

A Practical Guide to the European  
Convention on Human Rights



The Right to Life

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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') is an international legal agreement (or 'treaty') that 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.

### **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 (for further details, see the section called 'Options in Northern Ireland' at the end of this guide).

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 (for further details, see the section called 'Going to Strasbourg' at the end of this guide).

### **The right to life: a key right protected by Article 2 of 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 first of those rights: the **right to life**, which is set out in Article 2 of the ECHR.

This right has been chosen because of its fundamental importance. If a State does not respect a person's right to life, that person may not be able to benefit from any of the other rights and freedoms set out in the ECHR. 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 guide is to assist people to better understand the nature of the right to life. The guide also contains practical information about the ways in which people in Northern Ireland can act to make sure that they are able to fully enjoy this right.

This guide is the first 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 2. A guide to Article 3, which protects the right not to be ill-treated, 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 TO LIFE (ARTICLE 2)

### Introduction

#### **Article 2 of the European Convention on Human Rights**

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a in defence of any person from unlawful violence;
  - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 of the ECHR does not provide complete and unconditional protection of the right to life. When the ECHR was written, the death penalty was still being used in a number of Council of Europe States, and the first paragraph of Article 2 recognises this fact. The ECHR has since been updated by the addition of new texts (known as 'Protocol nos. 6 and 13'), which outlaw the death penalty, even in times of war or 'imminent threat' of war.

There are three other specific exceptions to the Article 2 rule against intentionally taking life, which are listed in paragraph 2 (a), (b) and (c) of the Article.

To decide whether one of these exceptions applies, it is necessary to consider the 'lawfulness' of the behaviour which has caused the death. Force which causes death may not be a violation of Article 2 if it is used to protect another person against 'unlawful' (illegal) violence. This exception

includes the use of force in self defence. Similarly, deaths caused by State agents during their 'lawful' work of making arrests, preventing the escape of legally-detained people, or trying to stop extreme disorder may not fall foul of Article 2.

However, these exceptions only apply if the State can show that the force which caused death was 'no more than absolutely necessary'. Consequently, Article 2 can be said to amount to **a ban on unlawful killing by State agents**.

In considering complaints about violations of Article 2, the European Court of Human Rights has also provided guidance regarding a number of other areas, including **deaths in custody** and **'disappearances', euthanasia, and abortion**. It has emphasised as well, that States are under a 'positive obligation' to **protect life** and that States must conduct **effective investigations of deaths**, where a breach of Article 2 may be in question. This Guide provides information on all of these dimensions to **Article 2**.

### **A ban on unlawful killing by State agents**

It is almost ten years since the European Court of Human Rights first provided guidance about the nature of the ECHR obligation on States to ensure that their agents do not engage in unlawful killing.

In the case of ***McCann and Others v UK***, the European Court of Human Rights considered a complaint by relatives of three members of the IRA who had been shot dead in Gibraltar by the British security forces. In its judgment, the Court made clear that, when it is deciding whether or not State-sanctioned force is 'absolutely necessary', the key question to be answered is whether the use of lethal force is 'strictly proportionate' to achieving a clearly-defined lawful purpose.

In other words, when lethal or potentially-lethal force is used by agents of the State, the European Court of Human Rights has to be convinced that no other action – short of using such force – could have achieved the same lawful purpose.



In the **McCann** case, the European Court of Human Rights accepted that the soldiers who fired the lethal shots honestly believed that this was the only way to prevent the suspects from detonating a remote-controlled car bomb. However, from the information gathered by the Court about the planning of this counter-terrorist operation, it was clear that the suspected persons could have been lawfully arrested at a much earlier stage, as they entered Gibraltar. In these circumstances, the European Court of Human Rights was not convinced that it had been 'absolutely necessary' to use lethal force, and, in its 1995 judgment, it found the killings to be in violation of Article 2 of the ECHR.

The Court has made clear that the text of Article 2, read as a whole, covers not only intentional killing but also situations where it is permitted to 'use force' that may result, as an unintended outcome, in the deprivation of life.

In a number of cases, the Court has examined the proportionality of the force

used by members of the security forces in Turkey. One example is the case of **Egri v Turkey**, which involved the death of a woman who appeared to have been caught in crossfire between members of the security forces and members of the banned paramilitary organisation, the PKK. The State denied that the bullet which killed Havva Egri had been fired by the security forces. Nonetheless, in its 1998 judgment, the Court decided that it 'must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush'. The Court found that 'insufficient precautions' had been taken to protect the lives of the civilian population and, consequently, Turkey was found to be in violation of Article 2 of the ECHR.

More recently, the European Court of Human Rights has declined to delve into the issue of the lawfulness of killings by agents of the State. In the case of **McKerr v UK**

(which concerned the east Lurgan shooting of Gervaise McKerr by police officers), the Court decided not to call witnesses, or to rely on documentary evidence regarding the circumstances of Mr McKerr's death. The Court's 2001 judgment makes clear that it took this view because it wanted to avoid acting in a way that would duplicate the proceedings before the Northern Ireland civil courts, which it considered to be 'better placed and equipped as fact-finding tribunals'.

Similar views have been expressed by the Court in a string of 2001 judgments concerning Northern Ireland, including the cases of ***Kelly and Others, Hugh Jordan*** and ***Shanaghan v UK***.

In each of these cases, the European Court of Human Rights has chosen to adopt a different approach: instead of scrutinising whether or not a person has been lawfully killed, it has examined whether or not the State has conducted an effective investigation into the use of lethal – or potentially lethal – force. In each of the

judgments mentioned above, the Court found that the State had failed to conduct an effective investigation and, on this basis, it found a violation of Article 2 of the ECHR. This is an important development in the case law under Article 2, which is described in more detail in section 3 of this guide called 'What is an "effective investigation" of a complaint about unlawful killing?'.

### **Deaths in custody and 'disappearances'**

According to the European Court of Human Rights:

Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during such detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.



These words are taken from the Court's 2000 judgment in the case of **Salman v Turkey**. Agit Salman was a 45-year old taxi driver with no known history of ill-health. He was taken into custody by police officers from the Anti-Terror Branch of the Security Directorate in the town of Adana. One day later, police officers took him to hospital, where he was pronounced dead. His family were told that he had died from a heart attack; however, when his body was returned to them for burial, it bore injuries which had not been present when he was taken into custody. After considering independent forensic evidence which suggested that he had died following torture in police custody, the Court found that the State had failed to account for Mr Salman's death during his detention at the Adana Security Directorate. In these circumstances, it considered that Article 2 of the ECHR had been violated.

A similar result was reached in **Edwards v UK**, in 2002, a case where Christopher Edwards had been killed by a mentally ill

prisoner while on remand. Although the perpetrator pleaded guilty to manslaughter and a private, non-statutory inquiry was commissioned by three agencies with statutory responsibilities towards Christopher Edwards – the Prison Service, Essex County Council and North Essex Health Authority – the European Court still held that there had been a violation of Article 2 as regards the circumstances of Christopher Edwards' death and the failure to provide an effective investigation of the death. Compensation of £20,000 was awarded.

As regards people who 'disappear' after being in contact with agents of the State, the European Court of Human Rights has been prepared to conduct its own, very detailed, investigations into the fate of the persons concerned.

For example, in the case of **Çiçek v Turkey**, the Court considered a complaint by Hamsa Çiçek that her sons, Tahsin and Ali İhsan and her grandson, Çayan had 'disappeared' after having been detained

by the Turkish security forces. The Turkish Government denied that they had ever been taken into custody.

The European Court of Human Rights heard a substantial body of evidence from witnesses on behalf of Hamsa Çiçek, and on behalf of the Turkish Government. In its 2001 judgment, the Court concluded that there was insufficient evidence that Çayan Çiçek had been detained. As regards Mrs Çiçek's two sons, however, the Court found that they 'must be presumed dead following an unacknowledged detention by the security forces'. Noting that the authorities had not provided an explanation of events following Tahsin and Ali İhsan Çiçek's apprehension, and that they had produced no justification for the use of lethal force by their agents, the Court found the Turkish Government to be in violation of Article 2 of the ECHR.

### **Euthanasia**

In 2002, the European Court of Human Rights examined whether Article 2 of the ECHR applies in cases involving euthanasia.

The case of ***Pretty v UK*** was brought to the European Court of Human Rights by Dianne Pretty, a 43-year old woman who was suffering from motor neurone disease. By the time of the court hearing in Strasbourg, her disease had reached an advanced stage and she was virtually paralysed from the neck down, barely able to speak, and could only be fed through a tube. Her life expectancy was said to be very short. Given that her intellect and decision-making powers were unaffected, she had decided that she would prefer to be able to choose the moment and the manner of her death, rather than allow the disease to run its course. Although her physical condition meant that she was incapable of taking her own life, her husband was prepared to help her to commit suicide. However, under English law, he risked prosecution for the crime of assisting another person to commit suicide.



Dianne Pretty's lawyers argued that Article 2 of the ECHR protects the right to life and not life itself. In consequence, they claimed, Article 2 gives a person the right to choose whether or not to go on living and, in this way, recognises that a person has a right to die to avoid inevitable suffering and indignity.

The European Court of Human Rights categorically disagreed and, in its 2002 judgment, stated that:

Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life. [...] The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention.

Twelve days after the European Court on Human Rights ruled against her, Dianne

Pretty died, unassisted, from motor neurone disease.

### **Abortion**

The concept of the 'right to life' often features in debates about the issue of termination of pregnancy, and a limited number of abortion-related cases have come before the European Court of Human Rights.

Questions which have been put to the Court in such cases have included: whether or not the foetus has a right to life under Article 2; and whether Article 2 applies to the foetus, but subject to limitations designed to protect the right to life of the mother and/or the private life of the parents.

To date, the European Court of Human Rights has found procedural reasons not to answer these questions in an authoritative way. One explanation for the Court's reluctance to engage with the abortion debate is that, at present, laws concerning termination of pregnancy vary widely from

one Council of Europe member State to another. In these circumstances, the Court seems keen to avoid imposing its view on national authorities in an area where questions of law and morality are intertwined.

For example, in its 1992 judgment in the case of ***Open Door and Dublin Well Woman v Ireland***, the Court stated that:

The national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area [...] which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of [Council of Europe member States] a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals [...].

However, the Court has also recognised that a State's 'margin of appreciation' in this

area is not unlimited. It follows that, in a future case, the Court may find itself obliged to indicate whether, and to what extent, Article 2 of the ECHR protects life before birth.

The current law on abortion in Northern Ireland was recently the subject of a decision by the Court of Appeal there, which held that the Department of Health, Social Services and Public Safety should issue guidelines for medical professionals clarifying the state of the law (***Family Planning Association of Northern Ireland v The Minister for Health, Social Services and Public Safety***, 2004).

### **States have a 'positive obligation' to protect life**

The European Court of Human Rights takes the view that Article 2 of the ECHR not only prohibits unlawful killing by agents of the State, but also places States under a 'positive obligation' to take preventive



operational measures to protect persons whose lives are threatened, even if those threats are from another private person, rather than an agent of the state.

However, the extent of this positive obligation has been defined by the Court in a rather narrow way. In the case of **Osman v UK**, the Court had to consider whether the Metropolitan Police ought to have taken preventive action to save the life of Ali Osman, who was killed by a teacher who had become obsessed by his son, Ahmet. In its 1998 judgment, the Court made the following remarks about the extent of the positive obligation on the authorities:

[...] bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention

requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice [...]

On this basis, the Court concluded that, in order to establish that a State had failed in its positive obligation to protect life, the Court would need to be convinced that:

The authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Although this is a stringent test, there have been cases in which the European Court of Human Rights has found a violation of

Article 2 of the ECHR on the basis that State authorities have failed to take reasonable measures available to them to prevent a real and immediate risk to life.

One such case is ***Akkoç v Turkey***, which was brought to Strasbourg by Nebahat Akkoç who, together with her late husband Zübeyir, had been engaged in trade union activities in south-east Turkey that were regarded as unlawful by the Turkish authorities. They received a number of telephone calls threatening that they would be killed, and Mr Akkoç was shot dead one morning, while on his way to work as a teacher at a local primary school.

The Court found that the Turkish authorities were aware, or ought to have been aware, of the possibility that the risk to the life of Mr Akkoç 'derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces'. In other words, the Court considered the authorities knew that there could be collusion between members of the security forces and the persons

making death threats against Zübeyir Akkoç.

It also identified a number of 'defects' in the administration of justice in south-east Turkey, which 'undermined the effectiveness of the protection afforded by the criminal law in the south-east region during the period relevant to this case'.

Special emphasis was placed upon the fact that no steps were taken when the applicant and her husband petitioned the public prosecutor, drawing to his attention that they were victims of direct threats to their lives. The Court formed the view that these defects:

[...] permitted or fostered a lack of accountability of members of the security forces for their actions which [...] was not compatible with the rule of law in a democratic society respecting the fundamental rights and freedoms guaranteed under the Convention.

Taking all of these circumstances into account, the Court's 2000 judgment



concluded that Turkish authorities had failed to take adequate action to protect the life of Zübeyir Akkoç, and that there had been a violation of Article 2 of the ECHR.

In its 2001 judgment in the case of **Keenan v UK**, the European Court of Human Rights indicated that the State's positive obligation to take appropriate steps to safeguard life also applies in the context of suicide prevention in prisons. On the facts of this particular case, the Court considered that the prison authorities had acted in a reasonable way, including by placing Mark Keenan in hospital care and under special supervision when he displayed suicidal tendencies.

Consequently, it found that there had been no violation of Article 2 of the ECHR. Nonetheless, the Court's judgment makes clear that, where detained persons are concerned, the State has a positive obligation to take 'general measures and precautions' to 'diminish the opportunities for self-harm'.

### 3. WHAT IS AN 'EFFECTIVE INVESTIGATION' OF A COMPLAINT ABOUT UNLAWFUL KILLING?

#### Background information

In 2001, the European Court of Human Rights produced judgments in a number of cases concerning Northern Ireland, including ***Kelly and Others, Hugh Jordan*** and ***Shanaghan v UK***. One important feature of these judgments is that they make clear that Article 2 of the ECHR requires that all complaints about unlawful killing be investigated in an effective way. The onus is upon the State to prove that an investigation complies with Article 2. 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).

More recent European Court of Human Rights judgments regarding Northern Ireland (including the Court's 2002 judgment in the

case of ***McShane v UK*** and its 2003 judgment in the case of ***Finucane v UK***) have re-emphasised the need for all investigations into allegations of unlawful killing to meet these standards.

#### 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 [...]'.  

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Clearly, this means that it would not be acceptable for a complaint about unlawful killing 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 of unlawful killing. Instead, it seeks to evaluate the content and quality of the investigation.

### **Promptness**

In order to comply with Article 2 of 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 the use of lethal force, when immediate steps are required to seize any evidence which may support (or undermine) a complaint about unlawful killing (e.g. firearms which may have been discharged, clothing, etc.). 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 Article 2 of 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'.

The Court has recognised that the degree of public scrutiny that is required may vary from case-to-case but, in every case, the next-of-kin of the deceased 'must be involved to the extent necessary to safeguard their legitimate interests'.



## 4. THE PRACTICAL IMPACT OF ARTICLE 2 OF THE ECHR ON LIFE IN NORTHERN IRELAND

Evidence of the practical impact of Article 2 of the ECHR on life in Northern Ireland can be found in judgments of the European Court of Human Rights regarding Northern Ireland (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 Northern Ireland, including the cases of **McKerr**, **Kelly and Others**, **Hugh Jordan**, **Shanaghan**, **McShane** and **Finucane v UK**.

A common feature of these judgments is that they highlight **deficiencies in the investigation of the use of lethal**

**force** in Northern Ireland. These include: insufficiently independent police investigations; a lack of public scrutiny / failures to provide adequate information to families of victims; shortcomings in the manner in which inquests were conducted (including that witness statements were not disclosed in advance, police officers could not be compelled to attend inquests, and inquests did not begin promptly / were not pursued expeditiously).

International law (the European Convention on Human Rights or ECHR) obliges the State to take action to address the shortcomings identified by the Strasbourg court in these judgments. The extent to which the State complies with this obligation is supervised by the Committee of Ministers of the Council of Europe.

Some of the failings identified by the European Court of Human Rights have already been addressed, at least in part. For example, the use of lethal force by police officers is now investigated by the Office of the Police Ombudsman, rather than by police officers from the same force as those implicated in the killings. Although the Police Ombudsman's Office has no 'hierarchical or institutional connection' to the Police Service of Northern Ireland (PSNI), most of its senior investigators are serving police officers from a neighbouring jurisdiction. The European Court of Human Rights has not yet been called upon to consider whether this gives the Ombudsman's investigators sufficient 'practical independence' from the PSNI.

Other steps that have been taken include (limited) changes to the Northern Ireland rules on compelling witnesses to attend inquests, and the Government has presented the Committee of Ministers of the Council of Europe with a written 'package of measures' describing steps taken to ensure that, in future, investigations of the use of lethal force will comply with Article 2 of the ECHR.

The **Northern Ireland Human Rights Commission** takes the view that the Government's 'package of measures' does not go far enough to cure the current failings in the system of investigating the use of lethal force in Northern Ireland. As the Chief Commissioner noted in his foreword to the Commission's 2003 Annual Report:

We do not believe that enough is being done to ensure that thorough, impartial and effective investigations are being conducted into all killings in Northern Ireland, especially (but not exclusively) those allegedly perpetrated by, or with the connivance of, members of the security forces. More particularly, the inquest system in Northern Ireland remains in a chaotic state because of the failure of the Government to take the necessary steps to comply with European standards.

In order to address this problem, the Commission provided the Committee of Ministers of the Council of Europe with detailed information about the precise legal situation in Northern Ireland. In February



2005 the Committee of Ministers produced its view of the Government's 'package of measures' and called for the:

State rapidly to take all outstanding measures and to continue to provide the Committee with all necessary information and clarifications to allow it to assess the efficacy or the measures taken, including, where appropriate, their impact in practice.

In line with the commitment given in its Strategic Plan for 2003–06, the Commission has also begun to conduct its own 'detailed investigations into compliance with obligations concerning the right to life, with particular reference to the investigation of controversial killings in Northern Ireland'.

### **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 2 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 to life, 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, to include judgments involving Article 2 of the ECHR regarding any of the other member States of the Council of Europe. As a result, when considering a case involving the right to life, the courts in Northern Ireland must now take into account Article 2 judgments of the Strasbourg court in cases such as ***Egri, Salman, Ciçek*** and ***Akkoç v Turkey*** (mentioned in the previous section of this guide).

However, while national courts now 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.

In recent years, right to life issues dealt with by the domestic courts have included: the scope and duration of the State's obligation to **conduct effective investigations into the use of lethal force**; the nature and content of the State's **positive duty to protect life**, and **inquest procedures**.

### ***Effective investigations into the use of lethal force***

The European Court of Human Rights has outlined the basic elements that make up an effective investigation (independence, effectiveness, promptness and transparency).

Taking into account this case law, the domestic courts have been asked to consider questions such as the **time period** for which the State remains obliged to conduct an effective investigation, the **form** that an

effective investigation should take, and the extent to which the State is obliged to **disclose investigation records** regarding the use of lethal force.

The question of the **time period** within which an effective investigation should take place was central to the House of Lords case, ***In re McKerr***.

In its March 2004 judgment, the House of Lords made clear its view that, under domestic law, the State is *not* under an obligation to conduct an 'effective investigation' (in the sense of Article 2 of the ECHR), in cases where the death occurred before 2 October 2000 (i.e. the date on which the Human Rights Act came into force).

It is important to note, however, that the State may still have an obligation under international law (i.e. under the European Convention on Human Rights) properly to investigate deaths that occurred before that date. However, as the European Court of Human Rights has recognised (in its 2003 ***Finucane*** judgement):



It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or by way of providing transparency and accountability to the wider public. The lapse of time, the effect on evidence and the availability of witnesses, may inevitably render such an investigation an unsatisfactory or inconclusive exercise, which fails to establish important facts or put to rest doubts and suspicions.

As for the **form** that an effective investigation should take, it seems clear that a properly-conducted inquest could satisfy the requirements of Article 2 of the ECHR. In October 2003, in the case of ***R v Secretary of State for the Home Department, ex parte Amin***), the House of Lords decided that, if no inquest is held, then:

An independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights.

A number of decisions of the Northern Ireland courts have indicated that, even if an inquest is held, it need not be the only way in which the State can discharge its duty to conduct an effective investigation. It has been suggested that other inquiries 'freestanding' of inquests could also satisfy the requirements of Article 2 of the ECHR (***Re Jordan's Application***, judgment of 8 March 2002).

The Northern Ireland courts have taken the view that an effective investigation need not necessarily involve **disclosing investigation records** regarding the use of lethal force to the family/next of kin of the victim. The courts have described this as 'only one element among many others which may demonstrate the inadequacy of an investigation' (***Re Adams' Application***, 2001).

It seems, however, that the police may be under an obligation to release such documents to the coroner conducting an inquest (***Re McCaughey and Grew's Application***, 2004).

### ***Limits upon the State's positive duty to protect life***

When the domestic courts have considered the extent of (and the limits upon) the State's positive duty to protect life, they have taken into account the 1998 judgment of the European Court of Human Rights in the case of ***Osman v UK*** (mentioned in the previous section of this guide).

It should be recalled that the ***Osman*** judgment indicated that the positive obligation on the State can be triggered if the authorities 'knew or ought to have known' of a 'real and immediate risk to the life of an identified individual'. However, the European Court of Human Rights added that the positive duty on the State should not 'impose an impossible or disproportionate burden on the authorities'. It also stressed that, even if they are acting to protect someone's life, the police are still under a duty to fully respect 'due process and other guarantees'. In other words, the police also have an obligation fully to respect the legal rights of a person who may be suspected of

threatening someone else's life. These principles have been reflected in the judgments that have been produced by the domestic courts.

Acting on the basis that, in general, the police are in a better position than the courts to judge the real level of threat to which a person is exposed, the courts have refused to support a person's application to have access to information about him that had been seized by the police from Loyalist paramilitaries (***Re A's Application***, 2001). Similarly, the courts have upheld the refusal of the Secretary of State for Northern Ireland to issue a personal protection weapon to a Sinn Féin councillor who was time-barred from holding such a weapon on the basis of his previous convictions (***Re Meehan's Application*** (No.2), 2002).

However, in three separate decisions issued in October 2004 – ***Re Brolly's Application***, ***Re Frazer's Application*** and ***Re W's Application*** – the High Court in Belfast quashed the Secretary of State's decision not to grant protection to persons



who were under threat from paramilitary attack because he had asked himself whether they were under an 'imminent' threat rather than whether they were at a 'real and immediate risk'.

Another issue that has arisen in the domestic courts is the extent to which the State's positive obligation to protect one person's life needs to be balanced against the rights of others. Here, the courts seem to be proceeding on a case-by-case basis, looking closely at the merits of each individual application.

For example, the Court of Appeal has been asked to rule on whether police officers giving evidence to Lord Saville's inquiry into the events of 'Bloody Sunday' had to be screened from the public (***Re Donaghy's Application***, 2002). In its judgment, the court concluded that, where a person's Article 2 rights are concerned, there is no need for the protection of those rights to be balanced against the rights of others.

However, it seems that this may not apply if the 'rights of others' include their right to

life. Thus, in the 2003 case of ***Re Scappaticci's Application***, the court decided that it was legitimate for the Minister for Security to refuse to declare that the applicant was not the IRA informer apparently known as 'steak knife', because making such a declaration could create a serious risk to the lives of informers (and endanger the intelligence-gathering process).

### ***Inquest procedures***

In March 2004, the House of Lords produced its judgment in the case of ***R v HM Coroner for the Western District of Somerset and another, ex parte Middleton***. Although the facts of the case involved events that took place outside Northern Ireland, the judgment is important because it sets a precedent that is binding on the courts in Northern Ireland.

Colin Campbell Middleton took his own life by hanging himself in a cell in Horsfield Prison. An inquest was held, at the end of which the jury gave the coroner a note expressing its opinion that the Prison Service

had failed in its duty of care. The contents of this note remained private until Colin Middleton's family brought a legal challenge, seeking a formal public determination of the responsibility of the Prison Service for his death.

Taking into account the case law of the European Court of Human Rights under Article 2 of the ECHR, the House of Lords considered that:

To meet the procedural requirement of Article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case.

Having scrutinised the current regime for conducting inquests, it concluded that, in some cases, it does not match up to the investigative obligation imposed by Article 2. Consequently, the Court ordered that, in future, an inquest finding as to 'how' a death occurred should specify not only 'by what means' but also 'in what circumstances' a person had died.

According to the House of Lords, the purpose of this change is to enable an inquest jury to reach a 'judgmental conclusion of a factual nature, directly related to the circumstances of the case'.

The Northern Ireland courts have also recognised that it is indispensable that the relatives of a deceased person receive adequate legal representation at any inquest held into the death. In 2004, an applicant challenged the arrangements for funding preparatory legal work for inquests (the so-called 'Green Form' scheme), on the basis that they were too narrowly-focussed, not cost effective and caused undue delay (***Re Hemsworth's Application***, 2004).

The Court agreed, and found that, until March 2004, the Green Form scheme had been incompatible with the State's obligation under Article 2 of the European Convention on Human Rights to provide adequate legal representation at inquests.



## 5. WHAT TO DO IF YOU FEEL THAT YOUR RIGHT TO LIFE HAS NOT BEEN RESPECTED

### Options in Northern Ireland

If you feel that your right to life 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 life.

**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** that your right to life will not be respected.

You could also be an **indirect victim** of a violation of the right to life, if you have been personally affected by the failure to respect the right to life of another person (for example, if a member of your family has died because a public authority has not respected his or her right to life under Article 2 of the ECHR).

If the court (or coroner) 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 right to life issues. For example, it prepared a written submission to the House of Lords in the previously-mentioned **Middleton** case, which involved the application of Article 2 standards to inquest procedures.

There are a number 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 life 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 within **three months** of 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 to life, 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 2 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 2 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 2 of the ECHR.



## 'Going to Strasbourg'

If no domestic court agrees that your right to life 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 life;
- 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 2 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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