutions (approved by the General Assembly in 1993). The Commission is one of the leading national human rights institutions in Europe and in November 2002 it co-hosted, together with its sister organisation, the Irish Human Rights Commission, the Second Council of Europe Roundtable for National Human Rights Institutions. The event was addressed by Mr Pierre-Henri Imbert, Director-General of Human Rights at the Council of Europe and by Mr Alvaro Gil-Robles, the Council of Europe's Commissioner for Human Rights.

2 Amongst the duties specifically imposed upon the NIHRC by section 69 of the Northern Ireland Act are the following:

(1) The Commission shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights.

(3) The Commission shall advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights-

(a) as soon as reasonably practicable after receipt of a general or specific request for advice; and

(b) on such other occasions as the Commission thinks appropriate.

Lack of consultation

- 3 In view of these statutory functions, the NIHRC is very disappointed that, before it submitted a package of measures to the Committee of Ministers of the Council of Europe in relation to the judgments issued on 4 May 2001, the UK Government did not consult with the NIHRC as to what that package should contain. According to paragraph 1 of the package of measures, the Government “established a group of officials, under the chairmanship of an official from the Northern Ireland Office and including representation from all the relevant Government departments and other authorities” – but this group excluded the NIHRC. We are led to believe that it also excluded representatives from other key bodies such as the office of the Director of Public Prosecutions and the Northern Ireland Coroners’ Association.
- 4 The NIHRC was sent a copy of the package of measures on 7 October 2002, the day on which it was to be considered by the Committee of Ministers’ Deputies at Strasbourg. The annexes were not sent until 22 November 2002. The NIHRC has since written to the relevant Northern Ireland Office Minister, Ms Jane Kennedy MP, to complain about this neglect of the NIHRC. At our request a meeting with the Minister and officials took place on 12 December 2002. At that meeting the Commission’s representatives notified the Minister of most of the points contained in this paper (then in draft) and undertook to send a copy of the paper to the Minister once it was complete.
- 5 The neglect of the UK Government to consult with the NIHRC is all the more regrettable given that the NIHRC was permitted by the European Court of Human Rights to make an intervention in the four cases under review. The written intervention is referred to in all four judgments (para.101 of *Jordan*, para.90 of *Kelly*, para.107 of *McKerr* and para.84 of *Shanaghan*) and it is clear that it influenced the judges not inconsiderably in coming to their conclusions. (For your information, the person who drafted the intervention on the Commission’s behalf was Professor Fionnuala Ní Aoláin, a professor of law at the University of Ulster and a Visiting Fellow at Princeton University in the USA; she has recently contributed an article on the four European Court judgments to the European Human Rights Law Review, entitled “Truth Telling, Accountability and the Right to Life in Northern Ireland”, [2002] E.H.R.L.R. 572-590.)
- 6 According to the Minister at our meeting with her on 12 December 2002, the UK Government’s reason for not consulting with the Human Rights Commission was that it is not customary for the Government to consult with other bodies prior to submitting documents to inter-governmental organisations dealing with its legal obligations. She added that it would have compromised the independence of the Commission to have consulted it. In fact, of course, the UK Government does from time to time consult with other bodies, including the NIHRC, before submitting periodic reports to various UN treaty-monitoring bodies and the NIHRC itself is involved in a forum which the UK’s Lord Chancellor’s Department is currently consulting as part

of its review of the UK's adherence to international human rights treaties. The Paris Principles (especially at 3(d)) make it clear that human rights commissions should be involved in the reporting process and the Government has on more than one occasion indicated to us its desire to allow this, but the actual practice is not yet working well (a matter we are taking up separately with the Secretary of State). The Commission does not think its independence is compromised by its being involved at the consultation stage of policy development because it invariably makes it clear at that stage that if its views are not accepted the Commission reserves the right to publicise and campaign on those views afterwards. The UK Government is well aware of the Commission's approach in this regard. The Commission believes that it ought to have been consulted on the package of measures sent to the Committee of Ministers and that, if the package did not ultimately reflect the preferences of the Commission, we would still have been free to make our views known directly to that Committee (or via the Directorate General of Human Rights).

The duty to investigate in these cases

- 7 The NIHRRC's main concern with the UK Government's package of measures is that, in paragraph 7, the Government states that it has concluded that "in view of the passage of time since the incidents in question in the four judgments, it would not be feasible to re-open the police investigations in those cases". In our view this is an unlawful and untenable position. The 12 deaths in question (in the four incidents covered by the four cases) occurred in 1982 (1) 1987 (9), 1991 (1) and 1992 (1). Investigations of other deaths in Northern Ireland are on-going even though they occurred prior to 1987 and the Government has given no convincing reason why it is no longer feasible to investigate these particular deaths, with the possible exception of McKerr, since three police officers were tried in relation to that killing and acquitted. In recent weeks a man was convicted in Northern Ireland of a murder committed some 20 years ago on the basis of DNA analysis of forensic evidence collected at that time and since preserved. The NIHRRC is currently trying to discover exactly what systems the police have in place for continuing and reviewing investigations into "old" cases, and we know that the Police Ombudsman has made similar inquiries. We do not see that the mere passage of time can be a sufficient reason for refusing to conduct investigations.
- 8 It seems to us absurd that the European Court can declare something to be a breach of so fundamental a right as the right to life and yet the domestic authorities are not obliged to do anything except pay a little compensation and try to ensure that the same breach does not occur in future cases. Such a state of affairs risks allowing governments to "buy off" complainants and could bring the whole European Convention system into disrepute.

- 9 The package of measures refers in paragraph 5 to the practice of the Chief Constable in ensuring that incidents involving the security forces are investigated by persons who are independent of those implicated in the incident. The NIHRC would prefer this practice to be enshrined as a statutory duty, thereby reflecting the need to ensure that, in line with the European Convention's standards and the European Court's jurisprudence, human rights are protected in a manner "prescribed by law".
- 10 This statutory duty would be particularly important in incidents where the death has been caused by a member of the army in a situation where the army and police have been conducting a joint security operation (as in the *Kelly et al* cases). While the army does not act under the direction and control of the police in Northern Ireland, it often acts alongside and in conjunction with the police (*i.e.* "in support of the police"). In the Commission's view it is imperative that in such situations the police of Northern Ireland should not be involved in the investigation of any alleged malpractice by the army. In *McShane v UK* (28 May 2002), where a death occurred in Northern Ireland in just such a situation, the European Court found "that the investigation was conducted by police officers connected, albeit indirectly, with the operation under investigation and that this accordingly casts doubt on its independence" (para.112). We would add that it seems very odd that the package of measures presented by the UK Government does not refer at any point to the significant judgment of the European Court in *McShane v UK*. When we raised this recently at the meeting with the Minister there did not seem to be any real awareness that the *McShane* judgment was relevant.

The duty of the DPP to give reasons for not prosecuting

- 11 At paragraph 10 of its package of measures the UK Government refers to the new statement of policy issued by the Director of Public Prosecutions on 1 March 2002 on the giving of reasons. The NIHRC is very disappointed that this statement has not been given the force of law. A golden opportunity to do so arose when the Justice (Northern Ireland) Act 2002 was going through Parliament in London. This Commission argued strongly that that Act should contain a clause imposing a duty on the DPP to give reasons, citing in our support a recommendation of the government-appointed committee which published a Review of the Criminal Justice System in Northern Ireland in March 2000. Our suggested amendment (to clause 32) read as follows:

(2A) *Where proceedings against a person in relation to an offence are discontinued under subsection (1) –*

(a) the Director, where information is sought by someone with a proper and legitimate interest in a case on why there was no prosecution, or on why the prosecution has been abandoned, shall give as full an explanation as possible without prejudicing the interests of justice or the public interest, and

(b) the Director shall consider in the circumstances of each individual case the extent to which the reasons can be given in

more than general terms, and, if so, how much detail can be given without prejudicing the interests of justice or the public interest.

Unfortunately the government did not accept our suggested amendment and the Act is consequently silent on the DPP's duty to give reasons. To date we have noticed no change in the actual practice of the DPP in this regard, whatever the purported change in policy (see also paras.19 and 20 below). This Commission has in the past intervened in a court case to try to persuade the judge that international human rights standards require the giving of reasons by prosecutors when they decide not to pursue a prosecution. The judge and the Court of Appeal did not accept our argument, claiming that these international standards were not binding on him (*Re Adams' Application for Judicial Review* [2001] NI 1).

- 12 Despite the judgments of the European Court in May 2001, the DPP has still not provided reasons why no prosecutions have ensued in the cases of Jordan, Kelly *et al*, and Shanaghan. In the Commission's view it cannot be right that a Government is able to ignore the implications of European Court judgments in the very cases under scrutiny by the European Court. Although the European Court does not seem to have the power to direct a member state to undertake certain actions, we note that, according to Recommendation R (2000) 2 adopted by the Committee of Ministers on 19 January 2000, member states have been asked to adopt measures (albeit "in certain circumstances") to ensure that an injured party is put into the same situation, as far as is possible, as he or she enjoyed prior to the violation of the Convention. In our estimation this means that the families of the men who were killed in the three cases under review are entitled to be given reasons by the DPP why no prosecutions have been possible (a prosecution *did* occur in the McKerr case). The payment of the "just satisfaction" ordered in May 2001 was in respect of the failure to comply with the Article 2 obligations. It does not of itself exonerate the state from now seeking to comply with the Convention where that is possible.

The scope of coroners' inquests

- 13 At paragraphs 18 and 21 the package of measures refers to the discretion vesting in the coroners of Northern Ireland to determine the width of an inquest. Again the NIHRC is of the view that, to comply with the "prescribed by law" standard of the ECHR, this discretion ought to take the form of a statutory duty. At present the wording of the Coroners Act (NI) 1959 is simply that a coroner may hold an inquest in certain situations. The Act does not specify what the scope of the inquest should be, except that, in cases where a jury is involved, it states, in section 31, that the jury must set forth "so far as such particulars have been proved to them, who the deceased person was and how, when and where he came to his death". Indeed Rules 15 and 16 of the Coroners (Practice and Procedure) Rules (NI) 1963 seem to make it clear that the scope of the inquest *must* be limited to those matters:

15. *The proceedings and evidence at an inquest shall be directed solely [our emphasis] 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 Births and Deaths Registration (NI) Order 1976 to be registered concerning his death.*

16. *Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule.*

14 The discretion to which the government's package of measures refers is one which the government asserts exists under the Human Rights Act 1998 (which effectively incorporates the European Convention into UK law), but if this is so it seems clear that coroners are not fully aware of it. In Northern Ireland coroners have traditionally been very reluctant to extend the remit of any inquest and judges have supported them in that limited interpretation of their role. When, in 2000, this Commission sought permission to intervene in the inquest into the 1998 bomb in Omagh (which killed 29 people), with a view to arguing that the remit of the inquest should be widened, we were refused. It is in any event unclear whether the Human Rights Act has the effect which the Government ascribes to it in this context, since inquests are only one of the many mechanisms in place for dealing with an unexplained or suspicious death. The point remains that the Government has announced no change to inquest law as a result of the European Court's judgments in the May 2001 cases, with the exception of the amendment to Rule 9(2) of the Coroners' (Practice and Procedures) Rules (NI) 1963 (see para.16 below).

The lack of verdicts at inquests

15 As regards the absence of verdicts in inquests in Northern Ireland, this was addressed by Mr Justice Kerr in a further application for judicial review taken by the father of Pearse Jordan and decided on 29 January 2002 (*Re Jordan's Application for Judicial Review* [2002] NI 151). Having emphasised that the European Court clearly contemplated that inquests *should* have the capacity to establish the facts that are relevant to the legality of the force which caused the death, the judge said that:

"It does not follow, however, that, in order to establish the facts relevant to the lawfulness of the force that caused Mr Jordan's death, a verdict of unlawful killing must be available to the jury... [I]t appears that if there were in Northern Ireland a procedure akin to that in England and Wales whereby the DPP was required to reconsider a decision not to prosecute and was obliged to give reasons for his decision, the procedure as a whole would satisfy the requirements of Article 2. That outcome is not dependent on the jury being able to return a verdict of unlawful killing. What is vital is that the inquest

should be able to play its part in the identification of criminal offences and to contribute to the prosecution of offenders by bringing the offences to the attention of those who are responsible for directing prosecutions. In turn they should be required to 'give reasons which are amenable to challenge in the courts' [a quote from para.129 of the European Court's judgment in Jordan v UK]...Currently in Northern Ireland there is lacking any direct nexus between the investigation carried out by a properly conducted inquest and the decision to be taken by the DPP in relation to the prosecution of criminal offences identified in the course of the inquest."

- 16 This gap in Northern Ireland's law has still not been filled. The opportunity to do so arose when the Justice (NI) Act was going through Parliament earlier this year, but the government did not grasp it. The package of measures submitted to the Committee of Ministers by the UK Government does not address this gap.
- 17 At paragraph 22 reference is made to a training event for coroners. The NIHRC has written to the chairperson of the Judicial Studies Board of Northern Ireland (Lord Justice Campbell) to request that we be invited to attend this training. Otherwise we could not be certain that the full implications of the European Court's judgments in this field will be explained to the coroners.

Attendance of witnesses at inquests

- 18 Paragraph 23 refers to the change made to Rule 9(2) of the Coroners (Practice and Procedure) Rules (NI) 1963. This Commission was not happy with the limited nature of that amendment and we said so in our submission to the government's rushed consultation on the proposed amendment. The amended Rule 9 addresses the issue of the compellability of witnesses to give evidence at an inquest. It takes account of the need to protect the rights of individuals against self-incrimination conferred by Article 6 of the European Convention. However, an inquest does not involve a determination of the civil rights and obligations of any individual (and no change is proposed to Rule 16 in this regard), so it is questionable whether Article 6 rights are even triggered by the process. The proposed change may not sufficiently address the need for public scrutiny and for information to be made available to victims' families. The Commission was, and remains, concerned that those called to give evidence at inquests may refuse to answer questions impinging in any way on the circumstances surrounding the death. In those circumstances the Article 6 rights will, in practice, override the Article 2 rights of the next-of-kin of the deceased. The amended rule is likely to raise further arguments about incompatibility with Article 2 and lead to continuing delay as well as uncertainty about the law.
- 19 It was suggested in our discussions with representatives of the next-of-kin affected by the European Court's decisions that witnesses should be obliged to answer all questions and that the right against self-incrimination in the inquest context should be done away with. If this is not contrary to the European

Convention itself, it may be appropriate in the context of an inquest, which is just one part of the investigative process following an unexplained death. Other authorities would clearly have to be involved in the fact-finding and prosecution processes required to comply with Article 2. Another, more attractive, option suggested to us was that a witness should be obliged to answer questions, but that the answers should not be used as evidence in any subsequent prosecution against the witness. This option has been adopted in the on-going Tribunal of Inquiry into the events on Bloody Sunday in Derry / Londonderry in 1972. At present the NIHRC is of the view that the second of these alternatives is much preferable to the first and to the new amended rule. We would be satisfied with the amended rule only if it operated in a context where a new and fuller form of investigation could be established in situations where there are good public interest reasons for such a course of action. (Regard could be had, for example, to the Scottish system in this context.) In that new form of investigation witnesses should, we believe, be to some extent compellable. Until we see what the Government's more general proposals are for reforming the law and practice on inquests (the subject of an on-going "Fundamental Review"), we cannot be more definite as to what the legal position of witnesses at inquests should be. The Commission's view is that the role of witnesses in an inquest depends on the status of an inquest as an element of an effective investigation process.

Disclosure of information prior to inquests

- 20 Paragraph 24 of the Government's package of measures refers to the police's Force Order concerning advanced disclosure of information to families at inquests. Again the NIHRC would prefer this disclosure to be a matter of statutory duty (to comply with the "prescribed by law" requirement). When the Home Office first issued its circular in this area in 1999 the Northern Ireland Office did not choose to issue a supplementary one for Northern Ireland, thereby adding to the uncertainty as to the exact state of law and practice in a part of the UK where such controversial deaths are more likely to occur. This Commission intervened in an inquest and argued, successfully, that the circular ought to be given effect in Northern Ireland. In any event, the Force Order, like the original circular, refers only to deaths in police custody. Technically it does not cover the types of situations which occurred in the four cases examined by the European Court in May 2001. Nor, of course, does it cover deaths caused by the army.

Legal aid for the victim's family at inquests

- 21 At paragraph 26 the package of measure refers to the *ex gratia* scheme for the provision of legal aid at inquests. The NIHRC is dissatisfied with this scheme because:
- (a) it is not a statutory scheme: apparently the relevant section of the Justice (Northern Ireland) Act 2002 – which would allow for a statutory scheme – has not yet been brought into force, but we do not know the reason for the delay;

- (b) it is run by the Northern Ireland Court Service, not by the Legal Aid Department of the Law Society, yet it purports to be constructed around factors taken into account by the Legal Aid Department (such as financial eligibility);
- (c) one of the criteria used by the Northern Ireland Court Service in applying the scheme (although, bizarrely, this is mentioned only in the press release advertising the scheme and not in the scheme itself!) is “whether there is significant wider public interest in representation being provided”, but it is nowhere made clear what is meant by this; we do not know, for example, why the criterion was not satisfied in the one case so far where, having been applied for, *ex gratia* assistance was refused;
- (d) another of the criteria is that there must be no source of alternative funding available; this Commission is, at least in theory, such a source (and we have funded applicants in four inquests to date) but we are not aware of whether the Northern Ireland Court Service takes this into account when reaching decisions on applications; we would hope that it does not, since this Commission’s resources are very limited in this context.

The promptness of inquests

- 22 At paragraphs 32 to 35 the package of measures deals with the requirement for prompt inquests. Recent information received from the office of the coroner for Greater Belfast, Mr John Leckey, reveals that there is a long backlog of inquests still to be heard: there are 40 deaths mentioned on that list, all of them occurring prior to the judgments of the European Court on 4 May 2001. The inquest into the death of Pearse Jordan himself (one of the victims whose death was the subject of the European Court’s judgements) has still not been held even though the death occurred in 1992 (the anniversary was on 25 November). Indeed the family of Pearse Jordan has recently begun a legal action against the Lord Chief Justice of Northern Ireland and the Coroner, Mr Leckey, for their alleged failure to hold an inquest in line with the European Court’s requirements. Earlier this year the father of Pearse Jordan won an application for judicial review against a decision of the Legal Aid Committee not to grant him legal aid to challenge the decision of the coroner not to proceed with the inquest even *before* the European Court made its decision.

The use of public interest immunity certificates

- 23 The Commission notes what the Government’s package of measures says about so-called PIICs. To date, however, we have not noticed any actual change in practice in terms of a willingness on the part of the authorities to release information which previously they would not have released. The judgment in the *McCorley* case (Annex N of the government’s package) illustrates only too well the courts’ reluctance in Northern Ireland to provide even redacted documents which may assist an applicant’s case. Until we see more evidence of a change in practice (and whether the new policy is going to be applied in the McKerr case itself – and in the other cases under review), we must reserve judgment on whether the European Court’s standard on openness is being adhered to in this respect.

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