



NORTHERN
I R E L A N D
HUMAN
RIGHTS
COMMISSION

**COMMENTS ON COUNCIL OF EUROPE RECOMMENDATIONS
CONCERNING THE EUROPEAN COURT AND CONVENTION**

PART ONE

DH-PR(2004)007 concerning Recommendation Rec(2000)2 “Re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights”

United Kingdom

(a) Criminal proceedings

The account given in DH-PR(2004)007 explains the position in England and Wales and in Northern Ireland, but it does not say anything about the third jurisdiction in the United Kingdom, Scotland.

As regards the position in England and Wales and in Northern Ireland, the account does not explain that the courts in those jurisdictions have adopted the view that the Human Rights Act 1998, which effectively makes the Convention rights part of the law throughout the United Kingdom from 2 October 2000, is not retrospective in operation. In particular the Act cannot be used by an appeal court to quash a conviction obtained prior to 2 October 2000 on the ground that it was obtained in breach of one or more of the Convention rights (see *R v Lambert* [2001] 3 WLR 206). In at least one such case this conclusion has led to the defendant taking his case to the European Court of Human Rights, which held that his Convention rights were indeed violated, even though it awarded no compensation (see *Kansal v UK* (21413/02), [2004] ECHR 179, following the decision by the House of Lords in *R v Kansal* [2001] UKHL 62).

The Human Rights Act can, again, not be applied retrospectively in order to require an Article 2 complaint investigation to be conducted into a death occurring before 2 October 2000 that resulted from the use of lethal force by agents of the state (see the House of Lords decision in *Re McKerr* [2004] UKHL 12). The House of Lords said in that case

that Convention rights arising before that date were not rights arising under the Human Rights Act 1998. Yet in other cases, two of which were decided on the same day as the *McKerr* case, the House of Lords *has* required Article 2 compliant investigations to be conducted into deaths in custody occurring prior to 2 October 2000 (see *Amin* [2003] UKHL 51, *Middleton* [2004] UKHL 10 and *Sacker* [2004] UKHL 11).

A more general defect in the UK system for responding to decisions of the European Court, whether in criminal, civil or administrative matters, is that legislative attempts to meet deficiencies identified by the Court are often the minimum necessary and are therefore in danger of being again condemned by the Court as violating the Convention. An example of this arose in relation to the courts-martial system in the UK. After it was heavily criticized by the European Court in *Findlay v UK* (22107/93), (1997) 24 EHRR 221, the UK Parliament enacted the Armed Forces Act 1996 to make things right. But aspects of this new system have also been held to be in breach of Article 6(1) of the European Convention, in particular when it does not have the added guarantees of a civilian Judge Advocate and of a Permanent President (*Grievs v UK*, (57067/00) [2003] ECHR 683, and *Le Petit v UK* (35574/97), 15 June 2004) and because it has the anomaly of a non-judicial post-trial reviewing authority, thereby affecting the independence and impartiality of the court-martial (*Cooper v UK* (48843/99), 16 December 2003).

(b) Civil proceedings

It is regrettable that in none of the three jurisdictions in the UK is it possible to reopen civil proceedings after a decision by the European Court of Human Rights. The Northern Ireland Human Rights Commission is in favour of national legislation being enacted to make this possible. There is a definite need for this given that the European Court itself has not yet developed a wholly reliable approach to the award of compensation under Article 41 of the European Convention.

(c) Administrative proceedings

See the section on civil proceedings above.

PART TWO

Comments on DH-PR(2004)009 concerning Recommendation (2002)13 “Publication and dissemination in the member states of the text of the European Convention on Human Rights and of the case-law of the European Court of Human Rights”

The United Kingdom has presumably not supplied sufficient information to allow the relevant section of Table I in this document to be completed (“Dissemination of Strasbourg jurisprudence”). This is regrettable, not least because we believe that the UK government does have in place a system for making European Court judgments and decisions readily available to judges and others working in the Courts Service. The

Commission is not familiar with the details of the system in place for officially distributing the information (especially through the Courts Service's intranet).

Most lawyers in the United Kingdom would have easy access to the internet, where they can of course examine the jurisprudence of the European Court.

Translation of judgments and decisions is not a difficulty because all of those in cases relating to the United Kingdom are of course in English and judgments and decisions in other cases are nearly always available in English. Most judges and lawyers would have a working knowledge of French for those few cases where no English version is available.

As the "Official Publication" section of Table II in the document appears to recognise (by omitting any reference to the United Kingdom), there is no official publication within this country of Strasbourg judgments and decisions. The "Private Publication" section of Table II might also have mentioned series of law reports such as the United Kingdom Human Rights Reports (published by Sweet & Maxwell) and the Butterworths Human Rights Cases.

The Northern Ireland Human Rights Commission attempts to fill an information gap by placing on its website at regular intervals summaries of the judgments involving the United Kingdom in Strasbourg. The summary for 2004 has just been uploaded.

With reference to other aspects of Recommendation Rec(2002)13, in particular paragraph *vi*, it is clear to this Commission that the United Kingdom government does *not* "ensure, where necessary, the rapid dissemination to public bodies such as courts, police authorities, prison administrators or social authorities, as well as, where appropriate, to non-state entities such as bar associations, professional associations etc., of those judgments and decisions which may be of specific relevance for their activities, where appropriate together with an explanatory note or a circular." This Commission's experience is that in general the UK government is usually rather slow to react to Strasbourg judgments in which it has featured as a losing party. It is certainly slow to indicate within the UK what steps it intends to take to meet the requirements of the judgments in question.

Generally speaking the Northern Ireland Human Rights Commission wishes to see a more systematic approach adopted by the part of the UK government to the dissemination of information about Strasbourg judgments involving the UK and about the steps the government plans to take – and over what time period – to comply with those judgments. The saga over how the UK government intends to comply with the judgments issued against it in *Jordan v UK* (24746/94) (2003) 37 EHRR 52, *Kelly and others v UK* (30054/96), *McKerr v UK* (28883/95) (2002) 34 EHRR 553 and *Shanaghan v UK* (37715/97) (all decisions of the European Court of 4 May 2001) continues to this day and it is very difficult for outsiders, even for this Commission, to discover the up-to-date position at any particular time.

PART THREE

Comments on DH-PR(2004)010 concerning Recommendation (2004)4 “The European Convention on Human Rights in university education and professional training”

The information relating to the United Kingdom contained in this document is limited to school-level education and the first paragraph is inaccurate as regards Northern Ireland (where Citizenship Education is to become a compulsory part of the curriculum for 14-16-year-olds only in 2006 and for 11-14-year-olds only in 2007).

There is extensive coverage of the European Convention on Human Rights in university law degree courses throughout the United Kingdom, both at undergraduate and at postgraduate level, but not in political and administrative science degrees (despite what is recommended in Rec(2004)4). It is regrettable that more systematic information has not been provided about university and professional education. This Commission has commissioned research from the University of Ulster on the extent and nature of human rights education and training in Northern Ireland, but this will not be complete until, probably, March 2005. We are not in a position to conduct UK-wide research.

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