

A Practical Guide to the European  
Convention on Human Rights



The Right not to be Ill-treated

## **THE AUTHOR - Mark Kelly LL.B. (Hons), M.Sc., M.Phil.**

Mark Kelly is an international human rights lawyer. He is Director of the independent consultancy firm Human Rights Consultants, on behalf of which he works as an expert adviser to clients including the United Nations, the European Union and the Council of Europe. Before founding Human Rights Consultants, he served as Head of Unit in the Secretariat of the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

He has lectured and published extensively in the area of human rights and criminal justice, the prevention of torture, and combating racism. Mark's recent publications include the Commission's reports, *Human Rights Training for Student Police Officers in the Police Service of Northern Ireland* (2002) and *Human Rights in Police Training; Probationer Constables and Student Officers* (2004), as well as the Council of Europe book, *Ten Years of Combating Racism; A Review of the Work of the European Commission Against Racism and Intolerance* (2004).

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The case law in this area is extensive and complicated and Mr Kelly has, we feel, done an excellent job in explaining it clearly and succinctly. There will, probably, be further developments in the near future but we hope that the information in the current document is up-to-date as of 1 March 2005.



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## 1. INTRODUCTION

### **What is the European Convention on Human Rights?**

The **European Convention for the Protection of Human Rights and Fundamental Freedoms** (usually known as the European Convention on Human Rights, or 'ECHR') applies in all 46 member States of the Council of Europe.

#### **Council of Europe Member States**

Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom.

The ECHR places Council of Europe member States under a legal obligation to protect the human rights and freedoms of everyone within their borders, whether or not they are citizens of the State concerned.

Individuals or States may complain to the **European Court of Human Rights** (a permanent international court, based in Strasbourg, France), if they consider that a State has not respected one or more of the human rights protected by the ECHR. Only States can be held responsible for failing to respect the ECHR. Abuses committed by private individuals or groups cannot be directly challenged; however, the Court has recognised that, in certain circumstances, States have a responsibility to protect people against the activities of private individuals / groups (including paramilitary organisations).

If the Court decides to accept a complaint it has the power to examine the complaint in

detail, including by taking oral and written evidence. For more information about complaining to the European Court of Human Rights, see the section called 'Going to Strasbourg' at the end of this guide).

It may be possible for the Court to arrange for a 'friendly settlement' between a State and the person making a complaint. However, if this is not possible, the Court can issue a formal judgment, which is legally-binding.

Over the years, the European Court of Human Rights has considered a wide range of human rights issues from a truly international perspective. The Court has produced a number of significant judgments that relate to life in Northern Ireland. Points of principle set out by the Court in judgments concerning the other 45 Council of Europe member States in which the ECHR applies can also be of significance for people living in Northern Ireland.

Judgments of the European Court of Human Rights may be consulted –free of charge – on the Court's database (known as 'HUDOC'), by visiting the following Internet address: <http://hudoc.echr.coe.int>, and clicking on 'access HUDOC'.

### **How does the European Convention on Human Rights apply in Northern Ireland?**

Since 1966, people living in Northern Ireland have had a formal right to complain that the State has not respected the terms of the ECHR. However, until fairly recently, it was not possible to rely upon the wording of the ECHR when making a complaint at national level. This was because the State had not made ECHR-type rights part of the national law. People who wanted to prove that the State had failed to respect their ECHR rights and freedoms could only do this by taking their case to Strasbourg, after they had pursued their complaint in every possible way at national level.



In October 2000, the ECHR was 'incorporated' into the domestic law that applies in Northern Ireland. This means that people in Northern Ireland now have rights in national law expressed in the same terms as are used in the ECHR. In consequence, it is now unlawful for any public authority or official to act in a way that is contrary to the rights and freedoms set out in the ECHR. People living in Northern Ireland who consider that their ECHR rights and freedoms have not been respected can now complain about this to the national courts. If the courts agree, they can award compensation to the person making the complaint.

If no national court agrees that a person's ECHR-type rights have been violated, a person living in Northern Ireland can still apply to take her/his case to the European Court of Human Rights, in order to settle the matter (see the section called 'Going to Strasbourg' at the end of this guide).

### **The right not to be ill-treated: a key right protected by the European Convention on Human Rights**

The ECHR sets out a range of rights and freedoms that States are obliged to protect.

#### **Rights and freedoms protected by the ECHR**

Right to life; right not to be ill-treated; freedom from slavery/forced labour; right to liberty and security; right to a fair trial; right not to be punished in illegal ways; respect for family and private life; freedom of thought, conscience and religion; freedom of expression; freedom to gather and hold meetings; right to marry; right to an effective remedy; freedom from discrimination; right to peacefully hold property; right to education; right to free elections.

This guide focuses on the **right not to be ill-treated**, which is set out in Article 3 of the ECHR.

## The Right not to be Ill-treated

This right has been chosen because of its fundamental importance. The ECHR places States under a strict obligation to respect the right not to be ill-treated in all circumstances, including in times of war, and when responding to terrorism. The **Northern Ireland Human Rights Commission** is working to ensure that the fundamental importance of this right is recognised throughout Northern Ireland.

The aim of this short guide is to assist people to better understand the nature of the right not to be ill-treated. The guide also contains practical information about the ways in which people in Northern Ireland can act to make sure that they – and everyone else – are able to fully enjoy this right.

This guide is the second in a series and should be of assistance to the large number of people and organisations in Northern Ireland who need to be aware of the ramifications of Article 3. A guide to Article 2, which protects the right to life, is being published contemporaneously with this one.

It is hoped that further guides to the various Articles in the European Convention on Human Rights will be published by the Commission.



## 2. THE RIGHT NOT TO BE ILL-TREATED (ARTICLE 3)

### Introduction

#### **Article 3 of the European Convention on Human Rights**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 absolutely forbids ill-treatment. The ECHR allows no exceptions to this rule. Even in times of war or public emergency, States are legally obliged to ensure that people are not subjected to torture or to inhuman or degrading treatment or punishment (or exposed to the risk of being ill-treated).

The European Court of Human Rights has made clear that ill-treatment is prohibited regardless of the way in which a victim (or potential victim) may have behaved. This is particularly relevant as regards persons who

are suspected or convicted of offences related to terrorism, or who are believed to constitute a threat to national security. In the eyes of the Court, nothing that such persons may have done can be used to justify ill-treating them, or exposing them to the risk of being ill-treated. This is because, in the words of the Court, 'Article 3 enshrines one of the most fundamental values of democratic societies' which must be respected 'even in the most difficult circumstances', including when responding to terrorism and organised crime.

In order to fall foul of Article 3, ill-treatment must reach 'a minimum level of severity'. This means that a victim must have suffered (or have been placed at risk of suffering) serious consequences as a result of the way in which he or she has been treated. In its 1978 judgment in the case of ***Ireland v UK***, the European Court of Human Rights indicated that the factors that it would take

into account when assessing the severity with which someone had been treated include the duration of the treatment, its physical / mental effect, and the sex, age, and health of the victim. This means that treatment that might not be considered sufficiently serious if used against a healthy adult could violate Article 3 if inflicted on a more vulnerable person (e.g. a child).

In its judgments, the European Court of Human Rights has tended to 'break down' the content of Article 3 into its component elements, namely:

- torture
- inhuman treatment
- inhuman punishment
- degrading treatment
- degrading punishment

There have been very few cases in which the Court has considered the question of what amounts to inhuman or degrading **punishment** and, even in those cases, the Court has tended to concentrate upon the **treatment** of the people concerned, rather than the nature of the punishment to which

they may have been exposed. The following chapter of this guide provides an overview of some of the more significant cases involving complaints of **torture** and **inhuman or degrading treatment** that have been considered by the European Court of Human Rights.

### Torture

#### ***What is torture?***

More than a quarter of a century ago, the European Court of Human Rights defined torture as 'deliberate inhuman treatment causing very serious and cruel suffering' (1978 judgment in the case of ***Ireland v UK***). However, it is only within the last decade that the Court has begun to produce judgments in which it has found that torture has actually taken place.

The first such case was that of ***Aksoy v Turkey*** (judgment of 1996), in which the Court found that Zeki Aksoy (a 29-year-old metal worker) had been ill-treated while in police custody at the Anti-terrorist



Department of Mardin Headquarters. He had, in particular, been subjected to a form of ill-treatment known as 'Palestinian hanging', in other words, 'he was stripped naked, with his arms tied together behind his back, and suspended by his arms'.

The Court's judgment makes clear its view that:

This treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time.

Consequently, the Court considered that 'this treatment was of such a serious and cruel nature that it can only be described as torture'.

In another significant case involving events in Turkey, the European Court of Human Rights found that Şükran Aydın (a 17-year-old woman) had been subjected to various forms of ill-treatment – including rape – while detained in Derik Gendarmerie Headquarters. In its judgment, the Court noted that Ms Aydın's claims were supported by medical evidence, and stated that the 'acts of physical and mental violence inflicted on [her] and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention'. It added that it 'would have reached this conclusion on either of these grounds taken separately'. In other words, the Court considers that to rape a detained person amounts to torture (**Aydın v Turkey**, 1997 judgment).

A more recent case concerned the manner in which a Dutch/Moroccan national, Ahmed Selmouni, had been treated while in custody at Bobigny police station in Paris (**Selmouni v France**). The Court found that medical and other evidence indicated that, over a period of several days in police

custody, Mr Selmouni had 'endured repeated and sustained assaults' by police officers. In its 1999 judgment, the Court makes clear that 'such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention'.

The Court reached this conclusion, 'having regard to the fact that the Convention is a "living instrument" which must be interpreted in the light of present-day conditions'. It took the view that:

The increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

It follows that some conduct previously classified by the Court as inhuman and degrading treatment (see the following section) could, in the future, be classified by the Court as torture.

### **Inhuman and/or Degrading Treatment**

#### ***What is inhuman and/or degrading treatment?***

The European Court of Human Rights has defined treatment as 'inhuman' when it has been 'applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering'. Treatment has been found to be 'degrading' when it has been 'such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them' (1999 judgment in the case of **T and V v UK**).

In reality, the boundary between inhuman treatment and degrading treatment is likely to be more blurred. That said, it seems clear that all treatment that is inhuman will also be degrading, whereas not all treatment that is degrading will necessarily be inhuman. The Court has also indicated that treatment may be found to be inhuman and/or degrading even if there is



no express intention by the State to cause suffering or to humiliate.

The main types of cases in which the European Court of Human Rights has considered whether inhuman and/or degrading treatment has taken place have involved **assaults, conditions of detention, corporal punishment, racial discrimination and extradition / deportation.**

### ***Assaults***

In early 1983, Félix Tomasi was arrested on suspicion of involvement in terrorist acts in Corsica. He claimed that, during a 48-hour period in police custody, he was slapped, kicked, punched and given forearm blows by police officers, made to stand up for long periods with his hands handcuffed behind the back, spat upon, made to stand naked in front of an open window, deprived of food, and threatened with a firearm.

A number of medical certificates produced by independent doctors recorded injuries which were consistent with a large number of blows having been inflicted on Mr Tomasi during his time in police custody. The French Government accepted that it could offer no explanation as to the manner in which he had acquired these injuries, but argued that they were not sufficiently severe to breach Article 3 of the ECHR. It also suggested that special consideration had to be given to the 'particular circumstances' in Corsica at the time, and to the fact that Mr Tomasi had been suspected of participating in a terrorist attack (a charge of which he was later cleared).

In its 1992 judgment, in ***Tomasi v France*** the European Court of Human Rights rejected these arguments, noting that the

[...]requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.

The Court found that Mr Tomasi had been subjected to inhuman and degrading treatment in violation of Article 3 of the ECHR.

The Court's 1995 judgment in the case of **Ribitsch v Austria** reaffirmed the principle that, if someone apparently acquires injuries while in police custody, the onus is on the authorities to provide a plausible explanation of how those injuries occurred. While in police custody at the Security Branch of the Vienna Federal Police, Ronald Ribitsch sustained injuries including bruises on the outside and inside of his right arm, and acquired a so-called 'cervical syndrome' (including vomiting and headaches). The Austrian Government argued that these injuries had occurred as a result of an accidental fall from a police car. However, on the basis of all the material placed before it (including medical certificates), the European Court of Human Rights concluded that the Government had not 'satisfactorily established that the applicant's injuries were caused otherwise than - entirely, mainly, or partly - by the

treatment he underwent while in police custody'.

The Court found that Mr Ribitsch had been treated in an inhuman and degrading way, in breach of Article 3 of the ECHR.

The European Court of Human Rights continues to closely scrutinise the explanations that governments provide in cases where it is alleged that injuries have been sustained in police custody. For example, in its 2004 judgment in the case of **Mehmet Emin Yüksel v Turkey**, the Court declared itself unconvinced that Mr Yüksel could have broken one of his back teeth and sustained injuries to his nose at the same time, by simply falling against a sink. It reiterated that detained persons are in a vulnerable position, and that States have a duty to protect them from harm. Having regard to the medical evidence, and the absence of a convincing and plausible official explanation for the injuries that Mr Yüksel had sustained while in police custody, the Court found that his rights under Article 3 of the ECHR had been violated.



In more recent cases, the Court has also emphasised that, in respect of persons deprived of their liberty, any recourse to physical force that has not been made strictly necessary by their own conduct diminishes human dignity and is, in principle, a violation of Article 3 of the ECHR (see, for example, the Court's 2004 judgments in the cases of **Balogh v Hungary** and **RL and M-JD v France**).

### **Conditions of detention**

Since the turn of the century, the European Court of Human Rights has begun to produce judgements in which it has found that conditions of detention can violate Article 3 of the ECHR.

One of the first such cases was that of **Price v UK**, in which Adele Ursula Price complained about the manner in which she had been treated while committed to a short spell of imprisonment for contempt of court. Ms Price is a thalidomide victim, who suffers from mobility problems and kidney complaints. While held at Lincoln Police

Station for a night, she was kept in conditions which were too cold, and was unable to use the in-cell sanitary facilities. Once transferred to the hospital at Wakefield Prison, a prison doctor recorded that her difficulties included: 'bed – too high; sink – unable to reach; mobility – [wheelchair] battery running down; fluid intake – likes to take juice and there is none; diet – vegetarian; general hygiene – needs help...'.

In its 2001 judgment, the Court acknowledged that there was 'no evidence in this case of any positive intention to humiliate or debase the applicant'. However, it considered that:

To detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment contrary to Article 3 of the Convention.

There have been a number of other recent cases in which the European Court of Human Rights has reached the conclusion that conditions of detention of prisoners fall foul of Article 3 of the ECHR.

In its 2001 judgment in the case of **Peers v Greece**, the Court examined a complaint by Donald Peers, a British national, about the conditions in which he had been held at Koridallos Prison in Athens. The Court found that Mr Peers had had to spend a considerable part of each day confined to bed in a shared cell with no ventilation and no window, which would at times become unbearably hot. He also had to use a lavatory in the presence of another inmate and be present while it was being used by his cell-mate. The Court formed the opinion that these prison conditions:

[...] diminished the applicant's human dignity and aroused in him feelings of anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical or moral resistance.

Consequently, it considered that his conditions of detention amounted to degrading treatment within the meaning of Article 3 of the ECHR.

Detention in severely overcrowded conditions (to the extent of being required to sleep in shifts, in a bed used by two other prisoners), in a constantly-lit, poorly-ventilated, pest-infested and unsanitary cell has also been held by the Court to amount to degrading treatment (2001 judgment in the case of **Kalashnikov v Russia**).

In both the **Peers** and **Kalashnikov** judgments, the European Court of Human Rights made reference to inspection reports by a Council of Europe monitoring body – the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (known as the 'CPT'). The findings of this independent body, which has the power to enter any place of detention in Council of Europe member States, seem to be having an increasing influence upon the Court's judgments in cases involving conditions of detention.



For example, in its 2003 judgment in the case of **Lorsé v the Netherlands**, the European Court of Human Rights accepted that the CPT's detailed factual description of the conditions of detention in the 'Extra Security Institution' (or 'EBI') at the Nieuw Vosseveld Prison Complex in Vught 'adequately reflect[ed] the situation' in that establishment.

In its visit report, the CPT concluded that the regime in operation in the EBI 'could be considered to amount to inhuman treatment', and the Court's judgment expressly states that it 'does not diverge from the view expressed by the CPT that the situation in the EBI is problematic and gives cause for concern'. Having conducted its own review of the evidence regarding the specific conditions to which Mr Lorsé had been subjected while in the EBI, the Court concluded that 'the combination of routine strip searching with the other stringent security measures in the EBI amounted to inhuman or degrading treatment in violation of Article 3 of the Convention'.

The monitoring work being carried out by the CPT seems to be contributing to the increasingly high standard being required by the Court in Article 3 cases involving conditions of detention, even if the Committee for the Prevention of Torture has not visited the specific establishment in respect of which a complaint is raised before the Court.

In 2003, for example, the Court issued judgments in six cases involving the conditions of detention of prisoners who had, at one time, been held on 'death row' in Ukrainian prisons. (**Aliev v Ukraine** and **Nazarenko v Ukraine** concerned prisoners held in Simferopol; **Kuznetsov v Ukraine** and **Poltoratskiy v Ukraine** involved prisoners held in Ivano-Frankivsk; **Dankevich v Ukraine** related to a prisoner held in Zaporizkhiie, and **Khokhlich v Ukraine** concerned a prisoner held in Khmeltnitskiy). Notwithstanding the fact that the CPT had only visited the 'death row' facility in one of the above-mentioned establishments (Simferopol), all six of the judgments contain

a lengthy (and identically-worded) section which paraphrases the CPT findings-in-fact during its visits to 'death row' facilities in Ukraine, in the course of its 1998, 1999 and 2000 visits. Moreover, in all of the judgments – including in the four cases regarding prisoners who had been held in establishments **never** visited by the CPT – the Court's finding that the conditions of detention violated Article 3 of the ECHR makes explicit reference to the weight that it accorded to the CPT's observations.

In each case, the Court concluded that:

In common with the observations of the CPT concerning the subjection of death row prisoners in Ukraine to similar conditions, the Court considers that the detention of the applicant in unacceptable conditions of this kind amounted to degrading treatment in breach of Article 3 of the Convention.

### **Corporal punishment**

The infliction of corporal punishment upon children is another matter which has been brought before the European Court of Human Rights on a number of occasions.

One of the earliest cases concerned the practice of 'birching' (legalised beating on the buttocks with a birch cane) of juveniles on the Isle of Man. 15-year-old Anthony Tyrer was 'birched' on the orders of the local juvenile court, and complained to the European Court of Human Rights. In its 1978 judgment, the Court denounced birching as 'institutionalised violence', and added that it 'constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity'. Consequently, it held that 'the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention' (**Tyrer v UK**).



A number of subsequent cases have examined the use of corporal punishment to maintain discipline in schools. **Campbell and Cosans v UK** concerned the use of a leather strap to beat children in Scottish schools, **Y v UK** involved the caning of a 15-year-old and, in **Costello-Roberts v UK**, striking a 7-year-old child's buttocks with a gym shoe was the form of corporal punishment at issue.

For a variety of reasons, none of these cases led to a judgment that Article 3 had been breached (in **Campbell and Cosans**, the children concerned had not actually been beaten, in **Y v UK**, a 'friendly settlement' was reached, and the United Kingdom Government paid the applicant £8000 plus costs, and in **Costello-Roberts v UK**, the Court found that the boy's suffering was not severe enough to violate Article 3). Nonetheless, at least partly as a reaction to the reservations expressed by the European Court of Human Rights in these judgments, corporal punishment has been banned in schools in the United Kingdom.

The European Court of Human Rights has also decided that, in certain circumstances, Article 3 of the ECHR prohibits corporal punishment of children at home.

The case of **A v UK** concerned a complaint brought on behalf of a boy (known as 'A') who, at the age of 9, had been beaten by his stepfather with a garden cane, on more than one occasion, and with some considerable force. His stepfather had faced criminal charges of assault, but had been acquitted by a jury which appears to have considered that his actions were no more than 'reasonable chastisement' of the boy. The European Court of Human Rights took a different view, concluding that 'treatment of this kind reaches the level of severity prohibited by Article 3'.

Moreover, the Court decided that the State could be held responsible for having failed to take effective measures to prevent 'A' from having been ill-treated in this way. It pointed out that 'children and other vulnerable individuals, in particular, are entitled to State protection, in the form of

effective deterrence, against such serious breaches of personal integrity'. The Court found that the law in force at the time did not provide 'A' with adequate protection against ill-treatment, and that the failure of the State to provide such legal protection constituted a violation of Article 3 of the ECHR (**A v UK**, 1998 judgment).

### **Racial discrimination**

Racial discrimination may amount to degrading treatment contrary to Article 3 of the ECHR, particularly if it occurs in the context of refusing entry to a country on racial grounds.

Article 14 of the ECHR specifically prohibits discrimination on racial or other grounds; however, the Court has implied that, if a difference of treatment were to 'denote contempt or lack of respect for the personality' or be 'designed to [...] humiliate or debase', it could also violate Article 3 of the ECHR (**Abdulaziz, Cabales and Balkandali v UK**, 1985 judgment). This approach is consistent with an earlier

Strasbourg decision in the case of the **East African Asians v UK** (1973 report), in which it was:

[...] recognised that a special importance should be attached to discrimination based on race, and that publicly to single out a group of persons for differential treatment based on race might, in certain circumstances, constitute a special form of affront to human dignity.

### **Extradition / deportation**

The legal protection offered by Article 3 of the ECHR extends to situations where persons can show that they may be at risk of ill-treatment if they are extradited / deported to another country. All people present (legally or illegally) in Council of Europe member States have a right to benefit from this legal protection, even if the State to which they are to be returned is not a Council of Europe member State (and not bound by the European Convention on Human Rights).



This principle has been firmly established since the 1989 judgment of the European Court of Human Rights in the case of ***Soering v UK***. Jens Soering is a German national who, at the age of 18, allegedly killed his girlfriend's parents while visiting their home in Bedford County, Virginia in the United States of America. Just over a year later, he was arrested in England, and the American authorities sought his extradition to face capital murder charges. The European Court of Human Rights concluded that, at the time, the death penalty itself was not prohibited by Article 3 of the ECHR (although it is now prohibited by Protocol No. 13 to the ECHR). Nonetheless, it considered that, if Mr Soering were to be held for an extended period on 'death row', this could raise an issue under Article 3 of the ECHR:

In the Court's view, having regard to the very long period of time spent on death row in [...] extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his

age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. [...] Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.

The Court has applied this principle in a number of subsequent cases, including that of Karamjit Singh Chahal and his family. Mr Chahal, an Indian citizen who was living in the United Kingdom while he campaigned for Sikh separatist causes. In 1990, the Home Secretary decided that he ought to be deported:

[...] because his continued presence in the United Kingdom was uncondusive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism.

Mr Chahal complained that, were he to be deported, he would be at risk of ill-treatment

by 'rogue elements' in the Punjab Police. To support his case, his lawyers produced attestations of the involvement of the Punjab police 'in killings and abductions outside their State and [...] allegations of serious human rights violations which continue to be levelled at members of the Indian security forces elsewhere'.

In its 1996 judgment, the Court stressed that it:

[...] is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.

In the light of the evidence produced on his behalf, the Court found in **Chahal v UK**, that it:

[...] substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India.

Accordingly, the order for his deportation to India would, if executed, give rise to a violation of Article 3.

Similar reasoning was used by the Court in its 2000 judgment in the case of **Jabari v Turkey**, in which the Court concluded that to deport Hoda Jabari to Iran would violate Article 3 because there was a 'real risk' that she would be stoned for having committed adultery.

### **States have a 'positive obligation' to prevent ill-treatment**

In its judgments in a number of the cases mentioned in the previous sections, the European Court of Human Rights has highlighted the fact that the ECHR places States under a 'positive obligation' to prevent ill-treatment. This means that States must not only refrain from inflicting ill-treatment, but must also take active steps to protect people from being ill-treated, whether by agents of the State, or by private individuals.



This positive obligation includes a requirement not to expel people to countries where they may be ill-treated (as in the cases of ***Soering***, ***Chahal*** and ***Jabari***, discussed in the previous section), and to make sure that the law provides adequate protection against ill-treatment (as in the case of ***A v UK***, discussed above).

The Court has also made clear that, in cases where allegations of ill-treatment are made, the State is under an obligation to ensure that an effective investigation is carried out. This particular aspect of the positive obligation on States to prevent ill-treatment is discussed in more detail in the following section.

### 3. WHAT IS AN 'EFFECTIVE INVESTIGATION' OF A COMPLAINT ABOUT ILL-TREATMENT?

#### Background Information

The European Court of Human Rights has made clear that the ECHR places States under a positive obligation to conduct 'effective investigations' into complaints about ill-treatment.

In its judgments in a number of the cases discussed in the previous sections, the Court has found that the failure of the State to conduct an effective investigation into an allegation of ill-treatment can also raise issues under other Articles of the ECHR, including Article 6 (the right to a fair trial) and Article 13 (the right to an effective remedy).

The basic principle was set by the Court in its 1998 judgment in the case of **Assenov v Bulgaria**, namely that:

[...] where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2 [right to life], should be capable of leading to the identification and punishment of those responsible. [...] If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance [...], would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.



It is important to note that the onus is upon the State to prove that an investigation complies with the ECHR. In order to do this, the State must be able to show that the investigation was **independent, effective, prompt** and **transparent** (i.e. open to public scrutiny).

### **Independence**

According to the European Court of Human Rights, an investigation will only be independent if 'the persons responsible for and carrying out the investigation are independent from those implicated in the events'.

The Court has stressed that 'this means not only a lack of hierarchical or institutional connection but also a practical independence [...]'.

Clearly, this means that it would not be acceptable for a complaint about ill-treatment only to be internally investigated by members of the force against which the complaint had

been made. The notion of 'practical independence' indicates that the Court is also prepared to look behind the appearance of independence, in order to ascertain whether or not investigators are genuinely free of any professional connection with those whom they are investigating. This may have implications, for example, for investigative systems which allow serving police officers to be seconded to investigate the conduct of police officers serving in neighbouring jurisdictions.

### **Effectiveness**

The tests used by the European Court of Human Rights in order to decide whether or not an investigation has been effective are that:

- it must be 'capable of leading to a determination of whether force used was or was not justified under the circumstances and to the identification and, if appropriate, the punishment of those concerned';

and

- ‘all reasonable steps’ have been taken to secure evidence concerning the incident, including ‘eyewitness testimony, forensic evidence, and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death’.

The Court has stated that the requirement that an investigation be effective ‘is not an obligation of result, but of means’.

In other words, the Court’s emphasis is not upon whether (or not) an investigation has led to a finding that ill-treatment has taken place. Instead, it seeks to evaluate the content and quality of the investigation.

### **Promptness**

In order to comply with the ECHR, an investigation must also be conducted in a prompt and reasonably expeditious manner. Speed is of the essence at the very beginning of an investigation into alleged ill-treatment, when immediate steps are required to seize any evidence which may support (or undermine) a complaint about ill-treatment (e.g. police batons which may have been used, clothing, etc.). Given the rapidity with which injuries can heal, facilitating rapid access to independent forensic medical expertise is also a vital element in the truth-gathering process.

The investigation as a whole should also be conducted in an expeditious manner, in other words, it must be carried out as quickly as is consistent with completing the work in a professional way.



## **Transparency**

An investigation will only comply with the ECHR if it can be shown to have been transparent.

The European Court of Human Rights has explained that this means that 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.

## 4. THE PRACTICAL IMPACT OF ARTICLE 3 OF THE ECHR ON LIFE IN NORTHERN IRELAND

### Introduction

Evidence of the practical impact of Article 3 of the ECHR on life in Northern Ireland can be found in judgments of the European Court of Human Rights regarding the United Kingdom (which form part of international law), and in judgments of the national courts (domestic law).

### *International law*

The previous section of this guide mentions a number of important European Court of Human Rights judgments regarding the United Kingdom which have had implications for Northern Ireland, including the cases of **Price; Tyrer; Campbell and Cosans; Y; Costello-Roberts; A; Abdulaziz, Cabales and Balkandali; Soering** and **Chahal v UK**.

International law (the ECHR) places the United Kingdom under an obligation to take action to address the shortcomings identified by the Strasbourg court in these judgments. The extent to which the United Kingdom has complied with this obligation is supervised by the Committee of Ministers of the Council of Europe.

### *Domestic law*

Domestic law (the Northern Ireland Act and the Human Rights Act) makes it unlawful for any 'public authority' in Northern Ireland to act in a way that is 'incompatible' with Article 3 of the ECHR. 'Public authorities' in Northern Ireland include the Police Service of Northern Ireland, the Office of the Police Ombudsman, the Northern Ireland Prison Service, the Department of Health, Social Services and Public Safety, the Northern Ireland Court Service (and the courts



themselves), the Director of Public Prosecutions and many other bodies.

When domestic courts consider whether or not a public authority has respected the right not to be ill-treated, they are obliged to 'take into account' any relevant judgments of the European Court of Human Rights. This obligation extends beyond judgments of the Strasbourg court that deal with events in Northern Ireland (or in other jurisdictions in the United Kingdom), to include judgments involving Article 3 of the ECHR regarding any of the other 45 member States of the Council of Europe. As a result, when considering a case involving the right not to be ill-treated, the courts in Northern Ireland must now take into account Article 3 judgments of the Strasbourg court in cases such as ***Selmouni and Tomasi v France***, ***Peers v Greece*** and ***Lorsé v the Netherlands*** (mentioned in the previous section of this guide).

However, while national courts have to take this international case law into account, it does not form part of domestic law, and they are not legally bound to follow it in each and every case.

The main thematic issues where Article 3 of the ECHR is of particular relevance for Northern Ireland include **policing, prisons, the treatment of foreign nationals, and discipline in schools and at home.**

### **Policing**

In recent years, a significant number of reforms have been made to the organisation of policing in Northern Ireland. One of the aims of those reforms is to ensure that, as recommended by the Report of the Independent Commission on Policing (the Patten Commission), human rights are placed at the centre of policing. Helping to ensure that this actually occurs is a priority for the Northern Ireland Human Rights Commission.

Given that police officers have extensive powers legally to limit the rights of others, the Commission considers that it is essential that they be made fully aware of, and trained to act in compliance with, relevant human rights law, including Article 3 of the ECHR. Policing tasks which involve the **use of force**, such as carrying out searches, making arrests and restraining / detaining suspected persons can raise issues under Article 3, and police officers must be equipped to carry out these tasks in a human rights compliant manner.

In co-operation with the Police Service of Northern Ireland (PSNI), the Northern Ireland Human Rights Commission has carried out a number of evaluations of the human rights training being provided to new police officers. The evaluations have charted improvements in the content of the training; however, they have also emphasised that there is an ongoing need to provide new police officers with additional guidance (drawn from international and domestic law) regarding the permissible limits to the use of force.

Another significant development is the creation of the Office of the Police Ombudsman for Northern Ireland, which aims to provide 'an independent impartial police complaints service in which the public and the police have confidence' (mission statement of the Ombudsman's Office). Although the Police Ombudsman's Office has no 'hierarchical or institutional connection' to the Police Service, most of its senior investigators are serving police officers from a neighbouring jurisdiction. Neither the European Court of Human Rights nor the domestic courts have yet been called upon to consider whether, having regard to ECHR case-law on the need for truly independent investigations into alleged ill-treatment by police officers, this gives the Ombudsman's investigators sufficient 'practical independence' from the PSNI.

### **Prisons**

Recent judgments by the European Court of Human Rights (e.g. **Price v UK** and **Peers v Greece**) have indicated that, in certain



circumstances, conditions of detention in prisons may violate Article 3 of the ECHR.

These decisions have been mirrored by the domestic courts in other jurisdictions of the United Kingdom. In one recent example (***Napier v the Scottish Ministers***), Robert Napier complained that his detention on remand in Barlinnie Prison, Glasgow, amounted to degrading treatment because of poor in-cell sanitary conditions, overcrowding and a lack of regime activities. In his 2004 judgment in the Scottish Court of Session, Lord Bonomy concluded that he was:

[...] entirely satisfied that the petitioner [Mr Napier] was exposed to conditions of detention which, taken together, were such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation. He was, in my opinion, subjected to degrading treatment which infringed Article 3 of the Convention.

Prisoners in Northern Ireland have already raised Article 3-based complaints about being held in restricted association (***Re Conlon's Application***, 2002), and about being sentenced to life imprisonment (***R v Anderson***, 2003). Both of these challenges failed before the domestic courts. Nevertheless, given that international and domestic case-law in relation to Article 3 provides a growing body of guidance regarding the standards that should be met in prisons (and other places of detention) it should be expected that further challenges will follow.

### **Treatment of foreign nationals**

Foreign nationals can be deprived of their liberty for immigration purposes in Northern Ireland and, in some circumstances, may be deported / extradited to other countries.

The case-law of the European Court of Human Rights makes clear that conditions of detention of foreign nationals must comply with Article 3 of the ECHR. Moreover, it is

essential that all possible steps be taken by the authorities in Northern Ireland to ensure that foreign nationals are not returned to countries where they may face a real risk of ill-treatment.

### **Discipline in schools and at home**

It is quite remarkable that all of the most significant ECHR cases involving the use of corporal punishment to impose discipline in schools and at home have concerned the United Kingdom.

As already mentioned, at least partly in response to concerns expressed by the European Court of Human Rights in cases such as **Campbell and Cosans, Y**, and **Costello-Roberts v UK**, corporal punishment has been outlawed in schools in all jurisdictions of the United Kingdom, including in Northern Ireland.

The law has also been changed, in response to the ECHR judgment in the case of **A v UK**, to remove 'reasonable chastisement' as

a defence to a criminal charge of assaulting a child. Future developments in the case-law of the European Court of Human Rights regarding the responsibility of the State for preventing other forms of violence by non-State actors are eagerly awaited.



## 5. WHAT TO DO IF YOU FEEL THAT YOUR RIGHT UNDER ARTICLE 3 OF THE ECHR HAS NOT BEEN RESPECTED

### Options in Northern Ireland

If you feel that your right not to be ill-treated has not been respected by a public authority, you may be able to take legal action against that authority. In order to do this, you must be able to show that you have been a direct or indirect 'victim' of the authority's failure to respect the right to freedom from ill-treatment.

**Direct victims** are people who have been **directly affected** by the way in which a public authority has acted (or failed to act). However, it is not necessary for a person actually to have suffered the consequences of the public authority's action (or failure to act). You could still be a direct victim if you can demonstrate that, as a result of the public authority's behaviour, you have been exposed to the **risk** of being ill-treated.

You could also be an indirect victim of a violation of the right not to be ill-treated, if you have been personally affected by the failure to respect another person's right not to be ill-treated (for example, if a member of your family has suffered injuries because a public authority has not respected his or her right to freedom from ill-treatment under Article 3 of the ECHR).

If the court agrees, the **Northern Ireland Human Rights Commission** can 'intervene' in cases that raise issues of human rights law and practice. This means that the Commission can prepare a submission which will form part of the information on the basis of which the court will make its decision. A court may also request that the Commission prepare a submission to assist it in considering a case that includes a human rights dimension. The

Commission has intervened in a number of cases involving ECHR issues.

There are a variety of different ways in which legal action can be brought in Northern Ireland. You could go to court to bring a civil action against a public authority, complaining that the right to freedom from ill-treatment has not been respected, and seeking financial compensation ('damages'). If you choose to do this, you must bring a court action within **one year** of the events on which your complaint is based.

Another option is to ask for 'judicial review' of the public authority's behaviour. This means that a judge will be asked to decide whether or not the public authority has acted legally. If you select this option, you must ask for judicial review as promptly as possible, and no later than **three months** after the events about which you wish to complain.

Whatever legal route you choose, the court will expect you to be able to give precise details of the way(s) in which a public authority has failed to respect the right not to be ill-treated, and to specify the corrective action that you would like the court to take.

If you think that the law in Northern Ireland needs to be changed, you should identify the particular legal provisions that you think are not compatible with Article 3 of the ECHR. Lower courts in Northern Ireland have the power to rule that laws other than Acts of Parliament (e.g. Acts of the Northern Ireland Assembly, Northern Ireland Orders in Council and Statutory Instruments) should be set aside if they are not compatible with Article 3 of the ECHR. The higher courts – the High Court and the Court of Appeal – can make a statement that an Act of Parliament is 'incompatible' with the ECHR. This 'declaration of incompatibility' places the onus on the Westminster Parliament to amend the law to make it comply with Article 3 of the ECHR.



## 'Going to Strasbourg'

If no domestic court agrees that your right to freedom from ill-treatment has not been respected, you may wish to consider 'going to Strasbourg', i.e. taking your case to the European Court of Human Rights.

There are a number of strict conditions that must be met before the Strasbourg court will agree to consider your application:

- just as before the domestic courts, you must be able to show that you have been a **direct or indirect 'victim'** of a public authority's failure to respect the right to freedom from ill-treatment;
- you must have raised your case before all possible domestic courts (up to and including the highest appeal court that has competence to hear your case); this is known as **'exhausting domestic remedies'**;

- your application to the European Court of Human Rights must be made **within six months** of the final decision of the highest domestic appeal court that has competence to hear your case;
- your first contact with the European Court of Human Rights may be a simple letter setting out the facts of your application; however, if you decide to pursue the matter, you must complete the Court's **official application form**.

A copy of the form and a note explaining how the form should be completed can be obtained from:

European Court of Human Rights  
Council of Europe  
F-67075 Strasbourg Cedex  
France

Or from the Court's website at:

<http://www.echr.coe.int/bilingualDocuments/ApplicantInformation.htm#INFORMATIONFORAPPLICATIONS/INFORMATIONSCONCERNANTLESREQUETES>

In addition, the Rules of the European Court of Human Rights specify that every application must:

- give a brief summary of the facts about which you wish to complain, and the nature of your complaints;
- indicate which of the rights under the European Convention on Human Rights you consider has not been respected by a public authority (for the purposes of this guide, this means Article 3 of the ECHR);
- describe the progress of your case through the domestic courts (including by listing each domestic court decision, and providing brief details of, and a full copy of, each domestic court decision);
- be signed by you, as the applicant, or by your representative. Normally, the identity of an applicant to the European Court of Human Rights is made public; however, in exceptional

cases, the Court may agree that an applicant can remain anonymous.

Applying to the European Court of Human Rights can be a complex and time-consuming process, and it is advisable to seek the assistance of a lawyer in preparing your application. The Court does not grant legal aid to pay for a lawyer to draft your initial complaint but, if it decides to accept your case, you may be eligible for free legal aid at a later stage in the proceedings, provided that you cannot afford to pay for a lawyer. There are no other financial costs involved in bringing an application to the European Court of Human Rights; proceedings before the Court are free.









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© Northern Ireland Human Rights Commission  
Temple Court, 39 North Street  
Belfast BT1 1NA

tel: 028 9024 3987  
fax: 028 9024 7844  
email: [information@nihrc.org](mailto:information@nihrc.org)  
website: [www.nihrc.org](http://www.nihrc.org)

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