1. INTRODUCTION

1.1 British Irish RIGHTS WATCH is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and latterly the peace process, in Northern Ireland since 1990. Our services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. We take no position on the eventual constitutional outcome of the conflict.

1.2 We have previously intervened in a case before the House of Lords, that of *In re Northern Ireland Human Rights Commission*[1]. We have also intervened in two cases before the European Court of Human Rights: *McCann, Farrell and Savage v United Kingdom*[2], and *John Murray v United Kingdom*[3].

1.3 Since 1990 British Irish RIGHTS WATCH (BIRW) has monitored the following issues in relation to the conflict and peace process in Northern Ireland which we believe are relevant in this case:

- the use and abuse of lethal force
- the inquest system
- the investigation of killings perpetrated by agents of the state
- disclosure and public interest immunity.

1.4 BIRW has itself investigated many cases that engage Article 2 of the European Convention on Human Rights, including that of Gervaise McKerr. We have published numerous reports on such killings and made representations to, among others, the United Nations' Special Rapporteur on Extra-judicial, Summary or Arbitrary Executions, including in the case of Gervaise McKerr. We also made a submission to the Committee of Ministers concerning the United Kingdom government's implementation of the judgment of the European Court of Human Rights in *McKer*[4]*r* and the three other cases which were decided at the same time[5].

1.5 Notwithstanding our intimate knowledge of the *McKerr* case, we make this intervention because we recognise that it is a case that will set an important precedent for a large number of cases in Northern Ireland and elsewhere. According to the Fundamental Review on Death Certification and Investigation (the Luce Review), there were 1,897 cases awaiting an inquest or a decision on whether to hold an inquest in Northern Ireland at the end of 2001. This figure had scarcely fallen by the end of 2002, when according to Northern Ireland Court Service statistics there were 1,633 outstanding cases. Additionally, according to the Chief Constable of the

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1 [2002] UKHL 25
2 [1996] 21 EHRR 97
3 [1996] Case No 41/1994/488/570
4 *McKerr v United Kingdom*, Application No 28883/95, 2001
5 *Jordan v United Kingdom*, Application No 24746/94, 2001; *Kelly & Ors v United Kingdom*, Application No 30054/96, 2001; and *Shanaghan v United Kingdom*, Application No 37715/97, 2001

Police Service of Northern Ireland, some 1,800 unsolved murders remained on the books in June 2003 arising out of the thirty years of conflict in Northern Ireland. If the recommendations of the Luce Review are adopted, the inquest is likely to become the forum for delivery of Article 2 compliant, effective investigations into deaths. Amongst other issues, the current case will decide whether different standards of investigation are to apply depending on whether a death occurred before or after the coming into force of the Human Rights Act 1998.

1.6 This intervention examines two of the three issues identified in Statement of Facts and Issues in this case: the victim issue and the retrospectivity issue.

2. THE VICTIM ISSUE

2.1 The question before the House of Lords is whether the Respondent is the victim of an unlawful act for the purposes of s. 7 of the Human Rights Act 1998.

2.2 Section 7 (1) of that Act confines that Act's protection to people who are (or would be) victims of unlawful acts. There are clearly two arms to this eligibility test. A public authority, as defined in s. 6 of the Act, must have committed an act which is incompatible with a Convention right, and the person complaining of that act must be a victim of that act.

2.3 It would appear from the Statement of Facts and Issues that it is not in dispute between the parties that there has been a failure to hold an Article 2 compliant investigation into the murder of Gervaise McKerr. It also appears that it is not in dispute that no steps have been taken following the ruling of the European Court of Human Rights in his case, which found there had been no such investigation, to put one in place. The only issue that arises in relation to these facts is whether anything done or not done by the Appellant since 2nd October 2000, when the Human Rights Act 1998 came into force, is an unlawful act for the purposes of s. 7 of that Act. This has been termed "the retrospectivity issue" and is dealt with later in these submissions.

2.4 In case in the course or argument it becomes an issue, we have the following observations to make on the first eligibility arm, which is whether any unlawful act has been committed. The European Court of Human Rights has found unequivocally and unanimously "that there has been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the death of Gervaise McKerr"[6]. The United Kingdom has not appealed this decision and it has submitted a package of measures to the Committee of Ministers concerning the implementation of the Court's decision, thus indicating that it accepts the ruling of the Court. Under s. 2 (1) of the Human Rights Act 1998, the House of Lords must take account of the decision of the European Court of Human

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6 *McKerr v United Kingdom*, Application No 28883/95, 2001, Findings, paragraph 1

Rights. Furthermore, the procedural aspects of Article 2 of the European Convention have now been expressly adopted into domestic law and standards by the House of Lords itself in its recent judgment in the case of *R v Secretary of State for the Home Department ex p Amin*[7]. In our submission, there is no doubt that the Appellant has committed an unlawful act for the purposes of s. 7 of the Human Rights Act 1998.

2.5 If, as we submit, the "unlawful act" arm of the eligibility test is met, then the question arises of whether the Respondent is a victim. The reason why the Human Rights Act insists that only victims may vindicate their human rights is that the purpose of the Act is to incorporate into domestic law the European Convention on Human Rights, which itself protects only victims[8]. Where a person has been deprived of the right to life it is self-evidently impossible for the victim to bring a case himself and it is the established practice of both the European Court of Human Rights and the domestic courts to allow the next-of-kin to do so on the victim's behalf. The Respondent in this case is the son of Gervaise McKerr. Both the European Court and the domestic courts below accepted without demur his right to represent his father's interests. That right was expressed very clearly in a recent decision of the English Court of Appeal in the case of *Khan*, where a father appeared on behalf of his three-year-old daughter, who died as a result of medical negligence. Speaking of the European Court of Human Rights' approach in the *Jordan* case, Brooke LJ said, "… the court accepts without the need for any profound analysis that the victim's family is entitled to stand in his shoes after his death and make his right a real one"[9].

2.6 In our submission, on those grounds alone the Respondent qualifies as a victim. However, there are two other facets of the issue that bear examination. The first is whether the Respondent is in fact a victim in his own right. It is not in dispute that his father was killed by police officers. Nor apparently is it in dispute that there has never been an Article 2 compliant investigation into the death. Nor is it disputed that the Attorney General decided in January 1988 to advise the Director of Public Prosecutions "in the public interest" not to prosecute persons against whom the DPP considered there was evidence of perverting, or attempting or conspiring to pervert, the course of justice. The Stalker/Sampson report into the circumstances surrounding the death of Gervaise McKerr has never been published. The inquest has been abandoned. We submit that there are very strong grounds for regarding the Respondent as a victim in his own right. His father has been killed by agents of the state. There has been no effective investigation into his death and, not to put too fine a point on it, there has been a cover-up. Any son in such circumstances would be entitled to identify himself as a victim.

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7 [2003] UKHL 51, paragraph 20

8 European Convention on Human Rights, Article 34

9 *R v Secretary of Health ex p Khan*, [2003] EWCA Civ 1129, paragraph 84

2.7 The second additional facet, which was raised in the court of first instance, is the question of whether the ordering of £10,000 compensation by the European Court of Human Rights by way of "just satisfaction"[10] remedies the violation of Article 2 found by the Court and brings it to an end. In our submission, it does not. The European Court awarded the compensation in respect of the "feelings of frustration, distress and anxiety" caused the victim by the failure on the part of the authorities "in their obligation to carry out a prompt and effective investigation into the circumstances of the death". The Court's judgment makes it plain that financial compensation was awarded because the victim was "not sufficiently compensated by the finding of a violation as a result of the Convention".[11] In other words, the compensation was an additional rather than an alternative remedy. It was not made to compensate for the violation itself, but for the feelings suffered by the victim as a result of the violation.

2.8 Financial compensation is most appropriate in a situation where it is not possible to put right a past wrong and/or where a person has suffered pecuniary loss as a result of that wrong. In this case, the European Court described the victim as having suffered "non pecuniary damage" because of the failure to hold a prompt or effective investigation into his father's death. The feelings provoked by that failure could not be unfelt and the payment of compensation recognised that fact. In our submission, the compensation was not intended to and did not in fact remedy the violation of Article 2 itself. No sum of money could provide an effective investigation unless it was paid to enable such an investigation to take place. It is indeed far too late for the Appellant to establish a prompt investigation, but there is nothing to stop him from putting an effective investigation in place, even at this late hour. An example of just such action on the part of the authorities in Northern Ireland include the setting up a second public inquiry into the events that have become known as Bloody Sunday. The European Court in its judgment stated explicitly that "… the obligations of the State under Article 2 cannot be satisfied merely by awarding damages (see e.g. Kaya v. Turkey, p. 329, § 105; Yaşa v. Turkey, p. 2431, § 74). The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible."[12] The Court has also ruled in another case, *Donnelly v United Kingdom*, as long ago as 1975, that compensation for the violation of a fundamental right – in this case Article 3, which covers freedom from torture – will only constitute an adequate remedy if the state has taken reasonable measures to comply with its obligations under the Convention[13]. In other words, the state cannot simply pay its way out of violations of fundamental Convention rights. The instant case also involved a fundamental right, the right to life, and it is common ground between the parties that the Appellant has taken no steps to remedy the violation found by the European Court.

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10 Under Article 41 of the European Convention on Human Rights

11 *McKerr v United Kingdom*, Application No 28883/95, 2001, paragraph 180

12 Ibid, paragraph 121

13 *Donnelly v United Kingdom*, Application No 5577-83/72, 1975

2.9 In summary, then, we submit, not only in the instant case but in all similar cases, that:

a) a person is a victim if he or she represents the interests of a person who would themselves be a victim but for his or her death;
b) a person in those circumstances is a victim in his or her own right where the state fails to meet its obligations under the procedural guarantees implied into the European Convention on Human Rights; and
c) an award of compensation by the European Court of Human Rights does not bring the status of a victim as a victim to an end while the state continues to be in breach of its procedural obligations.

3. THE RETROSPECTIVITY ISSUE

3.1 The issue in relation to retrospectivity is whether the Secretary of State acted or failed to act on or after 2 October 2000 in a way which is incompatible with the Respondent's Article 2 Convention rights contrary to s. 6 (1) of the Human Rights Act 1998.

3.2 Our first observation is that the victim issue and the retrospectivity issue are to some extent linked. Most obviously, if the Respondent is not a victim, then the issue of retrospectivity does not arise. Secondly, if the Respondent's status as a victim derives only from his ability to stand in his father's shoes, then he may have some difficulty in showing that the violations of Article 2 found by the European Court, or any other violation, arose after the coming into force of the Human Rights Act. If, on the other hand, he is a victim in his own right, then any such difficulty disappears.

3.3 In our submission, the issue of retrospectivity as regards the Human Rights Act is not yet settled law. The issue has arisen before various courts, who have approached it in different ways.

3.4 Interestingly, in the most authoritative of these cases, *R v Secretary for the Home Department, ex p Amin*[14] the House of Lords, in a unanimous decision, did not take the point that the victim, Zahid Mubarek, died in March 2000, some months before the Human Rights Act came into force on 2nd October 2000. The inquest, which was formally opened on 31st March 2000, was never actually held. Bingham LJ, in a detailed passage in the lead judgment, undertook a thorough review[15] of the relevant case law of the European Court of Human Rights and then roundly upheld the ruling of Hooper J at first instance that "an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights." [16] Both

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14 [2003] UKHL 51

15 *R v Secretary of State for the Home Department, ex p Amin*, [2003] UKHL 51, paragraphs 18 – 21

16 *R v Secretary of State for the Home Department, ex p Amin*, [2001] EWHC

the lower court and the House of Lords seem to have taken their lead directly from the Convention and the European Court of Human Rights, rather than from the Human Rights Act. There are some obvious parallels with the instant case, in that the victim died and the inquest was finally abandoned before the Act came into force. Since these matters were not an issue in *Amin*, it would, we respectfully suggest, be inconsistent to make them an issue in *McKerr*.

3.5 The Northern Ireland Court of Appeal found that "… there is a continuing breach of Article 2 (1) which requires to be addressed by the respondent Government"[17]. It is common ground between the parties in the instant case that there has been a breach of Article 2 and that there has been no Article 2 compliant investigation into Gervaise McKerr's death. The only issue in relation to retrospectivity that arises is that of whether the Respondent is barred from obtaining an effective domestic remedy for the violation of Article 2 by the absence of any act of commission or omission arising after 2nd October 2000.

3.6 It is, in our opinion, a matter for regret that when the Human Rights Act 1998 was adopted it omitted to enshrine in domestic law the right to an effective domestic remedy under Article 13 of the Convention. However, in the instant case it would appear that the precedent set by *Amin* means that this omission does not have any detrimental effect on the Respondent, or anyone else in his position, because the courts will order an Article 2 compliant investigation in cases where there has been a violation of Article 2. In our submission, that being so, the issue of retrospectivity does not arise in such cases.

3.7 However, if that is wrong, then the first issue to be examined is whether in fact any unlawful act of commission or omission arose in the instant case after the Human Rights Act came into force. The Northern Ireland Court of Appeal, led by the Lord Chief Justice in that jurisdiction, considered that the violation of Article 2 was "continuing". The European Court of Human Rights found that there "has been" a violation of Article 2[18]. We submit that that means that there had been a continuous breach of Article 2 from the 11th November 1982, when Gervaise McKerr died, until at least the date on which the Court issued its judgment. Since it did so on 4th May 2001, after the Human Rights Act came into force, then the failure to provide an Article 2 compliant investigation was an unlawful act of omission arising within the ambit of the Human Rights Act. In our submission, this conclusively answers the retrospectivity question.

3.8 Indeed, we would go further, and argue that the violation continues and will continue to exist until such time as it is remedied. To suggest otherwise is,

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17 *In the matter of an application by Jonathan McKerr for judicial review*, NICA, 10 January 2003, paragraph 13

18 *McKerr v United Kingdom*, Application No 28883/95, 2001, Findings, paragraph 1

we respectfully contend, *Wednesbury* unreasonable. It would frustrate the very purpose of the European Convention on Human Rights if violations of fundamental rights were deemed to cease with a finding of violation by the European Court. It is not only a matter of common sense but a matter of fact that once the Court has found a violation that violation remains in place until it is remedied, because there is no other mechanism for removing the violation than remedying it. There would be no need for Article 13, for the institution of the Court itself, or for governments to lay measures for implementing the decisions of the Court before the Committee of Ministers, if the remedying of violations were not one of the primary purposes of the Convention, as well, of course, as the prevention of violations in the first place.

3.9 In the *Khan* case, the Appellants' three-year old daughter Naazish died before the Human Rights Act came into force. The Court of Appeal held:

> "It is Naazish's right to life that is at the centre of this case, and the fundamental importance of that right obliges the state to investigate her death judicially and publicly in the manner indicated by Strasbourg case-law. Her parents simply act as her proxy in requiring this investigation to take place. They are entitled to say after 2nd October 2000, just as much as they were entitled to say before she died, that the state must implement the Convention obligations it owed to her… In our judgment Naazish had a right to life which the Strasbourg court would have recognised when the 1998 Act came into force, even though by that time her parents had to act as her proxies, and they were limited to a reliance on the state's adjectival duty to investigate her death properly. We do not therefore consider that the fact that Naazish died in September 1999 provides any effective bar to the relief sought by her father in these proceedings."[19]

This line of reasoning seems to imply that the right to life, at least insofar as an effective investigation is concerned, survives the death of the victim. If that is right, and we think it must be, then the date of the victim's death is immaterial. On the day when the Human Rights Act came into force, anyone whose death required an Article 2 compliant investigation became entitled to one, not just by virtue of the Convention, but also under domestic law.

3.10 To adopt any other approach, we submit, would have the highly undesirable consequence of creating two classes of victim, i.e. those who were entitled to an effective investigation and could enforce it under domestic law, and those who could only enforce it by going to Europe. Once having obtained a ruling from the European Court, the domestic courts would have to take it into account under s. 2 of the Human Rights Act, and, a fortiori, in light of *Amin*. Both roads would lead to the same destination, but the latter class would be forced to take a much longer route. Not only would this be unfair and discriminatory, but it would almost certainly reduce the effectiveness of investigations for the latter class.

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19 *R v Secretary of Health ex p Khan*, [2003] EWCA Civ 1129, paragraphs 84 - 85

Cases where deaths arose before the Act came into force that have not by now received an effective investigation are already at least three years old. The longer ago a death occurred, the harder it becomes to investigate for a host of reasons, including the death or infirmity of witnesses, the loss of documents, and the deterioration of evidence. In our submission, to hinder the effectiveness of an investigation by forcing cases down the European route would in itself constitute a breach of Article 2.

3.11 In summary, we advance the following propositions in relation to the retrospectivity issue:

a) where there has been no Article 2 compliant investigation there is a violation of Article 2 which continues in existence until such time as it is remedied by the provision of such an investigation; and
b) the procedural aspects of Article 2 survive the death of the victim and may be exercised by others on his or her behalf.