Pending cases against the United Kingdom

Application Number	English Case Title	Date of Judgment	Date of Final Judgment	Meeting Number	Meeting Section
42949/98	RUNKEE v. the United Kingdom	10/05/2007	25/07/2007	1013	2
45773/99	CAIRNEY v. the United Kingdom	20/11/2007	20/11/2007	1020	2
53738/00	MCWILLIAMS v. the United Kingdom	09/10/2007	09/10/2007	1013	2
63388/00	DOBB v. the United Kingdom	20/11/2007	20/11/2007	1020	2
68621/01	SINCLAIR v. the United Kingdom	09/10/2007	09/10/2007	1013	2
63470/00	HANCOCK v. the United Kingdom	06/03/2007	06/03/2007	1013	3.A
63684/00	HOBBS v. the United Kingdom	14/11/2006	26/03/2007	1013	3.A
14858/03	C. v. the United Kingdom	10/05/2007	10/05/2007	1013	3.A
62617/00	COPLAND v. the United Kingdom	03/04/2007	03/07/2007	1013, 1020	3.A, 4.2
61019/00	HART v. the United Kingdom	06/02/2007	06/02/2007	1013	3.B
39482/98	DOWSETT v. the United Kingdom	24/06/2003	24/09/2003	1020	4.1
39647/98	**EDWARDS v. the United Kingdom**	**27/10/2004**	**27/10/2004**	**1020**	**4.1**
26494/95	**J.T. v. Royaume-Uni**	**30/03/2000**	**30/03/2000**	**1028**	**4.2**
27229/95	**KEENAN v. the United Kingdom**	**03/04/2001**	**03/04/2001**	**1013**	**4.2**
28212/95	**BENJAMIN and WILSON v. the United Kingdom**	**26/09/2002**	**26/12/2002**	**1020**	**4.2**
30668/96	**WILSON, NATIONAL UNION OF JOURNALISTS & OTHERS v. the United Kingdom**	**02/07/2002**	**02/10/2002**	**1013**	**4.2**
32555/96	**ROCHE v. the United Kingdom**	**19/10/2005**	**19/10/2005**	**1020**	**4.2**
34155/96	G.W. v. the United Kingdom	15/06/2004	15/09/2004	1028	4.2
35574/97	LE PETIT v. the United Kingdom	15/06/2004	15/09/2004	1028	4.2
36256/97	**THOMPSON v. the United Kingdom**	**15/06/2004**	**15/09/2004**	**1013**	**4.2**
40426/98	MARTIN v. the United Kingdom	24/10/2006	24/01/2007	1028	4.2
41534/98	BELL v. the United Kingdom	16/01/2007	16/04/2007	1013	4.2
45508/99	**H.L. v. the United Kingdom**	**05/10/2004**	**05/01/2005**	**1013**	**4.2**
46477/99	**Paul and Audrey EDWARDS v. the United Kingdom**	**14/03/2002**	**14/06/2002**	**1013**	**4.2**
57067/00	**GRIEVES v. the United Kingdom**	**16/12/2003**	**16/12/2003**	**1028**	**4.2**

66746/01	**CONNORS v. the United Kingdom**	**27/05/2004**	**27/08/2004**	**1028**	**4.2**
74025/01	**HIRST v. the United Kingdom (no. 2)**	**30/03/2004, 06/10/2005**	**06/10/2005**	**1013**	**4.2**
11002/05	ASSOCIATED SOCIETY OF LOCOMOTIVE ENGINEERS & FIREMEN (ASLEF) v. the United Kingdom	27/02/2007	27/05/2007	1020	4.2
25599/94	**A. v. Royaume-Uni**	**23/09/1998**	**23/09/1998**	**1013**	**4.3**
28883/95	**MCKERR v. the United Kingdom** and 5 other cases concerning actions of security forces	**04/05/2001**	**04/08/2001**	**1013, 1020**	**4.3**

Cases against the United Kingdom the examination of which has been closed in principle on the basis of the execution information received and awaiting the preparation of a final resolution

Application Number	*English Case Title*	*Date of Judgment*	*Date of Final Judgment*
18731/91	**JOHN MURRAY v. the United Kingdom**	**08/02/1996**	**08/02/1996**
22384/93	KEVIN MURRAY v. the United Kingdom	15/01/1998	15/04/1998
22520/93	**JOHNSON v. the United Kingdom**	**24/10/1997**	**24/10/1997**
23496/94	QUINN v. the United Kingdom	26/01/1998	26/04/1998
25594/94	**HASHMAN and HARRUP v. the United Kingdom**	**25/11/1999**	**25/11/1999**
25680/94	I. v. the United Kingdom	11/07/2002	11/07/2002
28135/95	MAGEE v. the United Kingdom	06/06/2000	06/09/2000
28901/95	**ROWE AND DAVIS v. the United Kingdom**	**16/02/2000**	**16/02/2000**
28945/95	**T.P. and K.M. v. the United Kingdom**	**10/05/2001**	**10/05/2001**
28957/95	**GOODWIN v. the United Kingdom**	**11/07/2002**	**11/07/2002**
29392/95	**Z. and others v. the United Kingdom**	**10/05/2001**	**10/05/2001**
29798/96	LLOYD+ v. the United Kingdom	01/03/2005	06/07/2005
30308/96	**FAULKNER v. Royaume-Uni**	**30/11/1999**	**30/11/1999**
32340/96	**CURLEY v. the United Kingdom**	**28/03/2000**	**28/06/2000**
33218/96	E. and others v. the United Kingdom	26/11/2002	15/01/2003
33274/96	**FOXLEY v. the United Kingdom**	**20/06/2000**	**20/09/2000**
33394/96	**PRICE v. the United Kingdom**	**10/07/2001**	**10/10/2001**
35605/97	**KINGSLEY v. the United Kingdom**	**28/05/2002**	**28/05/2002**
35718/97	CONDRON v. the United Kingdom	02/05/2000	02/08/2000
35765/97	**A.D.T. v. the United Kingdom**	**31/07/2000**	**31/10/2000**
36408/97	AVERILL v. the United Kingdom	06/06/2000	06/09/2000
36533/97	ATLAN v. the United Kingdom	19/06/2001	19/09/2001

37471/97	**FAULKNER v. the United Kingdom**	**04/06/2002**	**04/09/2002**
37555/97	**O'HARA v. the United Kingdom**	**16/10/2001**	**16/01/2002**
38719/97	D.P. & J.C. v. the United Kingdom	10/10/2002	10/01/2003
38784/97	**MORRIS* v. the United Kingdom**	**26/02/2002**	**26/05/2002**
39360/98	S.B.C. v. the United Kingdom	19/06/2001	19/09/2001
39393/98	**M.G. v. the United Kingdom**	**24/09/2002**	**24/12/2002**
39665/98	**EZEH v. the United Kingdom**	**09/10/2003**	**09/10/2003**
39846/98	**BRENNAN v. the United Kingdom**	**16/10/2001**	**16/01/2002**
40787/98	**HIRST v. the United Kingdom (no. 1)**	**24/07/2001**	**24/10/2001**
42317/98	**HOOPER+ v. the United Kingdom**	**16/11/2004**	**16/02/2005**
44647/98	**PECK v. the United Kingdom**	**28/01/2003**	**28/04/2003**
44652/98	**BECKLES v. the United Kingdom**	**08/10/2002**	**08/01/2003**
45276/99	**HILAL v. the United Kingdom**	**06/03/2001**	**06/06/2001**
45825/99	MILLER v. the United Kingdom	26/10/2004	26/01/2005
46295/99	**STAFFORD v. the United Kingdom**	**28/05/2002**	**28/05/2002**
46387/99	**WHITFIELD v. the United Kingdom**	**12/04/2005**	**12/07/2005**
47114/99	**TAYLOR-SABORI v. the United Kingdom**	**22/10/2002**	**22/01/2003**
47441/99	WOOD v. the United Kingdom	15/03/2005	15/03/2005
47676/99	BEET+ v. the United Kingdom	01/03/2005	06/07/2005
48015/99	**EASTERBROOK v. the United Kingdom**	**12/06/2003**	**12/09/2003**
48539/99	**ALLAN v. the United Kingdom**	**05/11/2002**	**05/02/2003**
49771/99	**JORDAN v. the United Kingdom**	**10/12/2002**	**10/03/2003**
50272/99	**HUTCHISON REID v. the United Kingdom**	**20/02/2003**	**20/05/2003**
53236/99	WAITE v. the United Kingdom	10/12/2002	10/03/2003
53741/00	**CROWTHER v. the United Kingdom**	**01/02/2005**	**06/07/2005**
56547/00	**P., C. and S. v. the United Kingdom**	**16/07/2002**	**16/10/2002**
56745/00	BLACK v. the United Kingdom	16/01/2007	16/04/2007
57646/00	MCELROY v. the United Kingdom	22/05/2007	22/05/2007
57836/00	**MELLORS v. the United Kingdom**	**17/07/2003**	**17/10/2003**
58370/00	O'CONNELL v. the United Kingdom	22/05/2007	22/05/2007
59512/00	BLACKSTOCK v. the United Kingdom	21/06/2005	21/09/2005
60148/00	SINGH AND OTHERS v. the United Kingdom	08/06/2006	08/06/2006
60469/00	TERRILL v. the United Kingdom	16/01/2007	16/01/2007
60525/00	CORCORAN v. the United Kingdom	06/02/2007	06/02/2007
60682/00	YOUNG v. the United Kingdom	16/01/2007	16/04/2007
60933/00	COLE v. the United Kingdom	23/05/2006	23/05/2006
60946/00	DAVIS v. the United Kingdom	06/02/2007	06/02/2007

60958/00	**S.C. v. the United Kingdom**	**15/06/2004**	**10/11/2004**
61036/00	OWENS v. the United Kingdom	13/01/2004	13/01/2004
61604/00	OLIVER v. the United Kingdom	25/04/2006	25/04/2006
61827/00	**GLASS v. the United Kingdom**	**09/03/2004**	**09/06/2004**
61928/00	CREW v. the United Kingdom	09/01/2007	09/01/2007
61956/00	GREENHALGH v. the United Kingdom	05/09/2006	05/09/2006
63176/00	HAGGAN v. the United Kingdom	22/05/2007	22/05/2007
63287/00	HYDE v. the United Kingdom	05/09/2006	05/09/2006
63466/00	DONOVAN v. the United Kingdom	06/03/2007	06/03/2007
63507/00	RATHFELDER v. the United Kingdom	09/01/2007	09/01/2007
65727/01	FORBES v. the United Kingdom	12/06/2007	12/06/2007
67385/01	WYNNE v. the United Kingdom	16/10/2003	16/01/2004
68056/01	GAMBLE v. the United Kingdom	09/01/2007	09/01/2007
68416/01	**STEEL and MORRIS v. the United Kingdom**	**15/02/2005**	**15/05/2005**
68890/01	BLAKE v. the United Kingdom	26/09/2006	26/12/2006
71841/01	YETKINSEKERCI v. the United Kingdom	20/10/2005	15/02/2006
74976/01	EASTAWAY v. the United Kingdom	20/07/2004	20/10/2004
75362/01	VON BULOW v. the United Kingdom	07/10/2003	07/01/2004
515/02	**HENWORTH v. the United Kingdom**	**02/11/2004**	**02/02/2005**
517/02	KOLANIS v. the United Kingdom	21/06/2005	21/09/2005
1303/02	LEWIS v. the United Kingdom	25/11/2003	25/02/2004
13881/02	**KING v. the United Kingdom**	**16/11/2004**	**16/02/2005**
14399/02	MASSEY v. the United Kingdom	16/11/2004	16/02/2005
19365/02	HILL v. the United Kingdom	27/04/2004	27/07/2004
21413/02	**KANSAL v. the United Kingdom**	**27/04/2004**	**10/11/2004**
23414/02	WOOD v. the United Kingdom	16/11/2004	16/02/2005
36536/02	**B. and L. v. the United Kingdom**	**13/09/2005**	**13/12/2005**
40029/02	WINGRAVE v. the United Kingdom	29/11/2005	29/11/2005
6563/03	**SHANNON v. the United Kingdom**	**04/10/2005**	**04/01/2005**
6638/03	**P.M. v. the United Kingdom**	**19/07/2005**	**19/10/2005**
28867/03	**KEEGAN v. the United Kingdom**	**18/07/2006**	**18/10/2006**
32570/03	GRANT v. the United Kingdom	23/05/2006	23/08/2006
8866/04	HUSSAIN v. the United Kingdom	07/03/2006	07/06/2006
12350/04	**WAINWRIGHT v. the United Kingdom**	**26/09/2006**	**26/12/2006**
30034/04	ELAHI v. the United Kingdom	20/06/2006	20/09/2006

Main pending cases against United Kingdom

1007 (October 2007) section 2

62617/00 Copland, judgment of 03/04/2007, final on 03/07/2007
This case concerns a breach of the applicant's right to respect for her private life and her correspondence due to the monitoring of her telephone, e-mail and internet usage before the end of 1999, without her knowledge, on the order of the Deputy Principal of the college of further education where she was employed, which was a state body.
As at the material time there was no domestic law regulating monitoring by employers of the use of telephone, e-mail and internet by employees, the European Court found that the interference in this case was not "in accordance with domestic law" (violation of Article 8).
Individual measures: The European Court awarded the applicant just satisfaction in respect of non-pecuniary damage.
• *Information is awaited: on what has been done with the information obtained through unlawful monitoring*.
General measures:
***1) Legislative measures**:* The European Court noted that since the facts arose, legislation has been adopted (§20). The Regulation of Investigatory Powers Act 2000 provides for the regulation of *inter alia* interception of communications.
The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 (SI No. 2699), made under the 2000 Act, came into force on 24/10/2000. The Regulations set out the circumstances in which employers may record or monitor employee's communications (such as e-mail or telephone) without the consent of the employee or the other party to the communication. Employers are required to take reasonable steps to inform employees that their communications might be intercepted (§20).
***2) Guidance**:* Guidance on monitoring staff usage of technology is available on the website of the Department of Business, Enterprise and Regulatory Reform. The guidance includes the following:
- The requirement to inform staff of interceptions made under the Regulations without consent (for example by a note in staff contracts or in other readily available literature);
- For interceptions outside the scope of the Regulations, the consent of the sender and recipient is required; and
- Such consent may be obtained by inserting a clause in staff contracts and by call operators or recorded messages at the beginning of a call stating that calls might be monitored or recorded unless third parties objected.
***3) Publication and dissemination**:* The judgment has been published as follows: *All England Law Reports* [2007] All ER (D) 32 (April); *European Court of Human Rights* [2007] ECHR 253 and *The Times Law Reports* (TLR), 24 April 2007. It also appears on many websites.
The United Kingdom authorities have indicated that the judgment will be sent out to further education institutions in England and Wales.
• *Further information is awaited in this respect.*

The Deputies decided to resume consideration of this item:
1. at their 1013th meeting (3-5 December 2007) (DH), in the light of information to be provided concerning the payment of just satisfaction, if necessary;
2. at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of information to be provided on individual measures, namely what had been done with the unlawfully obtained information and general measures, *i.e.* the dissemination of the European Court's judgment to further education institutions in England and Wales.

61019/00+ Hart and others, judgment of 06/02/2007 - Friendly settlement

1007 (October 2007) section 4.1

39482/98 Dowsett, judgment of 24/06/03, final on 24/09/03
The case concerns the unfairness of criminal proceedings brought against the applicant in the Crown Court (in 1989) and subsequent proceedings before the Court of Appeal (in 1994) due to the failure by the prosecution to disclose certain evidence to the defence.
The European Court observed that a procedure, such as in this case, whereby the prosecution itself - without notifying the trial judge - assessed the importance to the defence of concealed information and weighed that against the public interest in keeping the information secret, could not comply with the

requirements of a fair trial. It reiterated the importance of placing material relevant to the defence before the judge for his or her ruling on questions of disclosure at the trial stage, i.e. at the time when it could serve most effectively to protect the rights of the defence.
The Court found that the review procedure before the appeal court could not remedy the unfairness caused at the trial because in this case, in deciding whether the material in issue should be disclosed, the Court of Appeal would neither have been assisted by defence counsel's arguments nor have been able to draw on any first hand knowledge of the evidence given at trial (violation of Article 6§1 in conjunction with 6§3b).
Individual measures: The applicant, who was sentenced to life imprisonment following these proceedings, applied to have his case reviewed by the Criminal Cases Review Commission (CCRC).
On 25/07/2005 the CCRC took a final decision, refusing to return the case to the Court of Appeal and concluding in particular that the new information put before it concerning the main document at issue, taken in any combination with any other frailties in the prosecution case, was not sufficient to lead it to believe that there was a real possibility that any properly directed jury might reasonably have reached a different decision in Mr Dowsett's case. On 22/06/2006, the Divisional Court granted the applicant leave to seek a judicial review of the CCRC's decision, limited to the implications of the European Court's judgment for the safety of the conviction.
The High Court dismissed the application on 08/06/2007 ([2007] EWHC 1923 (Admin)), concluding that the CCRC was "plainly entitled" to reach the conclusion that it had reached and so not to refer the case.
• *Assessment is under way of this information in the light of the criteria set forth in Committee of Ministers' Recommendation Rec(2000)2 on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights.*
General measures: This case presents similarities to that of Rowe and Davis (judgment of 16/02/2000) (in Section 6.2 on the basis of the domestic case-law developments noted in the judgment and of the publication of the European Court's judgment).
These common-law rules have, however, since been superseded by the Criminal Procedure and Investigations Act 1996 (CPIA), the relevant provisions of which have recently been modified by Part V of the Criminal Justice Act 2003. This Part also introduces heavier burdens of disclosure on the defence.
As regards disclosure by the prosecution, in accordance with the new Section 3 of the 1996 Act, as amended, the prosecutor will in future be under an initial duty to disclose to the accused "any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused". In addition, by virtue of the new Section 7A, the prosecutor will be under a continuing duty to keep under review the question whether at any given time the prosecution has such material which has not been disclosed to the accused, and, if so, to disclose the material to the accused as soon as reasonably practicable. A range of measures are in place to ensure that the prosecution discharges its disclosure obligations in full. It should be recalled that under the CPIA, in neither the new text nor the former does Section 3(6) require the prosecutor to disclose material that, upon his application to a court, the court has found to be not in the public interest to disclose and orders accordingly.
Finally, although prosecution disclosure duties apply without the defence having to make an application for disclosure, in accordance with the new Section 8, a safeguard section, the accused may apply to the court for an order requiring the prosecutor to disclose material which has not been disclosed to him or her and which he or she believes is required to be disclosed.
The United Kingdom authorities indicated that these provisions came into force on 04/04/2005 under the Criminal Justice Act 2003 (Commencement No. 8 and Transitional and Saving Provisions) Order SI 2005/950 made on 24/03/2005.
The judgment of the European Court was published in *European Human Rights Reports*, (2004) 38 EHRR 41.

The Deputies decided to resume consideration of this item at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of the assessment of the information provided concerning individual measures.

1007 (October 2007) section 4.1

39647/98+ Edwards and Lewis, judgment of 27/10/2004 - Grand Chamber
The case concerns violations of the applicants' right to a fair trial due to two judicial decisions (of 1995 and 1996) to withhold certain evidence from the defence in violation of the principle of equality of arms

and without adequately protecting the interest of the accused in criminal proceedings against them (violations of Article 6§1). The applicants argued that their criminal offences were the result of entrapment by undercover police officers.
The trial judges dismissed these claims on the ground that the undisclosed evidence did not prove entrapment, that it would not assist the defence and that non-disclosure was justified by genuine public interest. The European Court noted that the defence had been unable to argue the case on entrapment in full before the judges, because the evidence could not be challenged, and that the same judges who decided to withhold the evidence had also decided on an issue of fact related or possibly related to the withheld evidence. The applicants were sentenced to nine years' and four and a half years' imprisonment respectively.
Individual measures: Neither of the applicants is still detained.
According to the information received from the applicants' lawyers, Mr Lewis had not appealed his conviction prior to his application to the European Court. Leave was subsequently granted to appeal out of time but this appeal against his original conviction was dismissed on 06/04/2005 by the Court of Appeal ([2005} EWCA Crim 859). A further application was made to the European Court under Article 6 following the Court of Appeal's judgment, but that application was rejected at an early stage.
Mr Edwards applied to the Criminal Cases Review Commission (CCRC) to have his case referred to the Court of Appeal. According to information provided by the applicant, the CCRC decided on 28/02/2007 not to refer his case. On 14/08/2007 a single judge of the High Court refused to grant permission for the judicial review of this decision. The applicant has renewed his application for a hearing before the full court, arguing in particular that the domestic courts have failed to give due effect to the judgment of the European Court.
• *Assessment: In view of the concerns raised as to the effective application at domestic level of the judgment of the European Court, information is awaited as to the outcome of the judicial review application in the case of Mr Edwards.*
General measures: In a letter of 21/04/2005, the United Kingdom authorities indicated that on 05/02/2004 the House of Lords had delivered the decision in the case of *R v H and others* [2004] 2 AC 134, in which it considered the question of whether the procedures for dealing with claims for public interest immunity made on behalf of the prosecution in criminal proceedings were compliant with Article 6 of the Convention.

1) Disclosure of sensitive evidence: the House of Lords set out in its decision a number of general guiding principles on disclosure and the procedure which must be followed when a court is faced with an application to withhold sensitive material from the defence. The House of Lords concluded that such procedure was in compliance with Article 6. The principles were summarised in the Guidance which was issued by the Director of Public Prosecutions on 13/02/2004 and circulated among lawyers, caseworkers and prosecutors. One of the principles sets out that prosecutors should not put material unnecessarily before the court. The principles were later included Chapters 12 and 13 of the Crown Prosecution Service's Disclosure Manual issued in April 2005. Moreover, the United Kingdom authorities indicated that Part 5 of the Criminal Justice Act 2003 recently amended the disclosure regime in the Criminal Procedure and Investigations Act 1996. This latter Act gave statutory force to the prosecution's duty of disclosure. The new test requires initial and continuing prosecution disclosure of any previously undisclosed material "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused". The new edition of the Crown Prosecution Service's Disclosure Manual (issued in April 2005) supersedes all previous guidance. Along other things it clearly sets out when the prosecutor's statutory duty to disclose is triggered, the importance of scrupulously observing that duty, and sets out the consequences of failure to do so.

2) Possibility of appointing a "special independent counsel": the House of Lords held that there may be certain criminal trials where such counsel is necessary and in the interests of justice. However, such an appointment should always be exceptional and not automatic.

Moreover, the UK authorities have provided information on the procedure that is followed in the event that a court decides that it requires the assistance of independent counsel.

The Deputies decided to resume consideration of this item at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of information to be provided on individual measures.

1007 (October 2007) section 4.2

26494/95 J.T., judgment of 30/03/00 - Friendly settlement

The applicant, who was forcibly detained in a psychiatric institution until 1996, complained of the legislation (Mental Health Act 1983) under which she was unable to change the person appointed "nearest relative" - in her case her mother with whom she was in conflict (complaint under Article 8).
Individual measures: The applicant was discharged from the psychiatric institution in 1996. There was no undertaking by the government in respect of individual measures.
General measures: Under the terms of the friendly settlement, the Government committed itself to undertaking legislative reform to amend the legislation at issue in this case (Mental Health Act 1983), with a view to allowing committed psychiatric patients to contest the status of "nearest relative" before a court if the patient submits reasonable objections to a person acting in such capacity.

- *England and Wales:* The Mental Health Bill was adopted by Parliament on 04/07/2007 and received Royal Assent on 19/07/2007. Sections 23 to 26 of the Mental Health Act 2007 are relevant to the J.T. case. In particular, section 24 enables patients to apply to a court to discharge or vary an order appointing a person as "nearest relative". The court must be of the opinion that the person appointed is a "suitable person".
It is expected that the Act will be implemented in full by April 2008.
• *Further information is awaited on the entry into force of the sections of the Mental Health Act 2007 relevant to the J.T. case.*

- *Northern Ireland:* Under Articles 36-37 of the Mental Health (Northern Ireland) Order 1986, which mirror the wording of sections 29-30 of the Mental Health Act 1983, a patient cannot apply to a court to change the person appointed as "nearest relative".
Following the Review of Mental Health and Learning Disability, a report was published on 16/08/2007. This report will be submitted to the Department of Health, Social Services and Public Safety for their consideration.
The section relevant to the J.T. case is "A Comprehensive Legal Framework for Mental Health and Learning Disability", which states that the proposed legislative framework should include the introduction of a "nominated person" to replace the "nearest relative" (§ 6.6), and that a person should be capable of refusing the involvement of a previous carer, and that in such situations, the appointment of another "nominated person" should be facilitated (§ 6.35).
• *Further information is awaited on the consideration by the Department of Health, Social Services and Public Safety of the sections relevant to the J.T. case in the above report.*

- *Scotland:* Scotland has its own legislation in this area (The Adults with Incapacity (Scotland) Act 2000 and the Adult Support and Protection (Scotland) Act 2007). According to the Secretariat's assessment, it would not appear to give rise to circumstances similar to those in the J.T. case.

The Deputies decided to resume consideration of this item at the latest at their 1028th meeting (3-5 June 2008) (DH), in the light of information to be provided on general measures, namely the entry into force of the new legislation and the consideration of relevant proposals in Northern Ireland.

997 (June 2007) section 4.2

27229/95 Keenan, judgment of 03/04/01
The case concerns the inhuman and degrading treatment inflicted on the applicant's son in 1993 due to the conditions of his detention, in particular the belated imposition on him of a serious disciplinary punishment (including seven days' segregation and twenty-eight days added to his sentence, imposed just prior to his expected date of release), which was not compatible with the standard of treatment required in respect of a mentally ill person (violation of Article 3).
The case also concerns the absence of effective remedies enabling the applicant's son to contest the disciplinary sanctions to which he was subjected (violation of Article 13), as well as the lack of effective remedies available to the applicant herself, as she could not apply for compensation following her son's suicide, and nor was there an effective remedy available that would have established where responsibility lay for his death (violation of Article 13).
Individual measures: The European Court awarded the applicant just satisfaction for non-pecuniary damages in respect of her deceased son, and a sum for her own non-pecuniary damages.
General measures: The judgment of the European Court was published in *European Human Rights Reports* at (2001) 33 EHRR 38.

1) *Violation of Article 3*: A revision of the Segregation Policy (Prison Service Order (PSO) 1700), which is followed by all prison establishments, was approved by directors in July 2003 and was implemented in establishments from 17/11/2003.
This revised policy lays down, in particular:

- a requirement that prison staff who work in the segregation unit are adequately trained in suicide prevention and mental-health awareness;
- a new safety algorithm to be followed with respect to all prisoners placed in segregation, to ensure that appropriate mental-health screening is carried out; and
- a segregation history sheet, which must be opened on all prisoners in segregation, to help alert staff to any changes in the prisoner's behaviour pattern which could indicate that he or she is not coping with segregation.
- As already required by the new safety algorithm, a case conference must be held, involving the prison governor, relevant prison staff, nursing staff, a doctor and an outside psychiatrist, in all cases where the health-care team advises that there are medical reasons against segregation.

Finally, Statutory Instrument 2005 No. 3437 revised the Prison Rules 1999 to bring them into line with the new policy. Article 14, which amends Rule 58, lays down that before deciding whether to impose a punishment of cellular confinement, the governor, adjudicator or reviewer shall ask a registered medical practitioner or registered nurse whether there are any medical reasons why the punishment is unsuitable and shall take this advice into account when making a decision.

• *Preliminary assessment by the United Kingdom authorities*: The UK authorities have indicated that PSO 1700 and its underlying performance standard are undergoing the revision process that every policy document undergoes every 2-3 years. They are, however, satisfied that the review and implementation process adopted since the delivery of the judgment ensures that policy changes and amendments are implemented speedily throughout the prison system.

• *Additional information provided by the United Kingdom authorities:* The revision process has now become part of a wider review, examining the wider issues of, *inter alia* reducing the use of segregation, alternatives to segregation, and the management of prisoners with mental health needs. It is hoped that the report of that review will be available in autumn 2007.

• *Additional information is expected on the progress made in the review.*

2) *Violation of Article 13 (remedies to contest disciplinary sanctions)*: In February 2002, PSO 2510 established new complaints procedures for prisoners. It introduced a confidential box on all prison wings, where prisoners can both pick up a complaints form and post a completed complaints form. A response must usually be given within 3 week-days; for complaints concerning prison staff, the time-limit is 10 week-days.

(a) *Remedies with respect to disciplinary sanctions imposed by independent adjudicators, in particular, additional days*: As to the possibilities for prisoners effectively to challenge disciplinary sanctions imposed on them under the new procedures, the United Kingdom authorities pointed to the Prison Rules as amended in 2002 following the judgment of the European Court in the case of Ezeh and Connors.

They emphasised the relevance in particular of Rules 53A, 54(3), and 55A, dealing with the new adjudication procedures which apply whenever additional days should be awarded for the offence (if the prisoner is found guilty), and give the prisoner the right to legal representation. Statutory Instrument 2005 No. 869 amended the Prison Rules 1999 to provide for a review of a punishment imposed by an adjudicator. The review must be begun within 14 days of receipt of the request, and the reviewer may substitute another punishment or quash the punishment entirely. A prisoner requesting review must serve any additional days unless and until they are reduced.

The Adjudications Standard was revised in July 2002 to include the requirement for a fast-track system for urgent adjudication appeals to be available in all prisons. Requests for the review of punishments imposed by independent adjudicators (to whom the power to impose additional days has been transferred) are considered by the Senior District Judge or his deputy at Horseferry Road Magistrates' Court, and should be faxed if urgent. The Senior District Judge considers such a request within 14 days.

• *Additional information provided by the United Kingdom authorities*: In cases of the kind mentioned above, the judge must deliver his decision within 14 days in urgent matters. It is more likely to be within 2 and 5 working days. Where an inmate is already serving additional days, the Courts Service processes the paperwork on the day and passes it to a reviewing judge for a decision.

If the judge quashes or amends the disciplinary sanctions, the Courts Service will fax the decision to the prison and contact them by telephone. If the prisoner has a solicitor, the Courts Service will also telephone them, fax the decision, and advise that they should contact the prison to ensure arrangements for release are underway. If the judge confirms the disciplinary sanctions, the prison and the prisoner/solicitor are advised by post.

Assessment: It appears that a mechanism is available to prisoners enabling them to challenge effectively the disciplinary sanctions imposed on them by independent adjudicators.

(b) *Remedies with respect to disciplinary sanctions imposed by governors, in particular, segregation*: The Prison Discipline Manual was revised and reissued as PSO 2000, and came into force on 23/01/2006. It makes it mandatory for prisons to have a fast-track system available for urgent applications for the review of adjudications that have been heard by governors, such as when the prisoner is currently serving the punishment or is near to release. PSO 2000 instructs that in such cases, it may be necessary to fax the adjudication papers to the unit handling the request for review.
Any prisoner who receives a punishment of cellular confinement may submit a complaint to the Governor, which will be forwarded to the Briefing and Casework Unit in the Prison Service HQ for the Area Manager to decide whether to uphold or quash the finding or mitigate the punishment. If the prisoner is not satisfied, he may take the complaint to the Ombudsman, who may make a recommendation to the Director General of the Prison Service. The recommendation will normally be accepted, but it is not binding on the Prison Service and may on very rare occasions be rejected.
In addition, the Prisons and Probation Ombudsman now has jurisdiction to review disciplinary procedures and the merits of disciplinary hearings (although he cannot rehear disciplinary procedures). If the Ombudsman upholds such a complaint, the Prison Service may quash the adjudication.
• *Information is awaited as to the amount of time taken between the submission of a complaint by the prisoner and the decision being rendered by the Area Manager.*
- *Some outstanding questions with regard to these measures will be followed up bilaterally.*

3) Violation of Article 13 (remedy following the suicide of a prisoner): Similar issues are currently being examined with respect to the case of Edwards (judgment of 14/03/2002) (see below, Section 4.2).

The Deputies decided to resume consideration of this item at the latest at their 1013th meeting (3-5 December 2007) (DH), in the light of further information to be provided concerning general measures.

1007 (October 2007) section 4.2

28212/95 Benjamin and Wilson, judgment of 26/09/02, final on 26/12/02
The applicants were initially sentenced by courts to terms of discretionary life imprisonment but were subsequently granted the status of "technical lifers" (i.e. the recognition that they were suffering from a mental disorder which had influenced them to a significant extent at the time of the offence although the court had not made a hospital order on sentencing, and that they should accordingly be treated as patients rather than prisoners). The case concerns the fact that, as technical lifers, the applicants were unable to exercise their right to have their continued detention after the expiry of their tariffs reviewed by a body empowered to examine the lawfulness of their detention in accordance with Convention's requirements. At the relevant time, the applicants were detained in hospital, and, in accordance with the applicable provisions of the Mental Health Act 1983, the Mental Health Review Tribunal (MHRT) could only recommend but not order their release (violation of Article 5§4).
Individual measures: The first applicant was convicted in 1983, with his tariff of six years expiring in 1989. In October 1993 he was made a technical lifer. He was released by decision of the Secretary of State on the recommendation of the MHRT on 09/01/2001.
The second applicant was sentenced in 1977; his tariff, which was set at eight years, expired in 1984. In June 1993, he was made a technical lifer and he is currently detained at a medium secure psychiatric hospital. The MHRT reviewed Mr Wilson's case on 10/01/2006, and found that he continued to meet the statutory criteria for detention.
• *Recent developments:* The information provided on 17/08/2006 and 08/02/2007 concerning technical lifers applies to Mr Wilson's case (see general measures below).
• *Assessment: On 30/08/2007, clarifications were requested in the light of this information as to how the review of cases such as Mr Wilson's satisfied the Convention's requirement that the reviewing body must have the competence to decide on the lawfulness of the detention and to order release if the detention is unlawful.*
General measures: According to the Court's conclusions in this case (see §§36-37 of the judgment), the MHRT did not meet the requirements of Article 5§4 of the Convention as it could only issue recommendations and was not empowered to release the applicants.
• *Information provided by the United Kingdom authorities*: The judgment has been published in *European Human Rights Reports* at (2003) 36 EHRR 1.
Furthermore, as of 02/04/2005, all future life-sentence prisoners have their discharge determined by the Parole Board and managed on discharge through "life licence" arrangements (i.e. the specific parole conditions applicable to life prisoners).

• *Further information provided by the UK authorities on 17/08/2006 and 08/02/2007:* All life-sentence prisoners held in hospitals (including the remaining technical lifers) are entitled to apply to the MHRT in the period between 6 months and 12 months following detention and in any subsequent period of 12 months. In addition, the Secretary of State may at any time refer the prisoner to the MHRT and must do so in any three-year period. Following an application or referral to the MHRT, the Tribunal will notify the Secretary of State as to whether they consider that the prisoner continues to meet the conditions for detention in hospital or should be absolutely discharged or discharged subject to conditions.

1) Technical lifers: Technical lifers (such as Mr Wilson) are treated as patients under sections 37 ("hospital orders") and 41 ("restriction orders") of the Mental Health Act 1983, and if the MHRT recommended discharge, such patients would be discharged without referring to the Parole Board.

From information provided on 08/02/2007, it appears that the Tribunal makes a recommendation for a discharge (either absolute or conditional) under section 74(1)(a) of the Mental Health Act. The Secretary of State will agree to it. Whilst he reserves the right to refuse discharge, he has never actually refused a discharge. In accordance with section 74(3) of the Mental Health Act, if the Tribunal notifies the Secretary of State that the patient would be entitled to be absolutely or conditionally discharged, but the Secretary of State does not agree to his discharge within a 90-day period, the patient is remitted back to prison, where his detention is reviewed by the Parole Board under section 28 of the Crime (Sentences) Act 1997. He is then dealt with as if he had not been removed to a hospital.

If the Tribunal recommends discharge under section 74(1)(a) of the Mental Health Act but at the same time recommends, under Section 74(1)(b) of the Act, that in the event of the patient not being discharged he should continue to be detained in hospital, and if the Secretary of State does not discharge the patient within 90 days, the case is referred to the Parole Board. If the Parole Board makes a direction or recommendation by which the patient would become entitled to be released (whether unconditionally or on licence) from any prison or institution in which he might have been detained had he not been removed to hospital, the restrictions will cease to have effect at the time he would become entitled to be so released. The patient is then treated as a non-restricted patient and may be discharged by the responsible medical officer or the Tribunal.

• *Assessment: It would seem in the light of the above information that existing technical lifers are still not entitled to the review of their continued detention by a judicial body that is empowered to order their release (it appears that in all cases the Secretary of State still retains the right to refuse their discharge after the MHRT has recommended it). Bilateral contacts are under way to clarify this point.*

2) Transferred lifers: In the case of a transferred lifer (a life-sentence prisoner who did not or could not apply for "technical lifer" status before 02/04/2005 and who is currently held in a hospital), where his tariff has expired, or is about to expire, the Secretary of State will as a matter of course refer the matter to the Tribunal.

On 29/08/2006, the UK authorities indicated that if the MHRT finds that the prisoner no longer meets the criteria for detention in a hospital, it may make a recommendation under Section 74 of the Mental Health Act 1983 that the patient would be entitled to be absolutely or conditionally discharged. Referral to the Parole Board is then mandatory. The Parole Board will then consider whether the transferred lifer should be released on life licence.

On 08/02/2007, the UK authorities indicated that if the MHRT recommends absolute or conditional discharge, the Secretary of State can either agree to discharge within 90 days or refer the matter to the Parole Board.

It should be noted that when a Secretary of State refers such a matter to the Parole Board, the Parole Board review will take place by way of oral hearing within 55 working days. The circumstances of the individual case will always be taken into account, and the review could occur sooner. The Parole Board will continue to review the case whenever a subsequent MHRT decides that the patient would be entitled to be absolutely or conditionally discharged and where the Secretary of State does not agree to discharge.

• *Assessment: It may be noted that the judgment did not call into question the technical lifer system itself but merely the manner in which the release of technical lifers was decided. The effect of the abolition as from 02/04/2005 of the possibility of applying for technical lifer status appears in particular to have been to attach greater restrictions on prisoners who might previously have benefited from such a status (they appear now to have lost the possibility to benefit from unconditional release and to be entitled only to release on life licence).*

On 30/08/2007 the United Kingdom authorities were invited to put forward their observations regarding this assessment.

Issues concerning the Parole Board have been examined in the context of the supervision of the execution of the Stafford judgment (section 6.2).

The Deputies decided to resume consideration of this item at their 1020th meeting (4-6 March 2008) (DH), in the light of the outcome of the bilateral contacts with the respondent state concerning the general measures as well as on the individual measures concerning Mr Wilson, adoption of which is closely linked to the general measures.

997 (June 2007) section 4.2

30668/96 Wilson and the National Union of Journalists, Palmer, Wyeth and the National Union of Rail, Maritime and Transport workers, Doolan and others, judgment of 02/07/02, final on 02/10/02

The case concerns the failure of the state in its positive obligation to secure the enjoyment of rights under Article 11, by permitting employers to use financial incentives to induce employees to surrender important union rights (violation of Article 11 as regards both the individual and the trade union applicants). The individual applicants refused to sign new, individual contracts of employment offering a wage increase in return for renouncing the right to be represented by their trade unions. As a consequence their salaries fell below those of their colleagues who had signed individual contracts.

Individual measures: The European Court awarded each individual applicant a sum in respect of non pecuniary damage. The Court also awarded a sum to the applicant trade unions with respect to their own legal costs and expenses, as well as the individual applicants' legal costs and expenses which had been paid for by the applicant trade unions.

General measures:

• *General measures adopted:*

- The judgment of the European Court was published in the *European Human Rights Reports* at (2002) 35 EHRR 523; *Industrial Relations Law Reports* at [2002] IRLR 568; and appeared in *The Times Law Reports* on 05/07/2002.

- Following consultations by the Department of Trade and Industry in 2003, the Employment Relations Act 2004 was enacted on 16/09/2004. Part III of the Act, which came into force on 01/10/2004, deals with inducement and detriments in respect of membership of independent trade unions. It provides, *inter alia*, that workers have a right not to have an offer made to them for the sole or main purpose of inducing them to renounce union membership or activities. In the event that such an offer is made to a worker, the worker (or the former worker) may bring a complaint before an employment tribunal.

- The Act applies to "a worker who is a member of an independent trade union which is recognised, *or seeking to be recognised*, by his employer" (emphasis added). Thus, non-recognised unions may benefit from the protection afforded by these provisions. In addition, it is open to tribunals to apply the "sole or main purpose" test in a manner that is compatible with the present judgment, and at this stage there would appear to be no indication that they will fail to do so.

• *Additional information provided by the United Kingdom authorities:* According to the government, the Court did not hold that the Article 11 right of the applicant unions to strive for the protection of their members' interests was a right separate from and independent of the Article 11 right of their members to freedom to belong to a union for the protection of their interests.

It further stated that the infringement of the right of the applicant unions simply resulted from and was consequential upon the infringement of the rights of their members. The government considered that to confer rights and remedies on members protected the Article 11 rights of the unions to which they belong.

• *Bilateral contacts are under way concerning this issue.*

The Deputies decided to resume consideration of this item at the latest at their 1013th meeting (3-5 December 2007) (DH), in the light of the outcome of bilateral contacts concerning general measures.

1007 (October 2007) section 4.2

32555/96 Roche, judgment of 19/10/2005 - Grand Chamber

This case concerns insufficient access to information concerning the mustard and nerve gas tests the applicant participated in at the Chemical and Biological Defence Establishment at Porton Down in 1963. In 1962 and 1963, 3000 service personnel participated in nerve gas tests and 6000 in mustard gas tests, with some participating in both. Those tests were conducted under the auspices of the British Armed Forces.

The European Court considered that the United Kingdom did not fulfil its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests (violation of Article 8).
Individual measures: Measures are required to fulfil the positive obligation to provide the applicant with access to the information in question.
In this respect, it should be noted that at the time of the delivery of the judgment, there was a further hearing pending before the PAT (Pensions Appeal Tribunal) concerning the existence of a causal link between the tests and the applicant's claimed medical conditions in the context of the applicant's claim for a service pension. The PAT judgment was delivered on 23/07/2007. It found that Mr Roche's Chronic Obstructive Pulmonary Disorder is attributable to his service. The next step is to assess the degree of Mr Roche's disability attributable to service.
It should also be noted that the Ministry of Defence were pursuing the question with Porton Down as to whether the applicant has received the documents referred to in § 68 of the judgment. Porton Down have completed their search but were not able to locate any of the documents referred to in that paragraph.
• *Assessment*: *The European Court noted (§166) that certain records had been dispersed and the location of all relevant records was, and could still be, difficult. Consequently, the ability of the applicant to obtain access to the relevant and appropriate information in the framework of these proceedings or any other measure is linked to the adoption of the general measures.*
General measures: Information was requested on measures taken or envisaged to provide access to the relevant information to persons who participated in tests similar to those in which the applicant participated.
• *Information provided by the United Kingdom authorities on the implementation of the objectives of the Action Plan*: The Action Plan supplied on 05/04/2006 has three objectives:

1) To clarify the responsibilities of persons handling requests for access to information.

The UK authorites have indicated that the target completion date (31/07/2006) has been met, as foreseen in the action plan.
In July 2006, internal Ministry of Defence guidance was placed on the Department's intranet, as part of a series of documents called Defence Information Notices, which are the principal formal means of communicating with staff across the Department. The guidance was further highlighted in an e-mail drawing attention to Notices issued in July.
The guidance covers:
- how to recognise a request triggering rights arising from Article 8 of the Convention;
- action required over and above that already required by specific domestic legislation (the Data Protection Act 1998 and Freedom of Information Act 2000);
- the need to communicate with the applicant; and
- lastly, the appeals procedure (analogous to that under the Freedom of Information Act) with a recommendation to use the standard wording previously circulated.
• *Further information has been provided* on the appeals procedure available to anyone who is dissatisfied with the information provided following a request to the Ministry of Defence.
The authorities of the United Kingdom have indicated that the appeals procedure depends in part on the extent to which an Article 8 request falls within the scope of the relevant domestic legislation. A request for personal information about the requester held by the MOD falls under the Data Protection Act 1998 (DPA 1998). A request for other information held by the MOD falls under the Freedom of Information Act 2000 (FOIA 2000). In practice, it is expected that very few Article 8 requests will fall outside this framework. Any response to a request includes information on the availability of and contact details for Internal Review.
i) For all three types of requests, the applicant's first recourse would be to ask informally for the person responding to reconsider the information provided. This is a voluntary step.
Second, the applicant may seek an Internal Review, which is conducted independently by the Director of Information (Exploitation) in the Ministry of Defence Head Office. Under the FIOA 2000, this is a mandatory step before appealing to the Information Commissioner. Under the DPA 1998, this is a voluntary step before appealing to the Information Commissioner. For other Article 8 requests, this is a voluntary step.
ii) For requests within the scope of the FOIA 2000 or DPA 1998, the applicant may then appeal to the Information Commissioner. The procedures are outlined on the Commissioner's website: http://www.ico.gov.uk/complaints.aspx . The Commissioner is a UK independent supervisory authority reporting directly to the UK Parliament.

Decisions of the Information Commissioner may be appealed to the Information Tribunal, whose procedures are described on its website: http://www.informationtribunal.gov.uk/ .
The applicant may appeal a decision of the Information Tribunal (other than the Security Appeals Panel decision) on a point of law to the High Court under section 59 of FOIA 2000, and section 49(6) of DPA 1998.
iii) A separate National Security Appeals Panel of the Tribunal hears appeals against certificates issued by a Minister of the Crown under section 28 (relating to exemption from disclosure of information for reasons of national security) of the Data Protection Act and sections 23 (relating to exemption from disclosure of information supplied by or relating to bodies dealing with security matters) and 24 (relating to exception from disclosure of information for reasons of national security) of FOIA. Anyone who is directly affected by the issue of a certificate may appeal against it. The Panel of the Tribunal applies the principles of judicial review to the certificate, considering whether the Minister has reasonable grounds for issuing the certificate.
iv) An Article 8 request falling outside the scope of the DPA 1998 and FOIA 2000 would still be within the ambit of the Human Rights Act 1998. Section 6 requires public authorities (in this case, the MOD) to act in a way which is compatible with the Convention. An applicant who believed that the MOD had not discharged its obligations under Article 8 could seek judicial review of their action in the Administrative Court. That court could make an order compelling such discharge. The applicant could appeal, with permission, against the decision of the Administrative Court to the Court of Appeal or House of Lords.

2) To make it easier for applicants to make and pursue a request for information about their actual or possible exposure to hazard.

The UK authorities have indicated that the target completion date (31/10/2006) has been met, as foreseen in the action plan.
The pages on the Ministry of Defence Internet site (www.mod.uk) that allow applicants to submit requests have been revised to include information about a Special Subject Access Request (SSAR) procedure which has been introduced for individuals concerned about potentially hazardous exposure they may have experienced during their military service or civilian employment with MOD; applicants may access a SSAR form and explanatory notes under the heading *Potentially Hazardous Exposure*; the SSAR form is accessible via a number of avenues on the site; one direct link is: http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/HealthandSafetyPublications/HazardousExposure/PotentiallyHazardousExposure.htm ;
The changes to the internet site were highlighted on the intranet site so as to promote internal awareness of the extended access.
On 31/10/2006, letters outlining the new extended access to information regime and providing a copy of the SSAR form were sent to 15 groups representing potential applicants, including the Porton Down Veterans' Support Group; these groups were invited to advise their members accordingly. In addition, key personnel across the department have received written guidance and a verbal briefing about the European court's judgment, the Action Plan, how to recognise requests giving a right to information under Article 8 and how to handle requests and points of contact.
Moreover, the government has started revising the relevant leaflets made available to staff and members of the public: the relevant leaflets have been identified and will be updated to reflect the extended right of access when current supplies have been exhausted. In the interim, arrangements are being made for a note to be included in each leaflet to advise recipients about the changes.

3) To improve public availability of information about the tests at Porton Down, by publishing a historical survey of the Service Volunteer Programme at Porton Down.

The UK authorities have indicated that the target completion date (31/07/2006) has been met, as foreseen in the action plan.
The historical survey was published in July 2006. It is available on the Internet at: http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/HealthandSafety/PortonDownVolunteers/HistoricalSurveyOfThePortonDownServceVounteerProgramme19391989.htm. An introductory note, attached to the survey, is available at: http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/HealthandSafety/PortonDownVolunteers/PortonDownHistoricalSurvey.htm .
The historical survey describes the variety of studies undertaken together with their purpose, results and the number of individuals who participated in them. The survey seeks to put those studies into the context of the historical climate and contemporary events, and explores the ethical aspects of the studies. The authorities indicated that the survey places a great deal of information about activities at Porton Down into the public domain, thus proactively providing answers to many queries that participants in the tests might have.

A supporting letter was furnished with the Action Plan. It states*, inter alia*, that the Porton Down Volunteers' Helpline was set up in February 1998, with the objective of helping former volunteers/their representatives to gain easy access to information relating to their participation at Porton Down. The Helpline has a toll-free (0800) telephone number and is answered by MoD's Defence Science and Technology Laboratory (Dstl).
• *Assessment: Information submitted within the framework of the Action Plan is very positive.*
The Secretariat will contact the delegation shortly to clarify outstanding questions.

The Deputies decided to resume consideration of this item at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of further information to be provided in the course of the bilateral contacts to take place concerning general measures as well as individual measures which are linked to the adoption of the general measures.

997 (June 2007) section 4.2

36256/97 Thompson, judgment of 15/06/2004, final on 15/09/2004
The case concerns the detention, summary trial and conviction in 1997 of the applicant by his Commanding Officer in the Army for absence without leave, in proceedings conducted on the basis of the law applicable prior to the coming into force of the Armed Forces Act 1996.
The European Court found that the applicant's doubts as to the impartiality of his Commanding Officer in deciding on the necessity of his pre-trial detention were justified, as the commanding officer was liable to play a central role in the prosecution and was also responsible for discipline and order in his command. For these reasons, he could not be regarded as independent of the parties to the proceedings (violation of Article 5§3). In addition, the applicant had been unable to obtain compensation under domestic law for his detention in breach of the Convention, since his detention was lawful under domestic law (violation of Article 5§5).
Furthermore, the Court found that, since the commanding officer was central to the prosecution of the charge and was also the sole judge in case, the applicant had not had a fair hearing by an independent and impartial tribunal (violation of Article 6§1). In this respect the Court emphasised that, in electing a summary trial rather than a court-martial, the applicant could not be considered to have waived his relevant Convention rights.
Finally, the exclusion of legal representation from the applicant's summary trial did not meet the Convention requirement that a person charged with a criminal offence who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing (violation of Article 6§3c, which the Court considered separately from the structural breaches of Article 6§1).
Individual measures: The applicant pleaded guilty and was released after serving 28 days' military detention. Other proceedings against the applicant were discontinued.
• *Assessment: It appears that no further individual measure is necessary.*
General measures: The judgment was published in the *European Human Rights Reports* at (2005) 40 EHRR 11.

1) Violation of Article 5§3: The case presents similarities to that of Hood (judgment of 18/02/99), which was closed by Resolution ResDH(2000)82 on the basis, *inter alia*, of the new guarantees introduced by regulations 20-24 of the Investigation and Summary Dealing (Army) Regulations 1997 in respect of detention decided by a commanding officer. On 09/01/2006, the United Kingdom authorities provided further information on significant changes in the army custody rules, which came into effect in 2000. They provide further protection for persons detained before and after being charged.

2) Violation of Article 5§5: the case presents similarities to that of O'Hara (judgment of 16/10/01), section 6.2.) The measures adopted may be summarised as follows: under Section 6(1) of the Human Rights Act (HRA), it is unlawful for a public authority to act in a way incompatible with a Convention right. Under Section 8 of the HRA, if a court finds that such an unlawful act has occurred, it may award damages.

***3) Violations of Article 6§1 and 6§3c*:**
These would appear to raise certain new issues that have not been dealt with in previous military cases, which concerned courts-martial and not summary proceedings. In response to the letter sent to the United Kingdom delegation with a view to drawing up a possible plan of action for the execution of this judgment in these respects, the United Kingdom authorities forwarded a detailed response on 06/04/2005, referring in particular to changes introduced by the Armed Forces Discipline Act 2000, which came into force on 02/10/2000.
As to Article 6§1, the changes include:

- limiting the punishment available to a court-martial to that available to a commanding officer at a summary hearing;
- prohibition of any amendment, substitution or additional charge by the prosecutor once court martial has been elected without the written consent of the accused or referral of the new charge back to the commanding officer to begin the process again;
- the opportunity to elect court-martial will be offered to the accused before the commanding officer deals summarily with the charges (and only offers an election where he considers the accused guilty); and there is now a right to appeal from summary hearing to the Summary Appeal Court (SAC).
• *Further information furnished by the authorities of the United Kingdom*:
- They indicated that other safeguards are built into the system to ensure that the accused soldier is aware of his statutory rights and given every opportunity to exercise them.
- They pointed to the Baines case [2005] EWHC 1399 (Admin) (23/06/2005), in which the High Court found that a soldier does have a free and unrestrained right to elect for trial by court martial (§56).
- In that case the High Court noted that the "investigation" carried out by the Commanding Officer under Section 76 of the Army Act 1955 means consideration of the material arising from the investigation carried out by the service police so as to enable the CO to decide whether to dismiss the case without a hearing, whether to deal with it if he has jurisdiction to do so, or whether to refer it to a higher authority with a view to trial by court-martial (§29).
- *As to Article 6§3:* A soldier is entitled to legal representation and legal aid for appeal proceedings. He is also entitled to legal assistance for pre-custody hearings.
- An accused soldier is not entitled to legal representation at the summary hearing itself but he is entitled to seek legal advice at his own expense, including on the decision to elect.
- At the summary hearing, the soldier is entitled to the assistance of an "Accused's Adviser".
- In the UK, the names of firms in garrison towns are well known among soldiers, and these firms are regularly instructed by soldiers.
- Outside the UK, Army personnel may obtain legal advice free of charge from Royal Air Force lawyers.
• *Bilateral contacts are under way with respect to these points.*

The Deputies decided to resume consideration of this item at the latest at their 1013th meeting (3-5 December 2007) (DH), in the light of further information to be provided following bilateral contacts concerning general measures.

1007 (October 2007) section 4.2

40426/98 Martin, judgment of 24/10/2006, final on 24/01/2007
This case concerns the unfairness of certain army court-martial proceedings held in April 1995 against a young civilian. The European Court considered that the applicant's concerns about the independence and impartiality of his tribunal were objectively justified (violation of Article 6§1). In this context, the Court also expressed considerable doubts on whether the circumstances of the case could justify the trial of a civilian by a military court.
The applicant was sentenced to life imprisonment in May 1995.
Individual measures: The applicant did not claim any compensation for non-pecuniary or pecuniary damage. The European Court awarded the applicant a sum for costs and expenses.
The United Kingdom authorities indicated on 26/07/2007 that the applicant is still serving a sentence of life imprisonment, in HMP Wakefield, England. He had already (prior to applying to the European Court) fully exercised the appeal options from the original court-martial conviction, which were set out in full in the judgment, i.e. appeal to the Courts-Martial Appeal Court (CMAC) and thereafter the House of Lords.
There is no procedure allowing the applicant to appeal further in light of the judgment of the European Court. However, section 34(1)(b) of the Courts-Martial (Appeals) Act 1968 provides that, "if it appears to the Secretary of State, upon consideration of matters appearing to him not have been brought to the notice of the court-martial at the trial, to be expedient that the finding of the court-martial should be considered or re-considered by the Appeal Court… [he] may refer the finding to the Court". No referral has been made by the Secretary of State under this provision.
• *The Secretariat is currently assessing, in the light of this information, whether any other individual measures appear to be required*.
General measures:
1) Independence and impartiality of the tribunal: The European Court noted that the essential safeguards lacking in the Findlay case (no. 22107/93, judgment of 25/02/1997) (with respect

to the functions and powers of the convening officers and the lack of independence of the members of the tribunal from the convening officers) were also lacking in the present case, to which the same legislative and regulatory scheme applied. The Findlay case was closed by Resolution DH(98)11. That resolution noted, *inter alia*, the entry into force on 01/04/1997 of the Armed Forces Act 1996 (which abolished the post of convening officer and split the functions of that post between other authorities and provided that a judge advocate be a member of a martial court).
Further issues concerning safeguards relating to the independence of army court-martial members were examined in the context of the Morris case (Section 6.2), which concerned an army court-martial held after the 1996 Act had come into force (particularly relevant is the point concerning sufficient safeguards surrounding the ordinary members to ensure their independence; in this respect, an important element was the distribution and content of the Briefing Notes to ordinary members).
The scheme set up under the 1996 Act was again subject to scrutiny by the European Court in the Cooper case (no. 48843/99, judgment of 16/12/2003). In that case, on the basis of the more detailed information placed before it regarding the scheme set up under the 1996 Act, the Court found that in the relevant proceedings before an air-force court-martial there had been no violation of the applicant's right to a fair trial. It accepted the view that army and air force courts-martial were the same in all material respects (§ 107).
On 28/02/2007 the authorities of the United Kingdom once again emphasised that the judge advocate is an independent civilian judge appointed by the Lord Chancellor (now the Judicial Appointments Committee) and is a member of a court-martial. They further indicated that new legislation had been enacted – the Armed Forces Act 2006, scheduled to come into force at the beginning of 2009 – which creates a single system of Service law for all of the Services and under the provisions of which a standing Court Martial is established (see also the Grieves case.
It may be noted that issues relating to safeguards to ensure the independence of the members of navy courts-martial, regarding which substantial differences existed under the 1996 Act as compared with army and air-force courts-martial, are being examined in the context of the Grieves case.
• *Confirmation is requested that the guarantees of independence and impartiality of the tribunal that were extended to army courts-martial under the 1996 scheme have been preserved under the Armed Forces Act 2006.*

2) Determination of criminal charges against civilians by military courts:

• *System set up under the Armed Forces Act 2006 (entry into force due in early 2009):* According to the information provided by the United Kingdom authorities on 28/02/2007, the Armed Forces Act 2006 provides that certain civilians, when outside the United Kingdom, such as dependants of members of the Armed Forces living with them, will be able to be tried by the new standing Court Martial or by the Service Civilian Court (the latter having jurisdiction only over service offences committed outside the British Islands by a civilian). The 2006 Act enables the Court Martial and the Service Civilian Court to be constituted, when they deal with civilians, so that they contain no military members.
In all cases the judge advocate, as now, will be a civilian. In the Service Civilian Court, the only member will be the judge advocate. In the Court Martial, there are in addition lay members whose main function (like that of a jury in the English Crown Court) is to decide on guilt or innocence. Where the defendant is a civilian, all these members of the court will also be civilians, unless (in accordance with the judgment in Martin) there are considered to be compelling reasons sufficient to justify within Article 6 one or more service members.
Any appeal by a civilian defendant will be to a court composed entirely of civilians.
• *Position under the existing legislation (pending the entry into force of the Armed Forces Act 2006):* Following on from information provided on 28/02/2007, the United Kingdom authorities indicated on 18/07/2007 that the Army Act 1955, Air Force Act 1955 and Naval Discipline Act 1957 (collectively known as the Service Discipline Acts) have been amended to remove the restrictions on the number of civilians who were permitted to sit as board members (see SI 2007/1859, which came into force on 28/06/2007). These amendments pave the way to allow the Ministry of Defence to bring forward three new sets of Courts-Martial Rules applicable to each of the armed forces under the 1996 legislation (still in force), including provision for courts-martial boards to be composed entirely of civilians when the defendant is a civilian.
• *The Secretariat is currently assessing, in the light of this information, whether any other general measures appear to be required with respect to the possible trial of civilians by military courts*.

3) Publication and dissemination: The judgment of the European Court has been disseminated to the Services' legal branches, the Ministry of Defence's (MoD) relevant policy units and Ministers.

It has been published in the Times Law Reports (21/11/2006), in the All England Law Reports at [2006] All ER (D) 306 and in the European Human Rights Reports at (2007) 44 EHRR 31 (information provided by the United Kingdom authorities on 23/04/2007 and 15/05/2007).

The Deputies decided to resume consideration of this item at the latest at their 1028th meeting (3-5 June 2008) (DH), in the light of the information provided with respect to individual and general measures.

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45508/99 H.L., judgment of 05/10/2004, final on 05/01/2005

The case concerns the 1997 detention in a psychiatric institution of the applicant – who was compliant but, suffering from autism, did not have legal capacity to consent to his admission and stay in hospital – as an "informal patient" under s131(1) of the Mental Health Act 1983, itself based on the common law doctrine of necessity.

The Court observed that as a result of the lack of procedural regulation and limits applicable to informal patients, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit: this left effective and unqualified control in their hands. While the Court did not question the good faith of those professionals or that they acted in what they considered to be the applicant's best interests, it found that the absence of procedural safeguards surrounding the admission and detention of compliant incapacitated persons failed to protect against arbitrary deprivations of liberty on grounds of necessity and, consequently, failed to comply with the essential purpose of Article 5§1 of the Convention (violation of Article 5§1).

The Court further concluded that it had not been demonstrated that the applicant had had available to him at the relevant time a procedure for the review of his continued detention that complied with the requirements of Article 5§4. Judicial review, even based on the expanded ("super-Wednesbury") principles applicable in human rights cases prior to the entry into force of the Human Rights Act 1998, would not have allowed an adequate examination of the merits of the clinical views as to the persistence of mental illness justifying detention; nor had it been shown that the other possibilities referred to by the Government would have allowed for such an examination (violation of Article 5§4).

Individual measures: None: the applicant was discharged from hospital on 12/12/1997.

General measures: The judgment of the European Court was published in the *European Human Rights Reports*:(2005) 40 E.H.R.R. 32; *Butterworths Human Rights Cases*: 17 B.H.R.C 418; (2005) *Lloyd's Rep. Med*. 169; *Butterworths Medico-legal Reports*: (2005) 81 B.M.L.R 131; and in *The Times* on 19/10/2004.

On 23/03/2005, in response to the judgment of the European Court, the Department of Health published a consultation document with a view to bringing forward proposals for appropriate safeguards. The preferred approach in the document was the one of "preventive care", involving a new system of admission/detention procedures for persons who have to be deprived of their liberty so that care and treatment can be provided in their best interests.

Under such a system, the power to deprive a person of liberty would be exercisable by specified persons or bodies, in defined circumstances, on the basis of objective medical evidence. It would incorporate guarantees such as requirements to specify the reason for deprivation of liberty, limits on the length of time, involvement of relatives, carers and advocates, provision for regular reviews and access to court for review of the lawfulness of detention. In September 2005, consultations were under way between the Department of Health and other government departments and administrations, with a view to introducing legislation which would come into force in April 2007. The Department of Health was also in contact with the Scottish Executive and the relevant department in Northern Ireland.

In addition, pending the implementation of legislation, on 10/12/2005, the Department of Health issued advice to local authorities and those responsible for the provision of health care in England and Wales, setting out steps that should be taken in the interim to avoid further breaches of the Convention.

• *The results of the consultations were as follows*:

- *In England and Wales,* the government proposed to introduce a Mental Health Bill. This Bill was introduced on 16/11/2006 in the House of Lords. The Bill has completed its passage through the House of Lords and has passed through the first and second reading stages before the Commons, being is currently at the Committee stage, undergoing a detailed clause-by-clause examination.

- *In Northern Ireland,* the authorities are currently consulting on the last report following the Review of Mental Health and Learning Disability. The final report will be submitted to the Department of Health

for Northern Ireland by the end of June 2007 for consideration. The Department will then publish its proposals for legislation.
- *The Scottish Executive* stated that no amendment was required to the Adults with Incapacity (Scotland) Act 2000. The Scottish Executive amended the Social Work (Scotland) Act 1968 in order to clarify the law on provision of community care services to adults with incapacity, through the Adult Support and Protection (Scotland) Act, which received Royal Assent on 21/03/2007. Section 64, which amends section 13 of the 1968 Act, came into force on 22/03/2007.
On 30/03/2007, the Scottish Executive issued the document: "Guidance for Local Authorities: Provision of Community Care Services to Adults With Incapacity".
• *Information is required*: *on progress made in the adoption of the legislative reforms announced in Northern Ireland as well as in England and Wales. As to Scotland, a copy of section 13 of the Social Work (Scotland) Act 1968 would be useful, as would a copy of the other sections of the 1968 Act referred to in the guidance..*

The Deputies decided to resume consideration of this item at the latest at their 1013th meeting (3-5 December 2007) (DH), in the light of further information to be provided concerning general measures.

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46477/99 Edwards Paul and Audrey, judgment of 14/03/02, final on 14/06/02
The case concerns a breach of the positive obligation imposed on the national authorities to protect the life of the applicants' son, who was killed while in custody by another detainee considered dangerous, who shared the same cell (November 1994). The failure of the agencies involved in the case (medical profession, police, prosecution and court) to pass on information about the second detainee to the prison authorities and the inadequate nature of the screening process on his arrival disclosed a breach of the state's positive obligation to protect the life of the applicants' son (violation of Article 2).
The case also concerns the ineffectiveness of the inquiry into the death of the applicants' son as it was not possible to oblige prison staff to give evidence and because the applicants were not sufficiently associated with the investigation procedure (violation of Article 2). Finally, it concerns the lack of an effective remedy in this respect (violation of Article 13).
Individual measures: The United Kingdom authorities have informed the Committee that the Prison Service has conducted a further investigation looking into the specific issues that still concerned the applicants. The terms of reference of the investigation, including 35 questions, were agreed with the applicants, who were also involved in its progress. The investigation was carried out by a senior governor, who reported to the applicants and the commissioning authorities. All current Prison Service employees who were asked to be interviewed agreed to do so. All documentation within the control of the Prison Service was made available to the applicants at its conclusion and they attended a meeting with the investigator. A meeting with members of staff who could give first-hand evidence relating to three outstanding issues was organised and a follow-up meeting planned focusing on mentally ill offenders generally.
The applicants indicated in October 2004 that three important issues remained outstanding following the Prison Service inquiry, which in their view had to be clarified to ensure accountability within the Prison Service and to prevent recurrences in future.
They further noted that several key witnesses were not interviewed and that they had not been given an opportunity to cross-examine all relevant witnesses in detail, particularly as they did not meet all the prison officers involved and were not accompanied by a legal representative at the meeting. As a result, the Prison Service inquiry had in their view failed to resolve the two key faults identified in the original inquiry criticised by the Court in its judgment.
On 07/12/2004 the United Kingdom authorities indicated that the Prison Service investigation was not intended to meet the Article 2 requirements on its own but rather to fill the two specific gaps in the previous inquiry identified by European Court. They emphasised that the two prison officers who had declined to attend the earlier inquiry had willingly given oral evidence in the Prison Service investigation, that interview transcripts were made available to the applicants and that the latter had met and questioned directly the one officer whom the European Court had considered might have potentially significant evidence. The applicants had not only listed the questions that formed the terms of reference for the Prison Service investigation, but there had been a dialogue with the applicants and reports on progress throughout the investigation, including meetings, at one of which the applicants had met and questioned face-to-face four staff members who had had key roles. Accordingly, this investigation had in the authorities' view remedied the two problems the Court had identified in the

original inquiry, which were due to the lack of power to compel witnesses at that inquiry and to the private character of the proceedings, from which the applicants had been excluded save when they were giving evidence.
In May 2005, the applicants reiterated their criticisms, mentioned above, of the Prison Service Inquiry.
• *Bilateral contacts are under way concerning this matter*.
General measures: The United Kingdom authorities have informed the Committee that the judgment of the European Court was disseminated to all the authorities concerned and published in the European Human Rights Reports at (2002) 35 EHRR 487.

1) Substantive violation of Article 2*:* In their letter of 07/12/2004, the United Kingdom authorities referred to, and in their letter of 23/05/2005, provided clarifications on a series of measures taken to prevent similar deaths in future, in particular by improving the capacity of the relevant agencies to identify prisoners at risk and improving communication between agencies.
These measures include:
- the Prisoner Escort Record, introduced in 2000; the new Suicide/Self-Harm Warning Form used throughout the prison estate since 12/01/2004;
- a pilot study in early 2004 on police use of a variation of this form, leading to the adoption of the system by the police force participating in the pilot study and consideration of wider use of the form by other forces;
- consideration being given on whether to use the Police National Computer to enable the police to identify persons who were a risk to themselves during earlier periods of detention: there are, however, serious concerns about information security and data protection;
- measures providing that the details of the at-risk prisoners are shared with the Probation Service/Youth Offending Team, if appropriate;
- the development of a new reception screening process showing improved detection rates for serious and immediate health problems;
- the establishment of the national use in July 2002 of a cell-sharing risk assessment that must be completed for every new prisoner on the first night of reception before allocation to a cell and the subsequent review of that assessment taking into account murders at Leeds and Manchester prisons, as well as the proceedings in the Mubarek Inquiry;
- a violence reduction strategy launched in May 2004.

Full details of these measures, as well as further information with respect to mental health in prisons, are available to interested delegations from the Secretariat.
• *Further information provided by the United Kingdom authorities*: The government is satisfied with the "Cell-Sharing Risk Assessment system" (CSRA) in place. They noted that the CSRA is an integral part of the "Violence Reduction Strategy" (VRS), which is currently being reviewed.
There is no plan to amend the CSRA process extensively; however, following the recommendations made in the Zahid Mubarek Inquiry Report (published on 30/06/2006), it is proposed that it is amended to clarify/re-emphasise certain aspects of the process, including:
- to make it mandatory for prisoners who arrive on a wing without a copy of the CSRA form to be placed in a single cell until the form is found or a new one completed;
- to remind staff that the CSRA review form must be used for reassessing any prisoner if there is a significant event that triggers concern;
- to require the register of prisoners designated as high- and medium-risk; and
- to ensure that every establishment has a violence reduction strategy in place, which makes clear to all staff their individual responsibilities in reducing violence and which must be robustly monitored and evaluated to measure progress, including using serious assaults as a baseline.

• *Additional information is awaited on whether the government will be taking any further measures in light of the Mubarek findings and recommendations relating to the prisoner escort record, reception screening process and flow of information.*

2) Procedural violation of Article 2 and the violation of Article 13*:*
• *Information provided by the authorities*:

a)The Crown Prosecution Service: The authorities referred to a July 2003 report of the Attorney General on the role and practices of the Crown Prosecution Service (CPS) in cases arising from deaths in custody. The United Kingdom authorities have stated that some of the measures announced in July 2003 to improve the CPS's handling of deaths in custody are now in place and others are under way.

b) the Prisons and Probation Ombudsman: On 27/09/2004, the United Kingdom authorities indicated that responsibility for investigations into deaths in prison custody had been transferred on 01/04/2004 from the Prison Service to the Prisons and Probation Ombudsman (PPO). However, the PPO focuses mainly on bereaved families, aiming to provide improved service for them throughout the

investigation. On 07/12/2004 the authorities indicated that this transfer had been effected on an administrative basis only. Until a statutory scheme is set up, the PPO will not have power to compel witnesses.

c) Reform of the Coroner System: The United Kingdom has indicated that the Coroner's inquest was the main vehicle by which the state meets its Article 2 obligations in such cases.

The United Kingdom authorities referred to the report of June 2003, "Death Certification and Investigation in England, Wales and Northern Ireland - The Report of a Fundamental Review 2003", which identified a number of weaknesses in the current coroner system (including the need for a more clearly defined and extensive role for the coroner, better training for coroners and their officers and a clearer and more involved role for the bereaved).

The draft Coroner Reform Bill was published on 12/06/2006.

Major reforms relevant to this case include:

- The duty to investigate a death where the deceased was in prison or otherwise in custody (Part I, clause 1).
- Where it is necessary to avoid a breach of any Convention rights within the meaning of the HRA 1998, the purpose of the investigation will be extended to ascertaining in what circumstances the deceased came by his death (Part I, clause 10).
- A Charter for Bereaved People setting out the rights of bereaved people in relation to coronial investigations will be prepared (a draft was attached to the draft Bill).
- A class of "interested persons" will have a right to appeal a decision made by a coroner in connection with the investigation (Part IV, clause 60 and Part V, clause 76);
- Coroners will be given powers to obtain information to help their investigations, including the power to summons witnesses to inquests and compel the production of evidence for the purpose of the investigation (Part III, clause 42).

The House of Commons Constitutional Affairs Committee issued its report on the draft Bill on 01/08/2006. It acknowledged that government had introduced some sensible reforms with respect to the death investigation procedure in Parts I and III of the draft Bill. It welcomed the government's draft Charter for Bereaved People, but noted that raising the expectations of the bereaved may lead to severe disappointment in the event of inadequate funding for the reform of the coronial system. Although accepting the right of appeal for those close to the bereaved as a valuable addition, it recommended that the class of "interested persons" be restricted and limits placed on the decisions of the coroner which are subject to appeal.

The government response to this report was published on 07/11/2006. The government response to the wider public consultation was published on 27/02/2007. No changes are planned to the draft Bill to limit in any significant way the proposed new rights of next-of-kin to access to involvement in the coroner's process, including the right of appeal against a coroner's decisions, in cases where Article 2 is engaged.

Minor changes, to clarify the appeals process, have been made which would affect family members who are not next of kin but who have an interest in the case.

The Bill will be introduced in the UK Parliament as soon as time allows, perhaps in the parliamentary session commencing in November 2007.

• *Information is awaited*: *on the progress made in the reforms mentioned above.*

• *Information received from civil society*: It should be noted that on 05/07/2006 an information document relating to this case, submitted by the NGO Prison Advice Service, which also represents the applicants, was placed on the Committee of Ministers' internet site (<http://www.coe.int/T/CM/WCD/humanrights en.asp#>), in accordance with Rule 9.2.

The Deputies decided to resume consideration of this case at the latest at their 1013th meeting (3-5 December 2007) (DH), in the light of further information to be provided concerning general measures.

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57067/00 Grieves, judgment of 16/12/03 - Grand Chamber
34155/96 G.W., judgment of 15/06/2004, final on 15/09/2004
35574/97 Le Petit, judgment of 15/06/2004, final on 15/09/2004

These cases concern the unfairness of naval court-martial proceedings held in 1998 (Grieves), 1996 (G.W.) and 1997 (Le Petit), and which resulted in the conviction of the applicants (violations of Article 6§1). In the G.W. and Le Petit cases, in which the proceedings were held in accordance with the law in force prior to the entry into force on 01/04/1997 of the Armed Forces Act 1996, the European Court

found that the applicants had not had a fair hearing by an independent and impartial tribunal (violations of Article 6§1) mainly because of:
- the conflicting roles played by the convening authority,
- the lack of any apparent basis on which the applicants could challenge the composition of their courts-martial, and
- the fact that no appeal lay to a judicial authority where a guilty plea had been entered.
In the Grieves case, the proceedings took place after the entry into force of Armed Forces Act 1996; the European Court found that certain shortcomings in the proceedings were such that the applicant's misgivings about the independence and impartiality of his naval court-martial could be considered to be objectively justified (violation of Article 6§1). These shortcomings included:
- the lack of a full-time Permanent President of Courts-Martial,
- the relative lack of detail and clarity in the briefing notes prepared for members of naval courts-martial, and
- especially the fact that the Judge Advocate in a naval court-martial is not a civilian but a serving naval officer who, when not sitting in a court-martial, carries out regular naval duties.
Individual measures:
- Mr Grieves sought neither pecuniary nor non-pecuniary damages before the European Court. After having unsuccessfully sought relief at the national level after the delivery of the judgment, Mr Grieves now seeks individual measures before the Committee of Ministers, with a view to putting him in the position of achieving *restitutio in integrum*.
- In the G.W. and the Le Petit cases, the Court held that the finding of a violation constituted in itself just satisfaction for any non-pecuniary damage suffered by the applicants.
• *Information provided by the authorities of the United Kingdom* (30/10/2006): The UK authorities state that re-opening of the criminal proceedings in these cases is not required as an individual measure, in particular because:
- The specific circumstances of the cases do not cast any serious doubts on the reliability of the convictions.
- There was no evidence of actual bias/injustice and nothing appears to suggest that the convictions were erroneous or otherwise arbitrary.
From these points, it follows that the violations established by the European Court were not such as to present serious doubts regarding the outcome of the proceedings.
It would not be practical to re-open these cases in the absence of any evidence that would cast doubt on the convictions.
- As to Mr Grieves, the UK authorities noted, in addition, that:
- the costs awarded by the European Court have been paid and that Mr Grieves having made no claim in respect of pecuniary or non-pecuniary damage, the Court saw no reason to make such an award;
- the European Court noted that the applicant did not suggest that anyone involved in his court-martial process was subjectively biased against him; and
- the fact that the Judge-Advocate was a naval officer does not in itself demonstrate actual bias or injustice and there is no evidence to suggest that the Judge-Advocate erred in any way or any complaint that can be made in his handling of Mr Grieves' court martial.
• *Information submitted by Mr Grieves' lawyer on 06/02/2007:* the main thrust of his argument is that he has been prevented from having the case referred ~~back~~ to the Court Martial Appeal Court with a view to having the conviction quashed following the decision of the European Court. He wished to draw the attention of the Committee of Ministers to the subsequent case of *R. v. Dundon* [2004] EWCA ~~CRIM~~ Crim 621, in which the Court Martial Appeal Court chose to quash the conviction, relying on the European Court's judgment in the Grieves case. He concludes that there appears to be an unfairness here, in that Mr Grieves won his case before the European Court but cannot get his case back to the CMAC whereas Mr Dundon was able to do so.
• *Response of the UK authorities*: The Ministry of Defence has considered the arguments submitted by Mr Grieves' representative on 06/02/2007. Their views remain the same as stated in the UK government's submission on individual measures, dated 30/10/2006. In particular, they noted that before going before the European Court, Mr Grieves had already sought to argue before the CMAC, by reference to the requirements for a fair trial under English common law, that his trial had been unfair. He was refused leave to appeal before the full Court in June 1999. In declining leave, the judge noted that there was nothing in the material before the court to conclude that Mr Grieves had received anything other than fair trial properly conducted. The Ministry of Defence remains of the view that the specific facts of the case do not case any serious doubts on the reliability of Mr Grieves' conviction.
- As to Mr Le Petit and G.W., the UK authorities also noted that both applicants received legal advice before making admissions as to the charges brought against them.

• *Assessment: The Secretariat notes that Mr Grieves did not seek pecuniary or non-pecuniary damages before the Court; in addition, despite the fact that the violation found concerned the lack of objective impartiality and independence of the court-martial and despite the incongruity at domestic level in that a subsequent claimant was able to have his conviction quashed on the basis of the European Court's judgment in Mr Grieves' case but that Mr Grieves himself has not been able to have his case referred to the CMAC, it nonetheless does not appear from the information in the files of any of the applicants that serious doubts exist as to the outcome of the proceedings that would require their reopening in accordance with the terms of Rec(2000)2 of the Committee of Ministers. In Mr Grieves' case it may be noted that the applicant has argued that the unfairness was such that his conviction ought as a matter of principle to be quashed, but has never suggested that, had the court-martial been constituted in a manner that conformed with the requirements of Article 6, the outcome of the proceedings may have been different. In the cases of Mr Le Petit and G.W., the Secretariat notes that, after receiving legal advice, each admitted the charges against them. On this basis the Secretariat considers that no further individual measures need to be taken in the above cases.*

General measures: The judgment of the European Court in Grieves has been published in *European Human Rights Reports* at (2004) 39 EHRR 2.

It should be noted that similar cases examined by the Court concerning proceedings occurring before the entry into force of the Armed Forces Act 1996 (B.E.V. and Lane), were closed, respectively, by Final Resolutions ResDH(2000)91 and ResDH(2000)92, following the enactment of that Act.

The facts in the G.W. and Le Petit cases having arisen before the passage of the Act, one of the elements leading to the finding of a violation, i.e. the conflicting role played by the convening authority, should have been remedied by that Act. The Court examined in Grieves the functioning of the naval courts-martial system set up under the Armed Forces Act 1996, and found that the amended system still gave rise to objectively justified fears as to the independence and impartiality (see above).

According to the information provided by the United Kingdom authorities (letter of 27/05/2004):

1) The issue of the lack of a civilian in the pivotal role of Judge Advocate in a naval court martial: The appointment of serving naval personnel as judge advocates has ceased since the Court's judgment in Grieves was delivered; under the Naval Discipline Act 1957 (Remedial) Order 2004, the responsibility of appointing judge advocates was transferred to the Judge Advocate of the Fleet, a civilian, who appointed as judge advocates civilian barristers, solicitors and other individuals holding judicial appointments. The current practice is that civilian judge advocates are appointed to conduct court-martial proceedings by the Judge Advocate General (JAG), who is himself a civilian, a circuit judge, and thus the holder of judicial office. The office of the JAG sits within the Department for Constitutional Affairs. The judge advocates in court-martial trials are subject to the same rules as civilian judges.

2) The issue of the relative lack of detail and clarity in the briefing notes for members of naval courts-martial: The briefing notes prepared for ordinary members of naval courts martial were amended in 2002 to include appropriate instructions as to the need to function independently and free from outside pressure, and amended again in 2004 to reflect the appointment of civilian judge advocates and to ensure maximum possible consistency with those of the Army and RAF. Further information provided by the United Kingdom authorities on 12/01/2006 includes a copy of "Order of Procedure at a Trial by the Naval Court Martial" issued by the Naval Courts Administration Office in March 2005. That Order of Procedure requires, *inter alia*:

- the clerk of the court to inquire of the prosecutor or the Accused's Friend (the person representing or assisting the accused) as to whether they object to any member of the court;

- the Judge Advocate to inquire whether the ordinary members of the court have read the guidance notes for Presidents and Court Members and to remind the ordinary members of their duties, of the need for them to remain independent, that their performance will not be reported on, and

-the obligation to report any attempts to interfere or to put pressure on them to the Judge Advocate.

3) The issue of the absence of a full-time Permanent President of Courts-Martial for the Navy**:** The Court considered that the absence of a full-time Permanent President of Courts-Martial deprived naval courts-martial of what was considered in the air force to be an important contribution to the independence of an otherwise *ad hoc* tribunal (§ 81). The United Kingdom authorities have previously indicated that they consider that the above-mentioned changes suffice to obviate the need to create such a post. Their possible introduction in navy courts-martial and reintroduction in army and air-force courts-martial is being considered as part of the continual review of policy in this area. However, the United Kingdom authorities have confirmed that there are no current plans to appoint a full-time Permanent President of Courts-Martial.

• *Further information submitted by the UK authorities on 29/01/2007:*

a) changes to the balance between the role of the president and that of the judge advocate: In July 2005, the UK made four further changes to the balance between the role of the president and that of the judge advocate. These were made by amendments to the Court-Martial (Royal Navy) Rules 1997/170 as amended by SI 2005/1535.
- it is the judge advocate (and no longer the president) who is responsible for conducting the trial in a manner befitting a court of justice (Rule 29(1)).
- the judge advocate votes last on sentence instead of the president (Rule 70 (4)).
- the judge advocate gives reasons for sentence, instead of the president (Rule 73(2)).
- it is now clear that only the judge advocate may put a question to a witness. Other members may request that the judge advocate put a question to a witness on their behalf. The judge advocate may only put the question if he considers it appropriate (Rule 53(3)).

Those changes were made in addition to the established, main powers of the judge advocate to give binding directions to the court on all questions of law and procedure. The purpose of the changes has been to emphasise and strengthen the control role of the civilian judge advocate in the conduct of the court, and to that extent, reduce the role of the president.

b) current role of the president: Notwithstanding the changes made to the position of the judge advocate, the UK Government still sees a role for the president.
- The president ensures that the conduct of the trial befits Royal Navy Traditions.
- The president continues to be involved in deciding with the members of the courts-martial on the verdict and will have a vote on sentence.
- In the event of an equal division of votes, the president still has the casting vote as to the sentence to be awarded, but it is customary and proper practice for naval courts-martial to try and achieve a unanimous opinion on the appropriate sentence in the first instance (§ 22 of the Notes for Guidance of Presidents and Members of Naval Courts-Martial).

c) safeguards in place: The UK authorities believe that while PPCMs have not been appointed, there are sufficient safeguards for the independence of the president and other members of the court-martial. The principal safeguards include:
- The key role of the civilian judge to give them binding directions on law and procedure, to be the only source of advice to them on law and procedure, and to give guidance on appropriate sentence.
- The president and other service members of the court-martial are selected by the Naval Courts Administration Office, which is staffed entirely by civilians. Although appointed, all members of the court-martial have effective security from removal.
- The president and other court-martial members are not appraised in the performance of their duties as such.
- The deliberations of the president and the other court-martial members are confidential. This forms part of their oath.
- The president and other members of the court-martial are warned in the Guidance Notes about the specific legal bars to external influence (the common law offence of attempting to pervert the course of justice and an offence under the Naval Discipline Act 1957).
- The practice set out in the Guidance Notes that the president must ensure that the vote of each member on finding is given in reverse order of seniority.
- The further safeguards included in the "Order of Procedure" issued March 2005 (see above: point 2).

Taking into account the safeguards outlined above, the UK Government believes that the position concerning the composition of naval courts-martial is such as to ensure full compliance with Article 6 of the Convention. It is on this basis that the UK has decided not to introduce the post of PPCM in naval courts-martial.

4) The issue of an appeal to a judicial authority against sentence in the event a plea of guilty is entered:

Appeal to the Courts-Martial Appeal Court (CMAC) against sentence was introduced by the Armed Forces Act 1996 section 17(2), which amended section 8 of the Courts-Martial (Appeals) Act 1968. This provision came into effect on 01/04/1997.

5) Enactment of the Armed Forces Act 2006 (information provided in the context of the examination of the Martin case (below))

The Armed Forces Act 2006 sets up a single, standing Court Martial for all three branches of the armed forces (army, navy, air force), which, rather like the Crown Court, may sit in more than one place at the same time; different judge advocates and service personnel may make up the court for different trials. The Act amends each of the existing Acts governing proceedings in the various armed forces in order to bring them into line with this structure (see the explanatory notes for more details: http://www.opsi.gov.uk/acts/en2006/ukpgaen_20060052_en.pdf). It is intended that this Act will come fully into force by January 2009 (Hansard, 24 July 2007, column 931W, written answer of Derk Twigg

to question 149567). In the meantime it is intended that the various existing Acts will continue in force for an extra year, until 08/11/2008 (see the Draft Armed Forces, Army, Air Force and Naval Discipline Acts (Continuation) Order 2007 available online at http://www.opsi.gov.uk/si/si2007/draft/ukdsi_9780110770437_en.pdf).

• *Confirmation has been requested that the Armed Forces Act 2006 does not disturb the measures taken above with respect to the appointment of civilian judge advocates, the level of detail and clarity in briefing notes provided for members of courts-martial and the possibility of appeal to a judicial authority against sentence in the event that a guilty plea is entered.*

With respect to the continued absence of a Permanent President of naval courts-martial (PPCM), the Secretariat notes that the Court's emphasis on this point was based on the fact that the presence of a PPCM made an important contribution to the independence of an otherwise ad hoc tribunal. The Secretariat notes that some of the powers of presidents of naval courts-martial have been transferred to the judge advocate in the existing system. Confirmation has also been requested that, following the introduction of a standing Court Martial under the Armed Forces Act 2006, the otherwise ad hoc nature of the tribunal will effectively have been eliminated.

The Deputies decided to resume consideration of these items at the latest at their 1028th meeting (3-5 June 2008) (DH), in the light of the information to be provided with respect to general measures.

1007 (October 2007) section 4.2

66746/01 Connors, judgment of 27/05/2004, final on 27/08/2004

The case concerns a breach of the applicant's right to respect for his private and family life and his home on account of the eviction of the applicant and his family from a local authority gypsy caravan site in August 2000. The European Court found that their eviction was not attended by the requisite procedural safeguards, in that there was no requirement for the local authority to establish proper justification for the serious interference with the applicant's rights. The eviction therefore could not be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued (violation of Article 8).

Individual measures: The European Court awarded just satisfaction to the applicant in respect of non-pecuniary damages consequent upon the denial of the opportunity to obtain a ruling on the merits of his claims that the eviction was unreasonable or unjustified.

• *Assessment: under the circumstances, no further additional measure appears necessary.*

General measures: The government intends to implement the Connors judgment by legislation, i.e. the Housing and Regeneration Bill. The Bill is included in the draft legislative programme for the autumn 2007- summer 2008 session of Parliament, which was presented to Parliament in July 2007.

On 17/05/2007 the government published for consultation a draft guidance on management of gypsy and traveller sites, including interim guidance to local authorities on summary possession and the implementation of the Connors judgment. The consultation period ended on 22/08/2007.

The draft recommends that authorities avoid asserting a right to summary possession, and encourages them to provide additional protection to licensees. The government hopes to publish the final version of the guidance by the end of 2007.

In addition to these measures, the United Kingdom authorities had already drawn attention, first, to the Housing Act 2004, which allows judges to suspend eviction orders against residents of local authority sites on certain terms (for example on condition that there is no further anti-social behaviour). Second, they indicated that the nature of judicial review has changed since the Human Rights Act came into force. In *R (Wilkinson) v Broadmoor Hospital RMO* [2002] 1 WLR 419, the Court of Appeal held that there should be cross-examination of witnesses to determine the factual matters at issue and that, on this basis, the judicial review procedure would be compatible with Article 6 of the Convention.

• *Further information would be useful as to the progress made in the implementation of the general measures envisaged*.

The judgment of the European Court has been published in the *European Human Rights Reports* at (2005) 40 EHRR 9.

The Deputies decided to resume consideration of this item at the latest at their 1028th meeting (3-5 June 2008) (DH), in the light of information to be provided concerning general measures.

997 (June 2007) section 4.2

74025/01 Hirst No. 2, judgment of 06/10/2005 - Grand Chamber

The case concerns the fact that the applicant, who was serving a prison sentence following a criminal conviction, had been barred from voting (violation of Article 3 of Protocol No. 1).
The European Court noted in particular that the ban imposed by the Representation of the People Act 1983 applied automatically to convicted prisoners irrespective of the length of their sentence, of the nature or gravity of their offence or of their individual circumstances. The Court concluded that such a general restriction on a vitally important right had to be seen as falling outside the wide margin of appreciation allowed to contracting states in this field, and thus incompatible with the Convention.
Regarding the existence or not of any consensus among contracting states on the subject, the Court noted that there remained a minority of states in which a blanket restriction on the right of convicted prisoners to vote was imposed or in which there was no provision allowing prisoners to vote.
Individual measures: On 25/05/2004, the applicant was released from prison on licence. He may therefore vote.
General measures:

1) The Action Plan: On 07/04/2006, the United Kingdom authorities supplied an action plan for the execution of this case. The UK authorities committed themselves to undertaking consultation to determine the measures required to implement the judgment (written ministerial declaration of 02/02/2006). A consultation paper setting out the principles, context and options should have been distributed and responses to that paper should be collected by September 2006. Between September 2006 and February 2007, analysis of those responses should take place, and if appropriate, further consultation should take place and the drafting of a second document containing the preferred option and detailed implementation issues.
Further analysis should then take place, and if appropriate, the drafting and publication of another document might take place between March and June 2007. If legislation is chosen as the method of executing the judgment, then the drafting of legislation will commence at that time. Draft legislation would then be introduced from October 2007 onwards, its timing being subject to parliamentary business.

a) The First Consultation Paper: The consultation paper on "Voting Rights of Convicted Prisoners Detained within the United Kingdom" was published on 01/12/2006. It sets out, *inter alia,* a summary of the European Court's judgment, the relevant international documents, the practice of the Council of Europe member states and the proposals that the government believes merit careful consideration:

i) retaining the ban (the Consultation Paper notes that this is the preference of some people and the government but recalls the European court's finding that retaining a blanket ban falls outside the margin of appreciation of contracting states; however, comments are invited on it);
ii) enfranchising prisoners serving less than a specified term;
iii) allowing those responsible for sentencing to decide; and
iv) enfranchising all tariff-expired life sentence prisoners.

The paper does not set out full enfranchisement as a realistic option, as the government is opposed to it. Proposals were also made specifically concerning prisoners found guilty of election offences and convicted offenders and non-offenders detained in mental hospitals.

b) Information from civil society: It should be noted that on 03/04/2007, the Committee of Ministers received a communication from a non-governmental organisation, the AIRE Centre, under Rule 9. That communication notes that despite the government's indication that it would engage in a proper debate, it states in the Consultation Paper that it remains wholly opposed to full enfranchisement. Although the Consultation Paper offers the option of retaining the blanket ban (and welcomed receiving the views of those who agree with this position), it excludes from consideration the possible option of abolishing disenfranchisement of prisoners altogether.

c) The response of the UK authorities: The United Kingdom government recalls that the Consultation Paper did state that views on total disenfranchisement were welcome but nonetheless made it clear, as noted above, that retaining the total ban is outside the margin of appreciation given by the Convention, and is therefore not an actual proposal. When expressing its belief that an offence serious enough to warrant a term in prison should entail a loss of voting rights while in prison, the government was simply repeating what its position was prior to and throughout the Court proceedings in this case. However, government recognises its obligation to comply with the judgment and has set out a range of options to achieve this. The United Kingdom government does not interpret the judgment as creating an obligation to enfranchise all prisoners, and has indicated its opposition to such an option, which is why it is omitted from the list of possible options for change in the consultation document. The government indicates that to amend UK law will require primary legislation, and that proposals and resulting draft legislation would be laid before, and thoroughly debated in, both Houses of Parliament.

2) The revised Action Plan: A revised Action Plan has been furnished, which includes a revised timetable. If a second consultation period is required, it would take place from July to September 2007. If legislation is chosen as the method of executing the judgment, the introduction of draft legislation would take place from May 2008 onwards, with its timing being subject to parliamentary business.
The first stage of consultation ended on 07/03/2007, and analysis of the responses is under way. There has been no slippage from the revised plan.
• *Additional information awaited*: *Information is required on a regular basis on the progress made in the consultation process and the follow-up to that process.*

The Deputies decided to resume consideration of this item at the latest at their 1013th meeting (3-5 December 2007) (DH), in the light of further information to be provided concerning general measures.

1007 (October 2007) section 2

11002/05 Associated Society of Locomotive Engineers and Firemen (aslef), judgment of 27/02/2007, final on 27/05/2007

This case concerns an independent trade union's being prevented, under section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992, from expelling a member due to his membership of a political party advocating views radically incompatible with those of the trade union (violation of Article 11). In such cases, trade unions would face the following sanctions: payment of compensation to the member as ordered by an employment tribunal upon application by the member; and payment of compensation to the member in the event of the trade union's failure to readmit him to the membership of the union.
The European Court noted that just as an employee or worker should be free to join, or not to join, a trade union without being sanctioned, so should the trade union be equally free to choose its members (§39). The European Court noted that the member in question would not have suffered any identifiable hardship because of the expulsion (§ 52). It also noted trade unions' traditional political ideals. The European Court concluded that in this case, the state had not struck the proper balance between the rights of the member in question and those of the applicant trade union (§§ 51 and 52).
Individual measures: The European Court indicated that after the domestic decision, the applicant trade union was forced to re-admit the member in question to the membership of the union, against its own Rules.
• *Information is awaited on whether the applicant union may now expel the member in question without being sanctioned on the ground of the latter's being a member of a political party whose views are incompatible with its own.*
General measures:
1) Amendment of the Trade Union and Labour Relations (Consolidation) Act 1992: The government proposes to amend section 174 and related provisions of the 1992 Act. In May 2007 the Department of Trade and Industry issued a Consultation Document entitled "*ECHR Judgment in ASLEF v. UK Case - Implications for Trade Union Law*". Consultation closed on 08/09/2007.
The amendments are to be made in the forthcoming Employment Simplification Bill, which the government intends to introduce on 03/12/2007.
• *Information is awaited on the progress of the Bill.*
2) Publication and dissemination
The judgment has been published in the *Industrial Relations Law Reports* [2007] IRLR 361, *The Times Law Reports* (2007) 09/03/2007, *Butterworths Human Rights Cases* 22 BHRC 140, and *All England Reports* [2007] All ER (D) 348 (February).
Details of the judgment were circulated within government by the Human Rights Information Circular prepared by Ministry of Justice lawyers: a report on the case featured in the first circular of 2007.

The Deputies decided to resume consideration of this case at the latest at their 1020th meeting (4-6 March 2008) (DH), in the light of information to be provided concerning individual and general measures.

997 June 2007 section 4.3

25599/94 A., judgment of 23/09/98
Interim Resolution ResDH(2004)39
CM/Inf/DH(2005)8, CM/Inf/DH(2006)29

The case concerns the failure of the state to protect the applicant, at the time a child of nine years old, from ill-treatment by his step-father, who was acquitted of criminal charges brought against him after he raised the defence of reasonable chastisement (violation of Article 3).
Individual measures: In its report, the former European Commission of Human Rights noted that the applicant was living with his father. The European Court awarded the applicant just satisfaction in respect of compensation for non-pecuniary damage.
General measures: It should be recalled that the European Court considered that the law in force did not provide adequate protection to the applicant against punishment or treatment contrary to Article 3, and that children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.
The Deputies are resuming their examination of the measures taken by the United Kingdom to protect children against treatment contrary to Article 3, in the light of the Interim Resolution adopted on 02/06/2004. A full history of the examination of the execution of this judgment by the Committee of Ministers up to the end of 2005 appears in the Annotated Agenda of the 966th meeting (June 2006); the present notes focus on more recent developments.

1) England and Wales:

A. Measures adopted

a)The Law:

i) Children Act 2004: The Children Act 2004 was enacted on 15/11/2004. Under s. 58 of this Act, which came into force on 15/01/2005, the battery of a child may no longer be justified on the grounds that it constituted reasonable punishment ("reasonable chastisement") where the accused is charged with wounding, assault occasioning grievous bodily harm, assault occasioning actual bodily harm or cruelty to persons under 16.
Nor can the battery of a child causing actual bodily harm be justified in any civil proceedings on the ground that it constituted reasonable punishment. The defence of reasonable punishment remains available in England and Wales, but is restricted to cases where the charge is one of common assault.
The provision in Northern Ireland corresponding to section 58 of the Children Act 2004 is currently under judicial review in Northern Ireland, *inter alia,* as to its compatibility with Articles 3, 8 and/or 14 of the European Convention on Human Rights (see below: Northern Ireland).
ii) The charging standard: According to the Charging Standard for Offences Against the Person, revised following the adoption of the Children Act 2004 and issued by the Crown Prosecution Service to assist prosecutors in selecting the most appropriate charge, "any injury that is more than transient or trifling can be classified as actual bodily harm". The Charging Standard recognises that "there may be cases where the injuries suffered by a victim would usually amount to common assault but due to the presence of serious aggravating features, […] such as […] when the victim is a child assaulted by an adult, […] the charge will normally be assault occasioning actual bodily harm". In such cases, the defence of reasonable punishment is no longer available .
iii) *The Human Rights Act 1998 (HRA)*: Section 2 of the HRA would require the court to take into account any judgment or decision by the European Court of Human Rights. In the R. v. H case [2001] EWCA Crim 1024, the Court of Appeal indicated that the direction to be given to the jury in cases where reasonable chastisement is pleaded as a defence should identify the factors which the European Court has decided are relevant in relation to whether there is a breach of Article 3 in its judgment in the A. case.

b) Case-law*:* No case-law arising under the Children Act 2004 could be furnished for the 966th meeting.
The Crown Prosecution Service for England and Wales were carrying out a project to identify cases where "reasonable chastisement" has been used as a defence against the charge of common assault of a child.

c) Awareness-raising measures: The United Kingdom authorities have indicated that this issue has been brought to the attention of the public through the consultation exercise relating to how the government would respond to the judgment and the public debate during the consultation process and at the time the Children Act was enacted. The new legislation and the revised charging standard are available to the public. As to awareness-raising measures for parents, the government has chosen to implement these through a "positive parenting" approach to discipline.
Guidance has been issued to practitioners working with children ("Working Together" and "What to do if you are worried that a child is being abused"). Up to 70 million GBP is being invested over a two-year period to fund new measures related to parenting, including universal access to parenting support, piloting parent support advisers, improving local authority delivery of parenting provision through guidance for Directors of Children's Services, etc.

B. Assessment and further information awaited

a) The United Kingdom's position: At the 966th meeting, the United Kingdom delegation repeated that the legislation fully complied with Article 3. It recalled that ill-treatment must attain a minimum level of severity to fall within Article 3. It gave a history of how section 58 came into effect, noting that the options were either a total ban, which would not be enforced on minor infractions, or a law drawing a line between physical violence causing harm and a light smack, which would be enforceable. The Parliament chose the latter. The United Kingdom repeated that the wider question of educational and other measures did not arise out of Article 3.

b) Assessment: At the 966th meeting, the Secretariat noted that for treatment to fall foul of Article 3, it must reach a certain level of severity. The Secretariat repeated its assessment that legislation adopted in England and Wales, taken together with the information provided on the charging standard, was in principle in conformity with the requirements of the Convention and the case-law. However, given the vulnerability of the victims, it was not clear whether the change in legislation on its own was sufficient to ensure effective deterrence. It for this reason that the Secretariat asked whether any awareness-raising measures had been taken.

Some delegations agreed with the Secretariat. Others expressed the opinion that the Children Act 2004 did not comply with the Convention. Some welcomed the legislation in place but wished to have more information on effective awareness-raising measures, which might include public campaigns, measures directed towards teachers, parents and various judicial authorities to make the prohibition known.

The Secretariat notes that the legal provision in Northern Ireland corresponding to section 58 of the Children

Act 2004 is currently under judicial review in Northern Ireland, *inter alia*, as to its compatibility with Articles 3, 8 and/or 14 of the European Convention on Human Rights (see below). It would be useful to await the outcome of that judicial review before proceeding to a discussion of the case.

The Secretariat is currently assessing recent information furnished concerning the Crown Prosecution Service for England and Wales project mentioned above.

As to awareness-raising measures, the Secretariat notes that useful measures have been taken and are being taken concerning positive parenting and setting up programmes, networks and services for supporting parents and parenting.

c) Further information awaited *on whether in the framework of those measures, any awareness-raising measures have been adopted or are envisaged that would inform parents and social workers of the effects of the new legislation.*

2) Northern Ireland

A. Measures adopted

a)The Law:

i) s. 58 of the Children Act 2004 replicated in Northern Ireland: The Law Reform (Miscellaneous Provisions) Northern Ireland Order 2006, Article 2, came into force on 20/09/2006 and makes corresponding provision to s. 58 of the Children Act 2004. The Northern Ireland Commissioner for Children and Young Persons has been granted leave to judicially review Article 2 of the Order. The Commissioner is seeking, *inter alia*, a declaration that Article 2 of the Order is incompatible with Articles 3, 8 and/or 14 of the Convention. The proceedings are still pending.

ii) Guidance for prosecutors: Guidance for prosecutors issued on 19/09/2006 provides that the vulnerability of the victim is to be taken into account when deciding whether to charge and the level of the charge.

iii) *The Human Rights Act 1998*: The HRA applies to Northern Ireland.

b) Case-law: No case-law under Article 2 of the Order has been found.

c) Awareness-raising measures: On 07/02/2005 the Department of Health, Social Services and Public Safety issued a Safe Parenting Handbook, containing advice on a range of issues, including positive parenting. It included a section on managing behaviour, which, *inter alia*, warned that yelling and over-discipline could lead to physical and emotional harm and highlighted services available to parents.

The updated version of the *Safe Parenting Handbook* states that the law on physical punishment has changed and the defence of reasonable chastisement will only be available to a parent if his or her child has experienced minor or more transient harm as a result of being physically chastised, and "…it is important to remember that you do not have a right to physically chastise your child" .

The authorities are currently working on an awareness-raising programme.

B. Assessment and further information awaited

a) The United Kingdom's position: At the 966th meeting, the United Kingdom delegation indicated that the Order bringing the relevant provision reflecting s.58 of the Children Act 2004 into effect would

be laid before Parliament in June 2006, and commence 2 months later. The legislation entered into force on 20/09/2006.

b) Assessment: At the 966th meeting, the Secretariat thanked the delegation for the news on the Order and noted that the position in Northern Ireland would then be the same as that in England and Wales. Effective deterrence remained an issue. As for awareness raising, the Secretariat was looking for guidance for social services and parents.

Some delegations welcomed the encouraging information on the legislation in Northern Ireland. Others noted that there was no effective deterrence. Some delegations wished to wait for more information.

The Secretariat notes that a judicial review is currently under way into the relevant legislative provisions in Northern Ireland with respect to their compatibility with Articles 3, 8 and/or 14 of the Convention. It would be useful to await the outcome of that judicial review before proceeding to a discussion of the case.

As to awareness-raising measures, the Secretariat notes the effort which has been and is being made in Northern Ireland. In particular, the handbook for parents which notes that parents do not have the right physically to chastise their child is a good example, which might be followed elsewhere in the United Kingdom. The Secretariat is currently assessing information provided on awareness raising measures.

c) Further information awaited: *on the progress of the judicial review.*

3) Scotland

A. Measures adopted

a)The Law:

i) The Criminal Justice (Scotland) Act 2003: Section 51 of the Criminal Justice (Scotland) Act 2003 came into force on 27/10/2003. The effect of section 51 is to provide a test which the court must apply when determining whether the punishment was reasonable (or "justifiable assault"). S. 51§1 and s. 51§2 list the factors to which the court must have regard when determining whether the punishment was "justifiable assault". S. 51§3 indicates circumstances where the use of physical punishment is never justifiable, i.e., where the punishment includes a blow to the head, shaking or the use of an implement.

ii) *The Human Rights Act 1998*: The HRA applies to Scotland.

b) Case-law: No case-law arising under section 51 of the Act was found.

B. Assessment and further information awaited

a) The United Kingdom's position: At the 966th meeting, the United Kingdom delegation indicated that the UK considered that the A. judgment had been fully implemented. It noted that no prosecution was reported under the relevant section of Scottish law. It asked whether the case would be open indefinitely because no case-law could be produced.

The government has recently repeated its position that a Convention-compliant system has been put in place, which the UK courts are bound to apply. It should be assumed that the courts and authorities will act in accordance with legislation and practice. The government has noted that the factors set out in s. 51§1 and s. 51§2 of the 2003 Act (i.e. the factors to which the court must have regard when determining whether the punishment was "justifiable assault") mirror the factors in the Court's judgment.

b) Assessment: At the 966th meeting, some delegations understood the difficulty of obtaining case-law. One indicated that the absence of case-law showed the absence of complaints, while another noted that lack of case-law is easily explained by the fact that such cases are rarely brought before the Court, and indicated its belief that the law in Scotland did not comply with the judgment. One delegation noted that case-law was requested because the law in force was not really in conformity with the judgment. One delegation noted that special legislation sends a bad sign, while another noted that legislation prohibiting certain acts implied that others were permitted. Some delegations mentioned awareness-raising. Some delegations believed that more information was needed as to case-law.

The Secretariat recalls that doubts had been expressed as to the Scottish law, which is the reason the Committee had requested examples of case-law. There may be case-law but it may be unreported.

Information recently received is currently under assessment, including submissions from the UK's Children's Commissioners and the National Society for the Prevention of Cruelty to Children.

The question of whether United Kingdom law as it now stands complies with the present judgment is examined in more detail in the relevant Memorandum (see document CM/Inf/DH(2007)… , to be issued).

The Deputies,

1. noted the information recently provided;
2. took note of the fact that an updated information document would be issued in due course; and

3. decided to resume consideration of this item at their 1007th meeting (15-17 October 2007) (DH) if the judicial review in Northern Ireland terminates in time for this item to be considered then, if not, this item will be considered again at their 1013th meeting (3-5 December 2007) (DH).

1007 (October 2007) section 4.3

- Action of the security forces in the United Kingdom
28883/95 McKerr, judgment of 04/05/01, final on 04/08/01
37715/97 Shanaghan, judgment of 04/05/01, final on 04/08/01
24746/94 Hugh Jordan, judgment of 04/05/01, final on 04/08/01
30054/96 Kelly and others, judgment of 04/05/01, final on 04/08/01
43290/98 McShane, judgment of 28/05/02, final on 28/08/02
29178/95 Finucane, judgment of 01/07/03, final on 01/10/03
Interim Resolutions ResDH(2005)20 and CM/ResDH(2007)73
CM/Inf/DH(2006)4 revised 2 and CM/Inf/DH(2006)4 Addendum revised 3

These cases concern the death of applicants' next-of-kin during police detention or security forces operations or in circumstances giving rise to suspicions of collusion of such forces.
In this respect, the Court found various combinations of the following shortcomings in the proceedings for investigating deaths giving rise to possible violations of Convention rights (violations of Article 2): lack of independence of the investigating police officers from security forces/police officers involved in the events; lack of public scrutiny and information to the victims' families concerning the reasons for decisions not to prosecute; the inquest procedure did not allow for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed; the soldiers / police officers who shot the deceased could not be required to attend the inquest as witnesses; the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings; the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.
The McShane case also concerns the finding by the Court of a failure by the respondent state to comply with its obligations under Article 34, in that the police had - albeit unsuccessfully - brought disciplinary proceedings against the solicitor who represented the applicant in national proceedings for having disclosed certain witness statements to the applicant's legal representatives before the European Court.
Individual measures: The United Kingdom authorities have underlined that they view their obligations in these cases as arising out of Article 46 rather than Article 2. The United Kingdom authorities submitted that this position is consistent with the judgment of the Court itself in paragraph 89 of the Finucane case, when the Court declined to indicate that a fresh investigation should be held and stated that "it rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance in each case".
The Committee of Ministers' position is reflected in Interim Resolution ResDH(2005)20 of 08/02/2005 and Interim Resolution CM/ResDH(2007)73 of 06/06/2007 recalling:

- "the respondent state's obligation under the Convention to conduct an investigation that is effective "in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible"; and
- the Committee's consistent position that there is a continuing obligation to conduct such investigations inasmuch as procedural violations of Article 2 were found in these cases.

The Committee therefore, in the second Interim Resolution, urged the authorities to take without further delay all necessary investigative steps in these cases in order to achieve concrete and visible progress and invited the government to keep the Committee regularly informed thereof.
• *Measures adopted and outstanding questions:* For the most recent extensive description of the situation in each case, see Interim Resolution CM/ResDH(2007)73, in particular Appendix II. Summarising, the current situation in each particular case is as follows:

1) Cases of Shanaghan and Kelly and others, the United Kingdom authorities announced, in a letter of 05/07/2005, the establishment of a new "Historical Enquiries Team" which is dedicated to re-examining all deaths attributable to the security situation in Northern Ireland between 1968 and 1998, with the aim of identifying and exploring any evidential opportunities that exist. The team contains two investigative units, one of which is staffed by officers seconded from police forces

outside Northern Ireland, dealing exclusively with cases in which independence from the Police service of Northern Ireland is a pre-requisite.
The HET have now completed the initial review stage in the Shanaghan case and a number of recommendations were made. The HET is currently carrying out enquiries in relation to these recommendations. They have been in contact with the family to discuss their work. The review in the Kelly and others case is also currently underway. The family representatives have engaged with the HET family contact team and have raised a number of concerns, which will be considered during the course of the review.
• *Information is awaited on the progress in the investigation into the Shanaghan case and on the outcome of the review processes and of possible next steps in the investigation in the case of Kelly and others.*

2) McKerr case, The case is now a matter for the Police Ombudsman (OPONI) who is responsible for investigating deaths as a result of the actions of a police officer. She will identify possible further evidentiary opportunities and will look into the original police investigation conducted. The case has been referred to the Ombudsman in accordance with the HET/OPONI protocol and the Ombudsman has given an assurance to expedite the case as best she can. The United Kingdom authorities have confirmed that OPONI are aware of the issues associated with the case.
• *Information is awaited on the progress in this investigation.*

3) Jordan case, the inquest had been suspended pending the outcome of the family's petition to the House of Lords for leave to appeal against two judgments of the Court of Appeal for Northern Ireland concerning inquests. At present, following the decision of the House of Lords in these cases, it is open for the inquest to proceed. A preliminary hearing was listed for 05/09/2007. The coroner remains under an obligation to report to the Director of Public Prosecutions any evidence that comes to light at the inquest that appears to disclose that a criminal offence may have been committed.
• *Information is awaited on the progress in this inquest.*

4) McShane case, the authorities have stated that the Coroner has carried out all the preliminary work and that a suitable date and venue for the inquest were being sought. The Coroner is in the process of attempting to obtain further video footage of the incidents surrounding the death of Mr McShane as well as additional statements to which the Committee on the Administration of Justice may have access. At present, following the decision of the House of Lords mentioned above in relation to the Jordan case, it is open for the inquest to proceed. As in the case of Jordan, the coroner remains under an obligation to report to the Director of Public Prosecutions any evidence that comes to light at the inquest that appears to disclose that a criminal offence may have been committed. This case is also currently being reviewed by the HET.
• *Information is awaited on the progress in the inquest and the HET investigation.*

5) Finucane case, the United Kingdom authorities have indicated that the third enquiry conducted by Lord Stevens of Kirkwhelpington is intended to form the basis of the individual measures relating to this case. The enquiry into the murder of Patrick Finucane and other matters is known as the Stevens III Investigation and commenced in April 1999. 17 individuals were arrested in connection with the murder of Patrick Finucane during the course of the investigation. Two persons were prosecuted in respect of the murder and other offences. One of those persons pleaded guilty to offences including the murder of Patrick Finucane. During the course of the Stevens III Investigation a number of files were submitted to the Public Prosecution Service for decisions as to prosecution. These included a substantial number of files relating to Army Personnel and files relating to members of the former Royal Ulster Constabulary (RUC) and a civilian employee of the Police Authority of Northern Ireland. On 25/06/2007 the Director of Public Prosecutions issued a Statement in relation to the decisions as to prosecution arising out of the Stevens III Investigation. These included decisions of no prosecution in respect of the Army Personnel, members of the RUC and the civilian employee of the Police Authority of Northern Ireland. The Stevens III Investigation has now concluded. The United Kingdom government considers that the conclusions of the Stevens III Investigation complete the individual measures required in this case. In response to the above indications of the United Kingdom government, the Irish delegation has stated its intention to make a written submission in relation to these cases.
The Secretariat is currently studying this recent information.
The commitment to a public Inquiry under the Inquiries Act 2005 relates to the separate political commitment given by the United Kingdom following talks with the Northern Ireland parties at Weston Park in 2001, and should not be considered as a requirement arising out of the United Kingdom's obligations under Article 46 which are instead met by the police re-investigation.

The letter from the United Kingdom authorities of July 2005 provided an extensive explanation of their position with regard to the capacity of the aforementioned inquiry under the Inquiries Act 2005 to provide for an Article 2 compliant investigation, and in a document submitted on 14/03/2006, this position was further clarified.
The applicant's representatives have, however, forwarded a number of submissions, including statements by judges having sat on previous inquiries and by NGOs, casting doubt on the capacity of an inquiry set up under the 2005 Act to fulfil the procedural requirements of Article 2, in particular as regards their independence and openness to public scrutiny.
On several occasions, the Irish delegation has expressed serious concerns concerning the capacity of an inquiry set up under the Inquiries Act 2005 to provide an Article-2-compliant investigation in the Finucane case. A number of delegations have indicated that they shared these concerns as well as those raised by the Secretariat in the memorandum on these cases (**CM/Inf/DH(2006)4 revised 2**) and the third revised Addendum to this memorandum. These regard in particular the use of ministerial powers in such matters as the scope of an inquiry, the approach to and use of restriction notices, publication of the full inquiry materials and findings, the control over the conduct of an inquiry, including the possibility to stop an inquiry, as well as regarding the extent of the victim's family's involvement in an inquiry conducted under the Act.
General measures: Information submitted to date by the United Kingdom authorities and other interested parties concerning the measures adopted and the outstanding questions appears in Interim Resolution ResDH (2005)20, in document **CM/Inf/DH(2006)4 revised 2** and, most recently in Interim Resolution CM/ResDH(2007)73.

1) Issues closed on the basis of the measures adopted: Having considered all information provided, the Deputies decided, at the 948th meeting (November 2005), to close the examination of the measures adopted to remedy the following problems revealed by the judgments:
- *the inquest procedure did not allow any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence*;
- *the scope of the examination for the inquest was too restricted;*
- *the persons who shot the deceased could not be required to attend the inquest as witnesses;*
- *the non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the ability of families to prepare for and to participate in the inquest and contributed to long adjournments in the proceedings;*
- *the absence of legal aid for the representation of the victim's families*.

Furthermore, at the 997th meeting (June 2007), with the adoption of the second Interim Resolution, the examination of the measures adopted to remedy the following problems was also closed:
- *the lack of public scrutiny of and information to victims' families on reasons for decisions of the Director of Public Prosecutions not to bring any prosecution;*
- *the fact that the public interest immunity certificate in McKerr had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case;*
- *the application of the package of measures to the armed forces.*

2) Outstanding issues: The outstanding questions appear in the revised 3 Addendum of document **CM/Inf/DH(2006)4** and, more up to date, in the second interim resolution. They include, among others, the following (the titles correspond to those used in the Interim Resolution):
- As regards the issue of ***defects in the police investigation***, the authorities of the respondent state are invited to continue to keep the Committee informed regarding the functioning of the HET, and in particular to, in due time, to provide information concerning concrete results obtained in this context.
- As regards the ***steps taken to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition:*** the authorities of the respondent state are invited to continue to keep the Committee informed as regards the concrete effects of the reforms of the Coroners Service of Northern Ireland, in particular on the length of inquest proceedings and the length of the period before an inquest is opened.
- As regards the issue of the **lack of independence of police investigators investigating an incident from those implicated in the incident**, the United Kingdom authorities were invited in the Interim Resolution to provide the Committee with the Police Ombudsman's report of the five-yearly review of her powers, at the time not yet completed, and with the response of the authorities. Recently, the authorities have provided the Ombudsman's report to the Secretariat, which is currently studying it.

The Deputies, having noted that recently information was submitted by the United Kingdom authorities on certain aspects of both individual and general measures, decided to resume consideration of these cases at their 1013th meeting (DH) (3-5 December 2007).

Interim Resolutions

Interim Resolution CM/ResDH(2007)73
Action of the Security Forces in Northern Ireland
(Case of McKerr against the United Kingdom and five similar cases)

Measures taken or envisaged
to ensure compliance with the judgments of the European Court of Human Rights
in the cases against the United Kingdom listed in Appendix III

(Adopted by the Committee of Ministers on 6 June 2007,
at the 997th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (hereinafter referred to as "the Convention"),

Having regard to the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III, in all of which the Court unanimously held that there had been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the death of the applicants' next-of-kin and in one of which (McShane) the Court also held, unanimously, that there had been a failure by the State to comply with its obligations under Article 34 of the Convention (these findings are summarised in Appendix III to this Resolution);

Recalling the first Interim Resolution on these cases (IntResDH(2005)20), adopted on 23 February 2005, which took stock of the measures taken or envisaged by the United Kingdom authorities until that date and called on the Government of the respondent State rapidly to take all outstanding general and individual measures in order to comply with the Court's judgments and to keep the Committee regularly informed thereof;
Recalling that at the Summit held in Warsaw in May 2005, the Heads of State and Government underlined among other things that member states must accelerate the execution of the Court's judgments;

General measures

Noting the additional information provided by the Government of the respondent State regarding the general measures taken or envisaged since the adoption of the first Interim Resolution (see Appendix I);

Welcoming the significant progress that has been made;

Recalling that on the basis of the developments which have taken place and the clarifications given, the Committee has thus been able at the 948th (DH) meeting (November 2005) to close its examination of several aspects, namely the issues regarding

- the role of the inquest procedure in securing a prosecution in respect of any criminal offence,
- the scope of examination of inquests,

- the compellability of witnesses at inquests,
- the disclosure of witness statements prior to the appearance of a witness at the inquest and
- legal aid for the representation of the victim's family;

Recalling that details of the measures adopted and the reasons for the Committee's decision to close these issues have been explained in the memoranda made public by the Committee (the latest being CM/Inf(2006)4 revised 2);

Noting however that several issues remained outstanding, which are considered below;

- *The lack of independence of police investigators investigating an incident from those implicated in the incident*

Stressing the importance of securing independent police investigations in all cases in which Article 2 of the Convention might be at issue;

Recalling further the longstanding practice of the Chief Constable of the Police Service of Northern Ireland (PSNI) to request that serious incidents involving police officers be investigated by officers from another police force ("calling in arrangements");

Noting that the United Kingdom Government has recently assured the Committee that where the Chief Constable is satisfied that there are objective reasons to believe that an investigation by the PSNI would not be seen to be independent and no other independent investigation routes are available, he will promptly call in another Police Force to investigate the incident or incidents;

Recalling that decisions not to "call in" are subject to judicial review if an application in this regard is made;

Recalling the establishment in 2000 of the Police Ombudsman who has the power to investigate complaints against the police, to supervise the investigation of complaints by the Chief Constable and to investigate other matters of her own motion;

Noting further that Section 55(2) of the Police Service (Northern Ireland) Act 1998 provides that, "The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person";

Noting the clarifications given as regards the Ombudsman's powers to efficiently investigate complaints, and the authority of the Ombudsman's findings in the context of the Prosecution Service's decision whether or not to initiate prosecution;

Noting also the Police Ombudsman's duty to liaise effectively with victims' families;

Noting that the Police Ombudsman is currently conducting a five-yearly review of the working of the police complaints system focused on the operation of the legislation governing the operation of the Police Ombudsman's office;

Stressing the importance for the Police Ombudsman to possess the necessary means and powers with a view to conducting effective investigations in conformity with the Convention requirements;

INVITES the Government of the respondent State to provide the Committee with the Police Ombudsman's report of the five-yearly review of her powers and with the response of the authorities to its content;

- *Defects in the police investigations*

Noting the improved safeguards for the independence of police investigations and their relevance for the efficiency of these investigations;

Recalling the establishment, on 28 March 2003, of the Serious Crimes Review Team (SCRT), which has the task of providing a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist, and, if evidential opportunities are identified, to proceed with the investigation of the crime;

Noting with interest the establishment in late 2005 of the Historical Enquiries Team (HET), which has the same task and powers as the SCRT, but specifically in relation to historical cases attributable to the security situation in Northern Ireland between 1968 and 1998;

Welcoming the family-centred approach of the HET;

Recalling that the competence of the Police Ombudsman also covers past cases which might also fall within the remit of the HET;

Emphasising the importance, in particular for the victims' families, of good coordination between the HET and the Police Ombudsman as regards cases in which both of them have an investigative role to play, and in this context welcoming ongoing discussions on the Ombudsman-HET Protocol;

Considering that the HET has only approximately a year ago started reviewing cases assigned to it;

Emphasising the need for rapid progress in the investigation into all past cases that fall within the remit of the HET and/or the Police Ombudsman;

WELCOMES the progress achieved as regards the establishment of appropriate institutions for the purpose of conducting effective police investigations;

INVITES the authorities to continue to keep the Committee informed as regards the progress made in the investigation of historical cases, and in particular to provide information concerning concrete results obtained in this context both by the HET and by the Police Ombudsman;

- *The lack of public scrutiny of and information to victims' families on reasons for decisions of the Director of Public Prosecutions not to bring any prosecution*

Noting that the Code for Prosecutors came into operation in June 2005, which among other things sets out the Prosecution Service's policy on the giving of reasons for non-prosecution, including in cases where death is, or may have been, occasioned by the conduct of agents of the state;

Noting further that decisions of the Prosecution Service not to prosecute are subject to judicial review if an application in this regard is made;

DECIDES to close its examination of this issue;

- *The fact that the public interest immunity certificate in McKerr had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case*

Noting the clarifications the United Kingdom authorities have provided on the new procedure, established in 2004, regarding public interest immunity certificates in inquest proceedings according to which the decision whether to issue such certificates is now taken by the coroner or the judge as the case may be, and that when making such decisions these officials today have access to the relevant information;

Noting further that coroners' decisions regarding public interest immunity certificates are subject to judicial review if an application in this regard is made;

DECIDES to close its examination of this issue;

- *The fact that the inquest proceedings did not commence promptly and were not pursued with reasonable expedition*

Taking note of the recent extensive reforms of the Coroners Service in Northern Ireland;

Welcoming the statement made by the United Kingdom authorities that these reforms will significantly shorten the length of inquest proceedings and the time before which an inquest will be opened;

Noting however that no concrete result of these reforms is yet measurable, because of the recent date on which these reforms were implemented and by the fact that all cases are treated in chronological order;

INVITES the authorities of the respondent State to continue to keep the Committee informed as regards the concrete effects of the reforms of the Coroners Service of Northern Ireland, in particular on the length of inquest proceedings and the length of the period before an inquest is opened;

- *The application of the package of measures to the armed forces*

Taking into account that cases in which a death occurs that might have been caused by an army officer are investigated by the police;

Noting that all the above-mentioned improvements apply to investigations into incidents involving army officers in which Article 2 of the Convention might be at issue, also if the

incident in question took place in the framework of a joint operation of the army and the police;

Noting in particular that the United Kingdom Government has recently assured the Committee that where the Chief Constable is satisfied that there are objective reasons to believe that an investigation by the PSNI would not be seen to be independent and no other independent investigation routes are available, he will promptly call in another Police Force to investigate the incident or incidents arising from joint police/military operations;

DECIDES to close its examination of this issue;

Individual measures

Noting that the United Kingdom authorities view their obligations to take appropriate measures to implement the judgments in these cases as arising out of Article 46 rather than Article 2;

Recalling that the Court in principle refuses to indicate appropriate individual measures in such cases, but rather considers that it falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance in each case;

Recalling in this regard the respondent State's obligation under the Convention to conduct an investigation that is effective “in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible”, and the Committee's consistent position that there is a continuing obligation to conduct effective investigations inasmuch as procedural violations of Article 2 were found by the Court in these cases (see *inter alia* the first Interim Resolution in these cases, ResDH(2005)20);

Noting with interest the information provided by the Government of the respondent State regarding individual measures to erase the consequences of the violations found in these cases for the applicants and in particular that the investigations are ongoing (see Appendix II);

Regretting however that in this field, as opposed to in the field of general measures, progress has been limited and that in none of the cases an effective investigation has been completed;

Stressing that the necessity of taking such measures is all the more pressing in these cases, considering the seriousness of the violations found and the time that has elapsed since the European Court's judgments became final;

URGES the authorities of the respondent State to take, without further delay, all necessary investigative steps in these cases in order to achieve concrete and visible progress;

INVITES the Government of the respondent State to keep the Committee regularly informed thereof;

DECIDES to pursue the supervision of the execution of the present judgments until the Committee has satisfied itself that all general measures have been adopted and their

effectiveness in preventing new, similar violations has been established and that all necessary individual measures have been taken to erase the consequences of the violations found for the applicants,

DECIDES therefore to resume consideration of these cases, as regards outstanding individual measures at each of its DH meetings and as regards general measures at intervals not longer than six months.

* * *

Appendix I to Interim Resolution CM/ResDH(2007)73

General measures

Additional information provided by the Government of the United Kingdom to the Committee of Ministers since the first Interim Resolution in these cases (Res/DH(2005)20) on general measures taken so far or envisaged to comply with the European Court's judgments

The Government of the United Kingdom recalls at the outset the information already provided and summarised in the first Interim Resolution in these cases (ResDH(2005)20), adopted at the 914th (DH) meeting (February 2005). They have provided the following additional information with respect to general measures to comply with the European Court's judgments in the present cases. This information is described in more detail in the memorandum on these cases (CM/Inf/DH(2006)4 revised 2) and in the addendum to this memorandum (CM/Inf/DH(2006)4 Addendum revised 3), both of which are public. The information below is categorised similarly as the information reflected in these documents.

A – Lack of independence of police investigators investigating an incident from those implicated in the incident

- *Police Ombudsman*

As regards the powers of the Police Ombudsman, legislation places a bar on the Ombudsman investigating matters which already have been the subject of disciplinary or criminal proceedings, except where there may have been a criminal offence or disciplinary proceedings, the case is grave or exceptional and there is fresh evidence. However, these conditions apply only to complaints made by members of the public to the Ombudsman. A number of public authorities (such as the Chief Constable or the Secretary of State) may also refer a case to her, and in some cases must do so. In this context, Section 55(2) of the Police Service (Northern Ireland) Act 1998 provides that “The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person”. The Ombudsman may also, at her own discretion, begin an investigation. This power applies if it appears that a member of the police force may have committed a criminal offence or acted in a manner which would justify disciplinary proceedings and it is in the public interest for an investigation by the Ombudsman to take place. The Ombudsman has never been challenged over the exercise of her power to call herself into a case. Both the Chief Constable and the Ombudsman would take into account their respective obligations under the Convention, and Article 2 in particular, when considering the exercise of their discretion to refer or call-in a case.

The fact that a person has left the police force does not mean that they may not be investigated by the Ombudsman; what is relevant is whether or not a person was a member of the police force at the time of the incident under investigation. In the case of a person off duty, what is relevant is whether or not their status as a member of the police is relevant to the incident. A person who is no longer a serving police officer may no longer be the subject of disciplinary proceedings. This means that former officers are in the same position as other civilians when it comes to the powers the Ombudsman has to compel cooperation with an investigation. The legislation confers on the Ombudsman powers under the Police and Criminal Evidence (Northern Ireland) Order 1989 (see section 56 of the Police (Northern Ireland) Act 1998), so that her powers are the same as those of the police. Whether or not the police or the Ombudsman have a power to compel cooperation in a particular case will depend on whether or not the person is a witness or a suspect.

Two examples of retrospective investigations carried out by the Police Ombudsman, in the cases of Brown and Devenny, have been provided to the Secretariat. In these cases the Ombudsman, after investigating the police handling of the respective investigations, made a number of recommendations to the Police Service of Northern Ireland (PSNI). The public statements she made in both cases can be found on her website at www.policeombudsman.org. The recommendations the Ombudsman made in these cases were implemented by the PSNI.

Where the Ombudsman finds evidential opportunities relating to the actions of police officers they will be exploited and, where appropriate, recommendations for prosecution forwarded to the Director of the Public Prosecution Service for Northern Ireland (DPP). Where evidence of crimes by individuals who are not police officers is uncovered this information will be passed to the PSNI for appropriate action.

The Public Prosecution Service disagreed with the recommendation of the Police Ombudsman on prosecution in roughly 3% of the cases that were transmitted.

As regards the average time needed for a Police Ombudsman investigation, more minor cases are dealt with by an informal resolution process requiring a minimal (informal) investigation and followed by a form of mediation. 91% of complaints suitable for informal resolution are referred within 3 days to the police who carry out the process which can normally be completed quite quickly. More serious cases would be dealt with by formal investigation and would ultimately involve the DPP and the Coroner. The average time for formal investigations to be completed is 117 days. This includes time taken up by the Coroner and the DPP fulfilling their role.

The Police Ombudsman has an extensive family liaison process. This involves the appointment of a named family liaison officer, with an identified telephone number, who is available to families as reasonably required. Families will be updated at 6-weekly intervals on the progression of the investigation. This process is quality assured and the most recent quality assurance tests indicate that such updating is occurring in 81% of cases. The Police Ombudsman has a target for the incoming year of ensuring that 90% of families are updated on a six-weekly basis. Ultimately the aim is to update all families every six weeks. The assumption is that information should be shared with families unless there are cogent reasons to withhold such information. There is a provision of the Police (Northern Ireland) Act 1998

which makes it a criminal offence for staff to disclose information other than in accordance with the Act. However this does not prevent proper disclosure of information to families.

The Police Ombudsman is aware that families need as much information as can be factually proved, as rapidly as it becomes available. Material made available to families has included information in relation to informants, intelligence held by the Royal Ulster Constabulary(RUC)/PSNI, police processes and practices, and the reasons given by officers in justification of their actions. The Police Ombudsman recognises the need to protect informants and also the need to protect sensitive investigation methodology. On occasion witnesses have also stated that they have been threatened or intimidated when they have given evidence to the Police Ombudsman's investigators, and the need to protect such witnesses means that details of their addresses etc will not be released. On occasion the Police Ombudsman has refrained from giving families information because disclosure of the information could prejudice an ongoing trial (accused persons could argue that the release of information would prejudice their ability to defend themselves). In those circumstances (and they are rigorously assessed) the Police Ombudsman will inform the families of matters in so far as it is possible, and will advise them that at the conclusion of the ongoing criminal proceedings further disclosure will be made to them.

A five-yearly review of the working of the police complaints system by the Police Ombudsman is currently ongoing. The review focuses on the operation of the legislation governing the operation of the Police Ombudsman's office. It is a large exercise involving extensive consultation both internally and externally. The review is expected to be completed in autumn 2007. When the review is completed and presented to the Secretary of State, the Northern Ireland Office will respond to its content.

- *“Calling-in” arrangements*

The arrangements used by the PSNI as regards calling-in arrangements have worked and continue to work well.

Generally, a decision to “call in” outside assistance will be initiated by the Chief Constable himself. In other cases, for example, cases which might fall within the remit of the Historical Enquiries Team (HET) (see under B), the decision to call in outside assistance may be taken by the Chief Constable after a considerable level of discussion with the Northern Ireland Office and other stakeholders, including the families. The decision to use outside assistance, however, remains a decision for the Chief Constable.

Section 55(2) of the Police Service (Northern Ireland) Act 1998 provides that “The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person”.

Where the Chief Constable is satisfied that there are objective reasons to believe that an investigation by the PSNI would not be seen to be independent and no other independent investigation routes are available, he will promptly call in another Police Force to investigate the incident or incidents.

The decision by the Chief Constable whether or not to call in an outside force is subject to judicial review.

The question of resources is in general not decisive in the decision to “call in” assistance from another police service. In Northern Ireland there are no cases where resources, or a lack of resources, has been decisive in any decision to “call in” or not.

B - Defects in the police investigation

The United Kingdom authorities have indicated that, on 28 March 2003, the Chief Constable of the PSNI established the Serious Crimes Review Team (SCRT), whose remit is “to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed”. If, as a result of this review, it appears that new evidence might come to light, reinvestigation of any of the present cases might follow.

The PSNI, with the support of and funding from the Northern Ireland Office, has established a new unit of the SCRT, that is dedicated to re-examining all deaths attributable to the security situation in Northern Ireland between 1968 and the Good Friday Agreement in 1998 (“the Troubles”). This Historical Enquiries Team (HET) has been designed to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist. The HET is operationally independent and reports directly from its Head of Branch to the Chief Constable.
The review process is designed to be exhaustive, and includes a re-examination of all documentation, any exhibits associated with the case and any intelligence on the case (both internal, partner agencies and open source). The intention is to take advantage of any developments in forensic science (e.g. fingerprint technology, DNA possibilities) to identify any evidential opportunities arising from witnesses (either people never seen or where the passage of time allows for changed loyalties etc), and to exploit any potential opportunities from intelligence that may have arisen since or which were not used at the time.
If evidential opportunities are identified during the review process by the HET, the investigation of the death will proceed and where there is credible evidence available reports will be forwarded to the Public Prosecution Service with a view to prosecution. The investigation process will be undertaken 'in-house' by the HET, and will be focused on the evidential opportunities that the review process identifies.
The first and primary objective of the HET is to provide a 'family centred' approach, seeking to identify and address issues that are unresolved from the families' perspectives. The HET's intention is to address, as far as possible, all the unresolved concerns that families raise. A bespoke Family Liaison Strategy has been designed, comprising a help desk, individual liaison officers for families and access for families to the two senior commanders in any case that is required. The principle that the HET adopts in dealing with families, underwritten personally by the Chief Constable, is maximum permissible disclosure, in line with legal and ethical considerations.

*As regards the possible interplay between the HET and the Police Ombudsman with regard to historical cases, t*he HET have a very good working relationship with the Office of the Police Ombudsman (OPONI). Since the inception of the unit, discussions have taken place on how issues that affect each agency, within individual or linked cases, can be progressed. A programme of minuted meetings has been instituted, at strategic (monthly), tactical (weekly) and operational (as required) levels. The HET have provided office space and IT support for an OPONI presence at the HET site. To preserve the independence of each party, discussions are continuing on how a parallel investigation process can best be managed in relevant cases. At present, the HET's view is that those cases that allegedly involve the actions of police

officers exclusively will be reviewed by the Ombudsman alone, however the HET is committed to supporting them in any way possible that legislation allows. In those cases of parallel investigation (e.g. some police and some external collusion alleged) the meetings structure is designed to facilitate prompt exchange of relevant information and co-ordinated investigative response.

C – Lack of public scrutiny of and information to victims' families on reasons for decisions of the Director of Public Prosecutions not to bring any prosecution

The Code for Prosecutors came into operation on 13 June 2005. The Code, among other things, sets out the Prosecution Service's policy on the giving of reasons for decisions not to prosecute. It states that, “the Prosecution Service recognises that there may be cases arising in the future, which it would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including duties under the Human Rights Act 1998, the Prosecution Service accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. The Prosecution Service will reach a decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.”

The Code itself is not binding but it gives rise to obligations that can be enforced in law. Judicial review is possible under two heads. Firstly, a freestanding challenge to a failure to give detailed reasons for a decision not to prosecute would be possible under the Human Rights Act, based on the failure to conduct an Article 2-compliant investigation. The possibility to bring such a challenge existed independently of any Code for Prosecutors. Secondly, in accordance with a well developed doctrine in domestic law in the United Kingdom, if a public body states that it will follow a given policy, this creates a legitimate expectation that the body will follow that policy unless there exist compelling reasons not to do so. Judicial review is possible on the basis of this legitimate expectation and is therefore possible on the basis of legitimate expectations arising out of the Code.

On a judicial review of a decision by the Prosecution Service in respect of the giving of reasons for not prosecuting, the court will review whether the reasons given in that case were in accordance with the Code for Prosecutors and were capable of supporting the decision not to prosecute. Such review will be conducted on the basis of consideration by the court of relevant correspondence and affidavit(s) sworn on behalf of the Prosecution Service for the judicial review proceedings. Generally, the court will also have access to relevant witness statements upon which the decision for no prosecution was made by the Prosecution Service.

It is open to the court to conclude that the reasons given are manifestly bad reasons and that the maker of the decision for no prosecution had failed to take relevant matters into account or had taken irrelevant matters into account. In such circumstances the court would almost certainly grant an order of certiorari. The effect of such an Order is to quash the original decision for no prosecution. This would require the Prosecution to reconsider the case and come to a fresh decision on prosecution.

The United Kingdom authorities have provided several examples of decisions on judicial review of decisions by the prosecutor not to prosecute.

D – The inquest procedure did not allow any verdict or findings which might play an effective role in securing a prosecution of any criminal offence and E - The scope of the examination for the inquest was too restricted

By way of example of the application in practice of the principles set out in the *Middleton* case (*R v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)* [2004] UKHL 10) and in the case of Jordan ([2004] NICA 29 and [2004] NICA 30), the United Kingdom authorities provided a total of eleven copies of verdicts on inquests. These included both narrative verdicts and verdicts in which the jury made detailed findings of fact in response to a list of specific questions asked by the coroner.

F – The persons who shot the deceased could not be required to attend the inquest as witnesses

The United Kingdom authorities referred to the information previously provided to the Committee, summed up in the first Interim Resolution in these cases (ResDH(2005)20 of February 2005).

G – Non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the ability of families to prepare for and to participate in the inquest and contributed to long adjournments in the proceedings

The Northern Ireland Court Service has contacted all coroners in its jurisdiction, and all of the coroners confirmed that in Article 2 cases where there is no public interest immunity certificate, families of the deceased will be given witness statements and will be informed of the relevant information that the coroner has, as soon as the relevance of the information and the absence of such a certificate has been established.

H – Absence of legal aid for the representation of the victim's families

The United Kingdom authorities referred to the information previously provided to the Committee, summed up in the first Interim Resolution in these cases (ResDH(2005)20 of February 2005).

I –The public interest immunity certificate in McKerr had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case

Public interest immunity issues at inquests are dealt with in the same manner as in litigation, but modified to take account of the coroner's inquisitorial role. If the coroner identifies documents which contain material the disclosure of which would cause real damage to the public interest, for example the identity of an informant, revelation of whose role would put his or her life at risk (thereby engaging Article 2 of the Convention), then it will be for the relevant Minister (or the Chief Constable) to decide whether a claim for public interest immunity should be asserted.

The Minister (or Chief Constable) will conduct a balancing exercise between the damage to the public interest if the material was disclosed and the public interest in disclosure. If he considers the balance falls in favour of disclosure he will not assert a claim for public interest

immunity and the material will be disclosed. If he considers the balance falls against disclosure he will assert a claim for public interest immunity. Whether the claim for public interest immunity is asserted by a Minister or by the Chief Constable will depend on the nature of the information which is to be protected and whether a certificate is required. At present in Northern Ireland all public interest immunity certificates are signed by Ministers.

If the Minister (or Chief Constable) decides to assert a claim for public interest immunity, the coroner will in turn conduct a similar balancing exercise. He may examine the documents in order to carry out that exercise. The coroner will then make his own decision as to where the balance of the public interest falls. That decision may be that may be that the balance falls in favour of disclosure or against. The coroner is not bound by the Minister's (or Chief Constable's) decision to assert a claim for public interest immunity. If the coroner decides the balance falls in favour of disclosure the document will be disclosed unless the Minister (or Chief Constable) successfully applies for judicial review. A decision by the coroner in agreement with the Minister's (or Chief Constable's) public interest immunity claim could also be challenged by judicial review. Therefore, a judicial authority makes the ultimate decision about whether material should be disclosed or not, taking into account potentially competing Convention rights and the circumstances of the individual case.

The coroner's decision to allow or disallow a public interest immunity claim may be challenged by judicial review.

J – The inquest proceedings did not commence promptly and were not pursued with reasonable expedition

A paper on Modernising the Coroners Service in Northern Ireland was published by the Northern Ireland Court Service on 1 April 2005. This reforms proposed in this paper have been fully implemented and the new coroners service was launched on 14 June 2006. The programme included the following reforms:

- the creation of a single Northern Ireland coroners jurisdiction;
- the appointment of a High Court Judge as presiding judge for the Coroners Service;
- the creation of a full time coronial judiciary with the appointment of two new full time coroners to work alongside the existing senior coroner;
- the appointment of coroners liaison officers to provide an improved service to bereaved families, and
- new accommodation and a new computer system.

In addition, new information leaflets have been developed including a Coroners Service Charter which set out the service standards that can be expected, with specific regard to the families' rights to participate during coroners investigations and inquests.

The authorities indicated that these reforms will significantly shorten the length of inquest proceedings and the time before which an inquest will be opened. They have also indicated that the overall number of outstanding cases will decrease as a result of the new structure. However, there will always be a number of outstanding cases for reasons outside the coroner's control, for example, cases awaiting the receipt of a final post-mortem report.

Recent statistics available on inquest proceedings show that the average time between the date of death and the start of an inquest for the District of Greater Belfast in 2005 was 108.81 weeks. The coroners are targeting the oldest cases first to deal with the backlog of cases, and

this has an impact on the statistics for average time frame. The number of cases pending before the coroner is 1,472. This was the figure at the end of 2005 and this figure excludes the district of North Antrim (which goes up to the end of June 2005). The figure of 1,472 includes all deaths reported to the coroner. In respect of the majority of these deaths the coroner is likely to decide no further investigation is required following inquiries or a post mortem, and that therefore an inquest should not be held.

K – Issues relating the application of the package of measures to the armed forces

The Police Ombudsman's competence to investigate complaints concerning police conduct extends to complaints concerning police investigations into deaths caused by members of the armed forces.

It is the Chief Constable's decision on whether to seek assistance from another police force (call-in). This remains the case where operations have been conducted jointly with the armed forces. In making such a decision the Chief Constable exercises his professional judgement. The Chief Constable is very conscious of the need to ensure that, in appropriate cases, an incident involving the armed forces is investigated by persons who are independent of those implicated in the incident.

Where the Chief Constable is satisfied that there are objective reasons to believe that an investigation by the PSNI would not be seen to be independent and no other independent investigation routes are available, he will promptly call in another Police Force to investigate the incident or incidents arising from joint police/military operations.

Decisions by the Chief Constable are, as stated under A, challengeable in the courts through judicial review.

The handling of complaints made against the Armed Forces depends on the specific nature of the complaint. All complaints alleging criminal conduct by soldiers are investigated by the PSNI and the Armed Forces fully cooperate with all such investigations as required. If, following investigation, the police decide a soldier may have broken the law, they will pass the evidence to the Public Prosecution Service which will decide if a prosecution should take place.

Non-criminal or informal complaints are dealt with by either the Civil Secretary at the Armed Forces' Headquarters Northern Ireland, Lisburn, or a Civilian Representative (Civ Rep), who will conduct an investigation locally. Significantly, as civil servants employed by the Northern Ireland Office, Civ Reps have an impartial status, acting as liaison between members of the local community and the Armed Forces. The vast majority of complaints are resolved informally, to the satisfaction of both parties. In some cases, the Claims Investigation Team (CIT), made up of Royal Military Police (RMP) personnel wholly independent of the military chain of command, will also conduct non-criminal investigations and enquiries. Their primary function is to investigate Litigation Claims lodged against the MOD.

Since 1993 there has been an Independent Assessor of Military Complaints Procedures (IAMCP), who reviews the Army's procedures for investigating non-criminal complaints against members of the Armed Forces in Northern Ireland, and in doing so seeks to reassure the public that there is independence in the procedures. He may periodically call in at the Headquarters in Northern Ireland to see files or to check on the procedures of an investigation

and is given access to relevant files as required. The remit of the IAMCP is set out in Section 98 and Schedule 11 of the Terrorism Act 2000. Under his statutory terms the Assessor can investigate the handling of a, "complaint about the behaviour of a member of Her Majesty's forces under the command of the General Officer Commanding Northern Ireland," and specifically: "(a) shall keep under review the procedures adopted by the General Officer Commanding Northern Ireland for receiving, investigating and responding to complaints to which this section applies, (b) shall receive and investigate any representations about those procedures, (c) may investigate the operation of those procedures in relation to a particular complaint or class of complaints, (d) may require the General Officer Commanding to review a particular case or class of cases in which the Independent Assessor considers that any of those procedures have operated inadequately, and (e) may make recommendations to the General Officer Commanding about inadequacies in those procedures, including inadequacies in the way in which they operate in relation to a particular complaint or class of complaints." Further, as outlined in schedule 11, "the Independent Assessor may report to the Secretary of State on any matter which comes to his attention in the course of the performance of his functions".

* * *

Appendix II to Interim Resolution CM/ResDH(2007)73

Individual measures

Information provided by the Government of the United Kingdom to the Committee of Ministers
on individual measures taken so far or envisaged to comply with the European Court's judgments

The United Kingdom authorities have underlined that they view their obligations in these cases as arising out of Article 46 rather than Article 2. The Government has confirmed its commitment to abide by the judgments of the Court in these cases and to implement the judgments, in accordance with Article 46. This commitment is not affected by the findings of the House of Lords in the *McKerr* judgment of 11 March 2004 (*In re McKerr* [2004] 1 WLR 807) that the Human Rights Act 1998 does not have retrospective effect and that under domestic law, there was no continuing breach of Article 2 in that case. The House of Lords' judgment does not address the question of the measures to be taken in implementation of the international obligations arising under Article 46.

In the latter respect, different factors are at issue in each case and some reveal more problems than others. Further proceedings have been conducted and the Government considers that any measures required are under way in each case. The main question, in the Government's view, is whether, on the facts in each case, a fresh investigation is actually possible. The Government concedes that new investigations in the present cases could not satisfy the Convention requirements in respect of promptness and expedition.

Information regarding the proceedings conducted prior to the judgment in each case is contained in the relevant judgments. The following information, provided by the Government, concerns the measures currently under way in each case:

In the Jordan case, the inquest opened in January 1995 experienced a serious of adjournments relating, inter alia, to a number of judicial review applications by the applicants or in similar cases. The inquest had been suspended pending the outcome of the family's petition to the House of Lords regarding the scope of the inquest. It is now open for the inquest to proceed following the House of Lords decision of 28 March 2007 in the cases of *Jordan and McCaughey* (*Jordan v. Lord Chancellor and another (Northern Ireland; McCaughey v. Chief Constable of the Police Service Northern Ireland (Northern Ireland)* [2007] 2 WLR 754).

Civil proceedings were also instituted in 1992 alleging death by wrongful act. The applicant wishes to await the outcome of the inquest before pursuing civil action further.

In the McKerr case, the family of Mr McKerr brought legal proceedings seeking to compel the Government to provide a fresh investigation into his death. These proceedings concluded with the House of Lords' judgment, delivered on 11 March 2004 (reference above). In that case, the House of Lords declined to order a fresh investigation, as it considered that no right to an investigation in accordance with the procedural requirements of Article 2 of the Convention existed under domestic law at the time of the relevant events and that as such, there could be no continuing right under domestic law to such an investigation at present since the Human Rights Act (which came into force on 2 October 2000) did not apply retrospectively. The House of Lords left open, however, the question whether such a continuing obligation existed under international law in this case. Two of the five judges did not address the issue; the remaining three doubted that there was such an obligation. The House of Lords observed that the Committee of Ministers had not yet decided whether the Government's proposals for implementation (which did not at that time allow for further investigation into the death in McKerr) were sufficient. It may be recalled that the Committee has, since then, adopted the first Interim Resolution in these cases (Res/DH(2005)20).

The case is now a matter for the Police Ombudsman who is responsible for investigating deaths as a result of the actions of a police officer. She will identify possible further evidentiary opportunities and will look into the original police investigation conducted. The case has been referred to the Ombudsman in accordance with the HET/OPONI protocol and the Ombudsman has given an assurance to expedite the case as best she can. *OPONI are aware of the issues associated with the case.*

The Kelly and others case concerned a single incident in which nine men were killed. These deaths are among 3000 cases which fall within the terms of reference of the HET. The review process is currently underway. Progress depends on evidential leads, and it is therefore impossible to assess at this stage when a final conclusion will be reached.

As regards civil actions, the family of Anthony Hughes issued proceedings against the Ministry of Defence in 1988 and the case was settled in 1991. Six other families, including the Kelly family, issued proceedings in 1990 but the families have not set down the cases for hearing.

The Shanaghan case also falls within the terms of reference of the HET, since the perpetrator of the shooting was never identified. The HET are currently reviewing this case to assess if any new evidential opportunities exist. Research is ongoing in relation to fingerprints. The family met senior officers from the HET and have agreed to engage with the Team. Further engagement between the Senior Investigating Officer and the family have taken place. After

this review, the HET will decide how to take the case forward. It is not possible to say at this stage when there will be an outcome from this review.

The applicant has taken no further steps in the civil proceedings commenced in 1994.

In the McShane case, an inquest was opened in May 1998 but adjourned pending the outcome of various legal proceedings and decisions at domestic level. However, a full-time coroner has now been assigned to this inquest which commenced in early 2005. He is now in the process of attempting to obtain further video footage of the incidents surrounding the death of Mr McShane as well as additional statements to which the Committee on the Administration of Justice might have access. In light of the hearing of the *Jordan and McCaughey* appeal in the House of Lords and following consultation with interested parties, including representatives of the deceased's family, the coroner had however indicated that he was not minded to list the inquest into the death of Mr McShane prior to judgment being given by the House of Lords. It is now open for the inquest to proceed following the House of Lords decision in *Jordan and McCaughey*. The coroner remains under an obligation to report to the Director of Public Prosecutions any evidence that comes to light at the inquest that appears to disclose that a criminal offence may have been committed.

This case will also be reassessed by the HET. They allocated the case to the Review and Investigation stage on 13 December 2006.

The applicant has not moved forward with civil proceedings brought against the Ministry of Defence and the Chief Constable of the Royal Ulster Constabulary.

In the Finucane case, two special police inquiries (the first two Stevens inquiries) were instituted to respond to concerns arising out of allegations of collusion between loyalist organisations and the security forces. The first of these two inquiries led to the reporting or charging of 59 people and the conviction of one person of conspiracy to murder persons other than Patrick Finucane. The second inquiry did not lead to the prosecution of any person.

The United Kingdom authorities have indicated that the third Stevens inquiry should be regarded as the individual measure aimed at fully executing the Court's judgment in this case. The investigation, which started in April 1999, is ongoing. The inquiry is squarely concerned with the Finucane murder. 17 individuals have so far been arrested in the course of the investigation in connection with the murder of Mr Finucane. One person has so far been successfully prosecuted for this murder.

On 15 April 2003, 63 files were submitted to the Prosecution Service by the Stevens Team. The subjects of some of these files are serving or former PSNI and Army personnel. These files remain under consideration by the Prosecution Service, which has kept close contact with the Attorney General regarding the issue.

In addition, the Government announced on 23 September 2004 that steps could now be taken to implement the decision to hold a new inquiry into this death. The inquiry will be held on the basis of the Inquiries Act 2005, which is designed to provide a statutory framework for a wide range of future inquiries, and its provisions are based to a large extent on existing legislation and practice. Most of the inquiries that will be held under it are in the Government's view not likely to engage Article 2. However, the Government is satisfied that, in those cases in which Article 2 is engaged, the Act is capable of being used to hold an

inquiry that will discharge or contribute to the discharge of the state's obligations under that article to provide an effective official investigation. The Government also emphasised that the provisions of the Inquiries Bill had been scrutinised in great detail by Parliament, and that the House of Lords had made a number of amendments to strengthen the role of the inquiry chairman, to increase parliamentary involvement in inquiries and to provide for public access to inquiry records under the Freedom of Information Act 2000.

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Appendix III to Interim Resolution CM/ResDH(2007)73

Judgments concerning violations of the Convention by or involving allegations of collusion by the United Kingdom security forces pending before the Committee of Ministers for supervision of execution

Application number	Case name	Date of judgment	Date of final judgment
24746/94	**Jordan**	04/05/2001	04/08/2001
28883/95	**McKerr**	04/05/2001	04/08/2001
30054/96	**Kelly and others**	04/05/2001	04/08/2001
37715/97	**Shanaghan**	04/05/2001	04/08/2001
43290/98	**McShane**	28/05/2002	28/08/2002
29178/95	**Finucane**	01/07/2003	01/10/2003

In the above cases the Court found that there had been a violation of Article 2 of the Convention in respect of various failings in the investigative procedures concerning the death of the applicants' relatives. The various failings may be summarised on a case-by-case basis as follows:

- Lack of independence of police investigators investigating the incident from the officers or members of the security forces implicated in the incident
Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane

- The independent police investigation did not proceed with reasonable expedition
McKerr, McShane

- Lack of public scrutiny and information to the victims' families on the reasons for the decision of the Director of Public Prosecutions not to prosecute any officer in respect of relevant allegations
Jordan, McKerr, Kelly and others, Shanaghan, Finucane

- The inquest procedure did not play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed
Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane

- The scope of examination of the inquest was too restricted
Shanaghan, Finucane

- There was no prompt or effective investigation into allegations of collusion

Shanaghan, Finucane

- The persons who shot the deceased, and in the McShane case, the soldier who drove the armoured personnel carrier that fatally injured the applicant's husband, could not be required to attend the inquest as witnesses
Jordan, McKerr, Kelly and others, McShane

- The non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the families' ability to prepare for and to participate in the inquest and/or contributed to long adjournments
Jordan, McKerr, Kelly and others, Shanaghan, McShane

- The absence of legal aid for the representation of the victim's family
Jordan

- The public interest immunity certificate had the effect of preventing the inquest from examining matters relevant to the outstanding issues in the case
McKerr

- The inquest proceedings did not commence promptly and did not proceed with reasonable expedition
Jordan, McKerr, Kelly and others, Shanaghan, McShane

Interim Resolution ResDH(2005)20
Action of the Security Forces in Northern Ireland
(Case of McKerr against the United Kingdom and five similar cases)

Measures taken or envisaged
to ensure compliance with the judgments of the European Court of Human Rights
in the cases against the United Kingdom listed in Appendix III

(Adopted by the Committee of Ministers on 23 February 2005
at the 914th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 46, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 (hereinafter referred to as "the Convention"),

Having regard to the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III and forwarded to the Committee of Ministers for supervision of their execution once they had become final under Article 44 of the Convention;

Recalling that in all these cases the applicants complained of violations of their right to an effective investigation into the death of their next-of-kin at the hands of the police or armed forces in Northern Ireland or in circumstances giving rise to allegations of collusion between the security forces and the killers;

Whereas in all of these judgments the Court unanimously held that there had been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the death of the applicants' next-of-kin (these findings are summarised in Appendix III to this resolution);

Whereas in the McShane case the Court also held, unanimously, that there had been a failure by the State to comply with its obligations under Article 34 of the Convention;

Having regard to the Rules adopted by the Committee of Ministers concerning the application of Article 46, paragraph 2, of the Convention;

Having invited the government of the respondent State to inform it of the measures which have been taken in consequence of the judgments, delivered on 4 May 2001, 28 May 2002 and 1 July 2003, having regard to the United Kingdom's obligation under Article 46, paragraph 1, of the Convention to abide by them;

Having satisfied itself that the government has paid the applicants the sums provided for in the judgments;

Whereas, from the outset of the Committee's examination of the present cases, the government of the respondent State has reiterated its commitment to abide by the Court's judgments in these cases in accordance with its obligations under Article 46, paragraph 1;

Whereas the government of the respondent State has provided the Committee with information about the general measures taken so far or envisaged to this effect (this information appears in Appendix I to this resolution);

Whereas the said government has also provided information in each of these cases regarding the issue of individual measures to erase the consequences of the violations found for the applicants (this information appears in Appendix II to this resolution);

General assessment of the Committee of Ministers

Welcomes the firm commitment of the government of the respondent State to abide by the judgments of the Court in the present cases;

Takes note with interest of the information provided by the government of the respondent State regarding the general measures taken so far or envisaged to comply with the judgments;

Notes nonetheless that certain general measures remain to be taken and that further information and clarifications are outstanding with regard to a number of other measures, including, where appropriate, information on the impact of these measures in practice;

Notes in this connection that the Committee's on-going assessment of measures taken so far or envisaged covers the range of issues referred to in the appended information, inter alia:

- “calling in” arrangements for police investigations;
- the role of the Serious Crimes Review Team;
- the possibility of judicial review of decisions not to prosecute;
- new practices with respect to the verdicts of coroners' juries at inquests;
- developments regarding disclosure at inquests;
- legal aid for inquests under the previous *ex gratia* scheme;
- measures to give effect to recommendations following reviews of the coroners' system;
- the Inquiries Bill intended to serve as a basis for a further inquiry in one of these cases;

Calls on the government of the respondent 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 of the measures taken, including, where appropriate, their impact in practice;

Recalls that the obligation to take all such measures is all the more pressing in cases – such as these – where procedural safeguards surrounding investigations into cases raising issues under Article 2 of the Convention are concerned;

Notes the information provided by the government of the respondent State regarding individual measures to erase the consequences of the violations found in these cases for the applicants;

Recalls in this regard the respondent State's obligation under the Convention to conduct an investigation that is effective “in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the

identification and punishment of those responsible", and the Committee's consistent position that there is a continuing obligation to conduct such investigations inasmuch as procedural violations of Article 2 were found in these cases;

Calls on the government of the respondent State rapidly to take all outstanding individual measures in these cases and to keep the Committee regularly informed thereof;

Conclusions of the Committee of Ministers

DECIDES to pursue the supervision of the execution of the present judgments until all necessary general measures have been adopted and their effectiveness in preventing new, similar violations has been established and the Committee has satisfied itself that all necessary individual measures have been taken to erase the consequences of the violations found for the applicants,

DECIDES also to resume consideration of these cases, as far as individual measures are concerned, at each of its DH meetings, and, as far as outstanding general measures are concerned, at the latest within nine months from today.

Appendix I to Interim Resolution ResDH(2005)20

Information provided by the Government of the United Kingdom to the Committee of Ministers
on general measures taken so far or envisaged to comply with the European Court's judgments

The Government of the United Kingdom has provided the following information with respect to general measures taken so far or envisaged to comply with the European Court's judgments in the present cases. Furthermore, in order to demonstrate its firm commitment to abide by the judgments and to allow a transparent and open debate on these measures, the Government wishes to point out that the most recent memorandum prepared for the Committee of Ministers' examination of the present cases (document CM/Inf/DH(2004)14rev2) was made public on 6 January 2005.

Independence of police investigators investigating an incident from the officers or members of the security forces implicated in the incident

Investigations into deaths allegedly caused by the police

- *Police Ombudsman*

Since November 2000, there has been an independent Police Ombudsman in Northern Ireland, established by virtue of the Police (Northern Ireland) Act 1998, with the power to investigate all complaints against the police, including deaths alleged to have been caused by police officers acting in the course of their duty. Where it appears that the conduct of a member of the police service may have resulted in the death of a person the Chief Constable is required, under section 55(2) of the Act, to refer the matter to the Police Ombudsman. The

Ombudsman is an independent authority and has her own team of independent investigators. She can recommend criminal or disciplinary proceedings against police officers and may direct that disciplinary proceedings be brought where the Chief Constable refuses to do so. The Ombudsman does not adjudicate on guilt or punishment.

Where the Ombudsman considers that the report of the investigation indicates that a criminal offence may have been committed by a police officer, the Ombudsman is required to send a report, together with any appropriate recommendations, to the Director of Public Prosecutions, who carefully considers the evidence, information and recommendations of the Ombudsman. It is for the DPP to decide if a prosecution should be commenced; this decision is based on the application of the test for prosecution, namely whether there is sufficient, admissible evidence to afford a reasonable prospect of conviction and, if there is, whether prosecution is in the public interest. In all cases, the DPP informs the Ombudsman by letter of the decision taken and the reasons for it. The principles governing the giving of reasons for decisions not to prosecute, described below (see under “Public scrutiny...”), apply.

- *“Calling-in” arrangements*

In addition, under the Police Act 1996, where one police service may provide aid to another, the Chief Constable of the Police Service of Northern Ireland (PSNI) may request that an incident be investigated by officers from a police service from Great Britain. It is a matter for the professional judgment of the Chief Constable to decide if the assistance of another police service is required in an investigation, taking account of local knowledge, interpretation of any intelligence, or any specialised skills that may be required. When such assistance is required, an appropriate police service is identified in discussion with Her Majesty's Inspector of Constabulary.

Cases identified by the Chief Constable as potentially requiring the appointment of an external service are monitored and discussed with the Policing Board. Moreover, the Chief Constable, as a public authority within the meaning of the Human Rights Act 1998, would, under section 6(1) of the Act, be acting unlawfully if he acted in a manner incompatible with a Convention right. His decision whether or not to call in an outside force may accordingly be subject to judicial review.

Investigations into deaths allegedly caused by the armed forces

In accordance with the relevant legislation and the Queen's Rules, military law does not apply to certain criminal offences, including murder, manslaughter, genocide, aiding, abetting, counselling or procuring suicide and various other offences. In Article 2 cases, therefore, as a matter of law, it is not the military but the civil authorities that investigate and prosecute. Accordingly, investigations into deaths caused by members of the armed forces are carried out by the police, who are separate from the armed forces and who are subject to scrutiny by the Police Ombudsman. The police investigation is subject to the Chief Constable's discretion to ask that the incident be investigated by another police force.

Allegations of collusion involving members of the armed forces and the police

Where there is an allegation of collusion involving members of the armed forces and the police, the Chief Constable of the PSNI may use his above-mentioned powers to bring in an outside police force to investigate.

Steps taken in response to defects identified in police investigations

On 28 March 2003, the Chief Constable of the PSNI established the Serious Crimes Review Team (SCRT), whose remit is "to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed". More than 2000 cases of unresolved deaths are to be examined by the SCRT. If, as a result of this review, it appears that new evidence might come to light, reinvestigation of any of the present cases might follow. The passage of time remains an influencing factor in that it can inevitably affect the availability of witnesses, exhibits and documentation, but it cannot be used in itself as a bar to reinvestigation.

The *PSNI* has adopted a three-stage approach to "historical" cases. First, a preliminary case assessment is carried out to ascertain if any potential evidential opportunities exist to move the investigation forward. Second, where these are identified then a full deferred case review will be commissioned by the Assistant Chief Constable. Subsequently, as the third stage of the process, the case may be referred to a murder investigation team for further investigation subject to the accepted recommendations of the Review.

The work of the SCRT is painstaking and places significant demands on police resources. As a consequence the Government have been discussing with the PSNI how this work might be expanded to process greater numbers of unresolved deaths and to do so in a way that commands the confidence of the wider community.

Public scrutiny of and information to victims' families on reasons for decisions of the Director of Public Prosecutions not to prosecute any officer in respect of relevant allegations

Judicial review of a failure to give detailed reasons for a decision not to prosecute in Article 2 cases would now be possible under the Human Rights Act 1998, based on the failure to conduct an Article 2-compliant investigation. This amounts to a claim of unlawfulness and already exists, independently of any further measures taken.

In addition, on 1 March 2002 the Attorney General tabled a statement in the House of Lords which recognised that there may be cases arising in the future where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. The statement indicated that the Director of Public Prosecutions accepted that in such cases it would be in the public interest to reassure a concerned public, including the families of victims, that the rule of law had been respected by the provision of a reasonable explanation. The Director would reach a decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.

A draft Code for Prosecutors in Northern Ireland was published for consultation in March 2004. Section 4.11 of the Code sets out the DPP's policy on the giving of reasons, which notes that in many cases the reason for non-prosecution is a technical one, lists the main interests at

stake in striking a balance between the proper interest of victims, witnesses and other concerns, and reiterates almost verbatim the statement of the Attorney General referred to above. As regards the giving of reasons for not prosecuting where death is, or may have been, caused by state agents, this text clearly reflects the policy announced by the Attorney General in 2002 and is not subject to change. The final Code, like the drafts, will be public. It is intended that the final Code will be produced in spring 2005.

In accordance with a well developed doctrine in domestic law in the United Kingdom, if a public body states that it will follow a given policy, this creates a legitimate expectation that the body will follow that policy unless there exist compelling reasons not to do so. Judicial review of decisions not to prosecute in Article 2 cases would therefore be possible on the basis of the legitimate expectation arising out of the Attorney General's statement of 1 March 2002, and will in future be possible on the basis of legitimate expectations arising out of the Code.

In addition, as regards information to victims' families more generally, both the PSNI and the Police Ombudsman now have family liaison officers, whose duty is to keep in contact with a victim's family during the course of an investigation.

Role of the inquest procedure in securing a prosecution in respect of any criminal offence that may have been disclosed

The inquest provides a public forum for the investigation of a death. The inquest is heard in a courtroom open to the public. It is the practice of coroners to sit with a jury in inquests into the deaths of persons alleged to have been killed by the security forces (although this is not a statutory obligation). It is a statutory requirement under the Coroners Act (Northern Ireland) 1959 that the inquest determine who the deceased was and how, when and where he or she came to his or her death.

Under Article 6 of the Prosecution of Offences (Northern Ireland) Order 1972, the coroner is required to send to the Director of Public Prosecutions a written report where the circumstances of any death appear to disclose that a criminal offence may have been committed. The report will include all the evidence before the coroner together with a full record of the proceedings. Upon receipt of such a report, the Director of Public Prosecutions for Northern Ireland considers the evidence then available to him to determine whether to prosecute. Such a report will either result in a prosecution or in the Director applying the new policy on the giving of reasons.

In addition, the House of Lords delivered judgment on 11 March 2004 in the *Middleton* case (*R v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)* [2004] UKHL 10). This judgment makes clear that in order to provide an Article 2-compliant investigation, an inquest is required, when examining “how” the deceased came by their death, to determine not only “by what means” but also “*in what circumstances*” the deceased came by their death. This means that inquests are now required to examine broader circumstances surrounding the death than was previously the case.

Following this judgment, the Court of Appeal in Northern Ireland found on 10 September 2004 in the case of Jordan ([2004] NICA 29 and [2004] NICA 30) that Rule 16 of the Coroners' Rules for Northern Ireland could and must be read in such a manner as to allow the

inquest to set out its findings regarding the contested relevant facts that must be determined to establish the circumstances of the death. This could be achieved either in the form of a narrative verdict or of a verdict giving answers to a list of specific questions asked by the coroner.

By way of example of the application of these principles in practice, the United Kingdom authorities have provided a copy of a verdict on inquest delivered in the County Court Division of Greater Belfast on 24 August 2004, in which the jury made detailed findings of fact in response to a list of specific questions asked by the coroner.

Scope of examination of inquests

It is the duty of the coroner to decide on the scope of an inquest. The coroner is a “public authority" for the purposes of section 6(1) of the Human Rights Act 1998, and it is thus unlawful for him to act in a manner incompatible with the Convention rights. Accordingly, if an issue is now raised at an inquest which, under Article 2 of the Convention, ought to be the subject of investigation (such as an allegation of collusion by the security forces), it is the duty of the coroner to act in a manner compatible with Article 2 and in particular to ensure that the scope of the inquest is appropriately wide. The judgments of the European Court, as applied through the Human Rights Act, will thus allow inquest procedures which can play a role in securing a prosecution for any criminal offences that may have been revealed.

To ensure that coroners are fully aware of this duty, copies of four of the judgments have been circulated to all coroners in Northern Ireland. Moreover, training sessions for coroners have been organised both by the Judicial Studies Board for Northern Ireland and by the Home Office in London.

Compellability of witnesses at inquests

The Lord Chancellor has brought forward an amendment to the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 so that, in future, witnesses suspected of involvement in a death can be compelled to attend the inquest, although they cannot be compelled to give self-incriminating answers.

The Government considered whether to replace the protection against self-incrimination under the amendment to the Coroners Rules with a rule which required a witness to provide incriminatory answers but which prevented those answers from being adduced in evidence at the criminal trial. However, as the principal objective of the procedural requirements of Article 2 is to ensure that criminal conduct is identified with a view to prosecution, it seems that compelling the giving of self-incriminating answers which could not themselves assist in the bringing of any prosecution would go beyond the purposes of the Article 2 investigation. Moreover, if such answers were required to be given under compulsion in the public inquest proceedings, that would itself be likely to jeopardise the possibility of there being a fair trial of the state agents themselves, and so would actually have the effect of undermining the effectiveness of the Article 2 procedures in holding state agents to account for their conduct.

Disclosure of witness statements prior to the appearance of a witness at the inquest

A Home Office Circular of April 1999 dealing with deaths in police custody and deaths at the hands of the police has been implemented by the Chief Constable of the Royal Ulster Constabulary (now the PSNI) by a Force Order, issued under the Chief Constable's statutory authority to direct and control the Police Force under Section 33 of the Police Act (NI) 2000. While the Home Office Guidelines, on which the Force Order is based, are restricted to deaths in custody and deaths at the hands of the police, the Chief Constable has chosen to interpret the latter flexibly, so that the Force Order would apply, for example, to events such as those in the McShane case, where an army vehicle was ordered towards a barricade by a member of the police force.

As a result of the implementation of this circular, the Chief Constable normally will disclose to interested persons, including the family of the deceased, the statements sent to the coroner where the death occurred in police custody or where it resulted from the actions of a police officer acting in the course of his duty. The Chief Constable has followed this practice in all current cases relating to deaths caused by the security forces. The Chief Constable considers that he is obliged to provide to the coroner all statements concerning the death obtained by him in the course of an investigation, whether from police, security forces or civilian sources. Where he is also obliged to disclose statements to the next of kin or family, then the same situation pertains.

The application of the above practice is enforceable by judicial review, and has been enforced by the courts in Northern Ireland in the cases of McClory (judgment of the Queen's Bench division of the High Court of 8 January 2001) and Thompson.

As regards disclosure by the Ministry of Defence, it is the policy and practice of the Ministry of Defence to co-operate fully with all police inquiries. There are no circumstances in which the armed forces or the Ministry of Defence can avoid disclosure to the Chief Constable in the course of a criminal investigation. All relevant information and persons are made available to the police in the execution of their investigation. However, this is subject to the right of the Secretary of State for Defence, like other Government departments and agencies, to seek public interest immunity when disclosable information may be made available to other persons, the disclosure of which would cause harm to the public interest. This might take the form of damage to national security or the lives of individuals being threatened.

As witnesses, members of the armed forces are no different from any other government agent. The Ministry of Defence, on behalf of the armed forces, exercises its public interest duties in the same manner as any other government department. The assessment of the public interest in allowing the disclosure of witness statements by members of the armed forces is no different from that for any other witness.

As regards documents, before deciding whether to claim public interest immunity in respect of a document which is otherwise disclosable, the Secretary of State will have to balance the public interest in the administration of justice against the public interest in maintaining the confidentiality of the document of which the disclosure would be damaging to the public interest. He may decide to assert public interest immunity where he considers that disclosure would cause real damage or harm to the public interest. Where a claim for public interest immunity is made in an inquest and is challenged, it is for a court to decide where the balance

lies between the interests of justice and, for example, the interests of national security. The Minister is never the final arbiter in relation to a claim for public interest immunity.

Public interest immunity certificates

Since the domestic proceedings described in the *McKerr* judgment of the European Court, there have been significant developments in the law and practice in relation to public interest immunity. First, since the 1994 case of *R v Chief Constable of West Midlands, ex-parte Wiley*, it has been clear that where a minister examines material which is subject to public interest immunity and considers that the overall public interest does not favour its disclosure, or is in doubt as to whether to disclose the information, then the minister should put the matter to the courts. It is therefore the courts, and not the executive, which determine whether a public interest immunity certificate is necessary.

Second, in December 1996, the Attorney General announced to Parliament changes in the Government's practice in relation to public interest immunity. In particular, the Government would no longer apply the division of claims into class and contents claims, but would in future focus on the damage caused by disclosure.

Although these changes were addressed to England and Wales, the Government has indicated that Ministers in the Northern Ireland Office have already applied the *Wiley* approach, and the new approach focusing on damage was also quickly adopted in Northern Ireland. Several examples of cases have been provided in which the claim of public interest immunity was at issue and in which the fairness of the trial was not found to be at risk. The approach taken was first to examine the necessity of the claim of public interest immunity and second to balance the competing interests of open justice and real damage to the public interest if full disclosure were made.

As regards the discharging of procedural obligations under Article 2 through inquests, the position on public interest immunity in respect of inquests has changed following the judgment of 20 January 2004 of the High Court in the judicial review case of *McCaughey and Grew*. It is now clear that the Police or Ministry of Defence are under a duty to disclose all documents to the coroner, and that it is then for the coroner to assess their relevance. At this stage the coroner will be aware of any public interest concerns that the Police or Ministry of Defence have in relation to the disclosure of the documents. If the documents that the coroner decides are relevant contain information which causes concern to the Police or Ministry of Defence, it is for them to decide whether to present to the coroner public interest immunity certificates setting out their concerns. If they do so, it will then fall to the coroner to conduct the balance for and against disclosure.

Legal aid for the representation of the victim's family

Following the judgments in the present cases, an *ex gratia* scheme was established by the Lord Chancellor to provide for legal representation at certain exceptional inquests in Northern Ireland where the applicant had a sufficiently close relationship to the deceased to warrant the funding of representation. In deciding whether to grant legal aid under this Scheme, the Lord Chancellor was obliged, by virtue of the Human Rights Act, to act in a manner compatible with the Convention.

The scheme governing legal aid for inquests is now on a statutory footing. The relevant legislation came into operation on 2 November 2003. The scheme is supported by ministerial and administrative guidance. While there have been a number of judicial review applications concerning legal aid for the representation of the victim's family at inquests, the questions raised in these cases are essentially technical, in the Government's view, in that the question at stake is the scheme under which legal aid is available to families for preparatory work for inquests, rather than whether legal aid is available at all.

Steps taken to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition

In accordance with the Human Rights Act 1998, coroners are now required to act in a manner compatible with Article 2 of the Convention to ensure that inquest proceedings are commenced promptly and pursued with reasonable expedition.

An additional full-time Deputy coroner has been appointed for Belfast to expedite business, so that in Belfast there are now one full-time coroner, one full-time deputy coroner and one part-time deputy coroner. The Northern Ireland Court Service is also providing additional administrative support to part-time coroners. The coroners in Belfast have an administrative support team of five staff and a computer system to facilitate their work. The coroners also have a dedicated legal resource and, in more difficult cases, counsel is instructed.

While a backlog of 40 inquests into deaths occurring prior to the judgments of the European Court of 4 May 2001 had built up at the office of the coroner for Greater Belfast, these deaths are cases to which Article 2 may apply and consequently had not been listed for hearing because the coroners were awaiting the outcome of the *Middleton* judicial review and not because of lack of judicial resources. Without prejudice to their judicial independence in that regard, coroners would take steps to list inquests for hearing once the Court of Appeal had given judgment in the *Jordan* case, which had also been adjourned pending the outcome of the *Middleton* case.

Two major inquiries have been conducted into the functioning of coroners' inquests in the United Kingdom. The report of the Fundamental Review of Death Certification and Coroner Services in England, Wales and Northern Ireland (Luce Review), which made a number of recommendations in relation to the inquest system for England, Wales and Northern Ireland, was published in June 2003. In addition, the Shipman Inquiry, established to investigate allegations of the murder by a doctor of at least 15 of his patients, issued its third report in July 2003, dealing with death certification and the investigation of deaths by coroners in England and Wales.

Following extensive consultation on the Luce Review, the Northern Ireland Court Service (NICtS) published a Consultation Paper outlining its proposals for the administrative redesign of the Coroners Service in Northern Ireland. The aim of the proposals is to modernise and improve the service by administrative means for all users, particularly the relatives of the deceased. The paper outlines the steps which might be taken to improve the inquest system in Northern Ireland in these areas and which can be implemented without primary legislation. The Home Office has also issued a position paper outlining the Government's response to the Luce and Shipman Reports.

In Northern Ireland, an interdepartmental working group has now been set up to consider and make recommendations for improving the arrangements for death certification and investigation in Northern Ireland having particular regard to the Luce Report, the Shipman Inquiry Third Report, the NICtS Proposals for Administrative Redesign and the Home Office position paper. The responses to the proposals of the NICtS, which were the subject of a period of public consultation, have been collated, and Ministerial approval will be sought to publish the full results of the consultation and a timetable for the introduction of the new proposals. It is hoped that the majority of the proposals can be introduced during 2005.

Individual right of petition

As to the violation of Article 34 in the McShane case, the Government's firm policy is to ensure that its obligations under this Article are respected. The Government has drawn the terms of the McShane judgment to the attention of all responsible for litigation in Northern Ireland on behalf of the Security Forces. In a recent case, where an undertaking was sought not to use documents disclosed by the Royal Ulster Constabulary, the undertaking was modified to ensure that disclosure to the European Court would not constitute a breach of that undertaking. Thus the solicitor from whom the undertaking was sought would not commit a disciplinary offence if the documents were disclosed to the European Court.

Appendix II to Interim Resolution ResDH(2005)20

Information provided by the Government of the United Kingdom to the Committee of Ministers
on individual measures taken so far or envisaged to comply with the European Court's judgments

In terms of the obligations incumbent on the United Kingdom under the Convention, the Government has confirmed its commitment to abide by the judgments of the Court in these cases and to implement the judgments, in accordance with Article 46. This commitment is not affected by the findings of the House of Lords in the *McKerr* judgment of 11 March 2004 that the Human Rights Act 1998 does not have retrospective effect and that under domestic law, there was no continuing breach of Article 2 in that case. The House of Lords' judgment does not prejudge the question of the international obligations arising under Article 46. In the latter respect, different factors are at issue in each case and some reveal more problems than others. Further proceedings have been conducted and the Government considers that any measures required are under way in each case. The main question, in the Government's view, is whether, on the facts in each case, a fresh investigation is actually possible. The Government

concedes that new investigations in the present cases could not satisfy the Convention requirements in respect of promptness and expedition.

Information regarding the proceedings conducted prior to the judgment in each case is contained in the relevant judgments. The following information, provided by the Government, concerns the measures currently under way in each case:

In the Jordan case, the inquest opened in January 1995 experienced a serious of adjournments relating, inter alia, to a number of judicial review applications by the applicants or in similar cases. Following the judgment of the Court of Appeal for Northern Ireland of 10 September 2004 in the Jordan judicial review application, however, the Coroner for Greater Belfast has indicated his intention to list the inquest in early 2005.

Civil proceedings were also instituted in 1992 alleging death by wrongful act. The applicant wishes to await the outcome of the inquest before pursuing civil action further.

In the McKerr case, the family of Mr McKerr brought legal proceedings seeking to compel the Government to provide a fresh investigation into his death. These proceedings concluded with the House of Lords' judgment, delivered on 11 March 2004 (*In re McKerr*, [2004] UKHL 12, on appeal from [2003] NICA 1). In that case, the House of Lords declined to order a fresh investigation, as it considered that no right to an investigation in accordance with the procedural requirements of Article 2 of the Convention existed under domestic law at the time of the relevant events and that as such, there could be no continuing right under domestic law to such an investigation at present, even after the Human Rights Act came into force on 2 October 2000. The House of Lords left open, however, the question whether such a continuing obligation existed under international law in this case, observing that it was for the Committee of Ministers to decide on this issue, in exercise of its functions under Article 46 § 2 of the Convention.

Without fresh evidence, there is, in the Government's view, no scope for reopening the investigation into the death of Gervaise McKerr. This case is, however, among the more than 2000 cases of unresolved deaths that will be reviewed by the SCRT to re-examine whether there are any evidentiary opportunities.

The Kelly and others case concerned a single incident in which nine men were killed. These deaths, like those in the McKerr and Shanaghan cases, fall within the terms of reference of the SCRT and will be among the more than 2000 cases of unresolved deaths to be re-examined. As regards civil actions, the family of Anthony Hughes issued proceedings against the Ministry of Defence in 1988 and the case was settled in 1991. Six other families, including the Kelly family, issued proceedings in 1990 but the families have not set down the cases for hearing.

The Shanaghan case also falls within the terms of reference of the SCRT, since the perpetrator of the shooting was never identified. The applicant has taken no steps for 9 years in the civil proceedings commenced in 1994.

In the McShane case, an inquest was opened in May 1998 but adjourned pending the outcome of various legal proceedings and decisions at domestic level. However, a full-time coroner has now been assigned to this inquest and it is expected to commence in early 2005. The coroner remains under an obligation to report to the Director of Public Prosecutions any evidence that

comes to light at the inquest that appears to disclose that a criminal offence may have been committed.

The applicant has not moved forward with civil proceedings brought against the Ministry of Defence and the Chief Constable of the Royal Ulster Constabulary.

In the Finucane case, two special police inquiries (the first two Stevens inquiries) were instituted to respond to concerns arising out of allegations of collusion between loyalist organisations and the security forces. The first of these two inquiries led to the reporting or charging of 59 people and the conviction of one person of conspiracy to murder persons other than Patrick Finucane. The second inquiry did not lead to the prosecution of any person. The third Stevens inquiry is squarely concerned with the Finucane murder and has led to a criminal prosecution being brought. One person was successfully prosecuted for the murder. This investigation continues.

The Government announced on 23 September 2004 that steps could now be taken to implement the decision to hold a new inquiry into this death. The inquiry will be held on the basis of new legislation, which is currently pending before the Parliament (Inquiries Bill).

Appendix III to Interim Resolution ResDH(2005)20

Judgments concerning violations of the Convention by or involving allegations of collusion by the United Kingdom security forces pending before the Committee of Ministers for supervision of execution

Application number	Case name	Date of judgment	Date of final judgment
24746/94	**Jordan**	04/05/2001	04/08/2001
28883/95	**McKerr**	04/05/2001	04/08/2001
30054/96	**Kelly and others**	04/05/2001	04/08/2001
37715/97	**Shanaghan**	04/05/2001	04/08/2001
43290/98	**McShane**	28/05/2002	28/08/2002
29178/95	**Finucane**	01/07/2003	01/10/2003

In the above cases the Court found that there had been a violation of Article 2 of the Convention in respect of various failings in the investigative procedures concerning the death of the applicants' relatives. The various failings may be summarised on a case-by-case basis as follows:

- Lack of independence of police investigators investigating the incident from the officers or members of the security forces implicated in the incident
Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane

- The independent police investigation did not proceed with reasonable expedition
McKerr, McShane

- Lack of public scrutiny and information to the victims' families on the reasons for the decision of the Director of Public Prosecutions not to prosecute any officer in respect of relevant allegations

Jordan, McKerr, Kelly and others, Shanaghan, Finucane

- The inquest procedure did not play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed
Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane

- The scope of examination of the inquest was too restricted
Shanaghan, Finucane

- There was no prompt or effective investigation into allegations of collusion
Shanaghan, Finucane

- The persons who shot the deceased, and in the *McShane* case, the soldier who drove the armoured personnel carrier that fatally injured the applicant's husband, could not be required to attend the inquest as witnesses
Jordan, McKerr, Kelly and others, McShane

- The non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the families' ability to prepare for and to participate in the inquest and/or contributed to long adjournments
Jordan, McKerr, Kelly and others, Shanaghan, McShane

- The absence of legal aid for the representation of the victim's family
Jordan

- The public interest immunity certificate had the effect of preventing the inquest from examining matters relevant to the outstanding issues in the case
McKerr

- The inquest proceedings did not commence promptly and did not proceed with reasonable expedition
Jordan, McKerr, Kelly and others, Shanaghan, McShane

Interim Resolution ResDH(2004)39
concerning the judgment of the European Court of Human Rights
of 23 September 1998
in the case of A. against the United Kingdom

(Adopted by the Committee of Ministers on 2 June 2004
at the 885th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of former Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"),

Having regard to the judgment of the European Court of Human Rights in the case of A. against the United Kingdom, delivered on 23 September 1998 and transmitted the same day to the Committee of Ministers;

Recalling that the undertaking of the High Contracting Parties to abide by the Court's judgments in accordance with this provision implies, *inter alia*, an obligation to take general measures in order to prevent effectively new violations of the Convention similar to those found in the Court's judgments;

Having invited the Government of the United Kingdom to inform it of the measures taken in consequence of the judgment;

Recalling that the case involved the acquittal, on the basis of the defence of reasonable chastisement, of a man charged with assault occasioning actual bodily harm after having beaten his nine-year-old stepson with a garden cane, which had been applied with considerable force on more than one occasion;

Recalling also that the Court, in its judgment, considered that treatment of this kind reaches the level of severity prohibited by Article 3, emphasised that children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against ill treatment in breach of Article 3 of the Convention, found that the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3 and held that the failure to provide adequate protection constituted a violation of Article 3 of the Convention;

Having regard to the fact that, before the Court, the United Kingdom admitted that there had been a violation of Article 3 of the Convention and committed itself to amending its domestic law to ensure that the corporal punishment of children would be unlawful under domestic law if it breached the standards required by the Article 3 of the Convention;

Noting that, upon the coming into force of the Human Rights Act 1998 on 2 October 2000, the Convention rights became directly applicable by domestic courts in cases of alleged violations of the Convention arising after that date;

Noting also that, subsequently, the Court of Appeal found in its judgment of 25 April 2001 in the case of *R v H* that domestic courts were now obliged to take account of the criteria applied by the European Court of Human Rights in determining whether certain treatment falls within the scope of treatment prohibited by Article 3 of the Convention, and that this judgment has been reported in a number of law reports;

Recalling that the case involved acquittal of a father who had admitted hitting his four and a half year old son across the back with a belt, several times, causing bruising, as a punishment for refusing to write his name;

Having been informed by the United Kingdom authorities that, in the light of the coming into force of the Human Rights Act 1998 and of the aforementioned decision of the Court of Appeal, they do not intend to legislate on this matter and consider that the current state of the law in the United Kingdom complies with the Court's judgment in the present case;

Noting in this context that the possibility for criminal liability to be extended through case-law has been recognised by the European Court of Human Rights, provided that such developments occur in accordance with the requirements of the Convention;

Considering, however, that a debate has arisen as to whether the application of the criteria enunciated by the Court of Appeal by the domestic courts in the case of *R v H* itself and in subsequent case-law clearly demonstrates that the corporal punishment of children in breach of the standards required by the Article 3 of the Convention is now unlawful under domestic law in the United Kingdom, or whether this fact has been effectively brought to the knowledge of the public so as to achieve the necessary deterrence;

Considering, therefore, that it is not at present able to conclude whether United Kingdom law complies with this judgment;

DECIDES to resume its consideration of the present case at a forthcoming meeting not later than 12 months hence, in the light of the measures taken to date and any further developments.