



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF MCKERR v. THE UNITED KINGDOM

(Application no. 28883/95)

JUDGMENT

STRASBOURG

4 May 2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of McKerr v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr W. FUHRMANN,

Mr L. LOUCAIDES,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Sir Nicolas BRATZA,

Mr K. TRAJA, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 4 April 2000 and on 11 April 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 28883/95) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Mrs Eleanor Creaney, on 7 March 1993. Mrs Creaney died in November 1996. Her son Jonathan McKerr ("the applicant") has continued the application.

2. The applicant, who had been granted legal aid, was represented by Mr K. Winters and Mr S. Treacy, lawyers practising in Belfast. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office.

3. The applicant alleged that his father Gervaise McKerr had been shot and killed by police officers on 11 November 1982 and that there had been no effective investigation into or redress for his death. He invoked Articles 2, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. Having consulted the parties, the President of the Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the

cases of *Hugh Jordan v. the United Kingdom* (no. 24746/94), *Kelly and Others v. the United Kingdom* (no. 30054/96) and *Shanaghan v. the United Kingdom* (no. 37715/97).

7. Third-party comments were received from the Northern Ireland Human Rights Commission on 23 March 2000, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. A hearing took place in public in the Human Rights Building on 4 April 2000.

There appeared before the Court:

(a) *for the Government*

Mr C. WHOMERSLEY,	<i>Agent,</i>
Mr R. WEATHERUP, QC,	
Mr P. SALES,	
Mr J. EADIE,	
Mr N. LAVENDER,	<i>Counsel,</i>
Mr O. PAULIN,	
Ms S. McCLELLAND,	
Ms K. PEARSON,	
Mr D. McILROY,	
Ms S. BRODERICK,	
Ms L. McALPINE,	
Ms J. DONNELLY,	
Mr T. TAYLOR,	<i>Advisers;</i>

(b) *for the applicant*

Mr S. TREACY, QC,	
Ms K. QUINLIVEN,	<i>Counsel,</i>
Ms P. COYLE,	<i>Solicitor.</i>

The Court heard addresses by Mr Weatherup and Mr Treacy.

9. By a decision of 4 April 2000, the Chamber declared the application admissible.

10. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Events relating to the death of Gervaise McKerr

11. On 11 November 1982, Gervaise McKerr was driving a green Ford Escort registration No. UPF 775. There were two passengers in the car: Eugen Toman and Sean Burns. None of the men was armed. At Tullygally Road, East Lurgan, at least 109 rounds were fired into the car by police officers in a specially trained mobile support unit of the Royal Ulster Constabulary (the RUC). All three men were killed.

12. The facts relating to the death of Gervaise McKerr remain in dispute despite over ten years of inquest proceedings, three criminal prosecutions and other related legal proceedings.

Concerning the criminal trial and police investigations

13. On 11 November 1982, steps were taken by Chief Inspector Whirter to preserve the scene of the shootings. A doctor attended the scene and conducted a preliminary examination of the bodies. On 12 November 1982, a forensic expert from the Northern Ireland Forensic Science Laboratory conducted a detailed examination of the scene and Professor Marshall conducted *post mortem* examinations of the bodies. Photographs were taken of the shootings and the *post mortem*, and maps prepared of the scene. On the same day, the Scene of Crimes Officer took possession of the police officers' rifles, a submachine gun and pistol. About 84 of the cartridges fired at the scene were recovered (leaving 25 unaccounted for). The police made house to house enquiries in the vicinity, in conjunction with an appeal in the press for any witnesses to come forward and a meeting with a local councillor.

14. As part of the investigation, on 15 November 1982, Detective Chief Inspector Scott interviewed three RUC officers from the five member unit. Sergeant M, Constable B and Constable R made written statements. These statements described the incident but did not mention that the deceased were the subject of surveillance by Special Branch officers and were believed to have set out to commit a murder. The officers had received instructions from the deputy head of Special Branch not to refer to the fact that they were Special Branch officers or that they had intelligence made available to them in advance of the incident. It was later alleged that this was in order to prevent the availability of advance intelligence becoming public knowledge and hampering the efforts to fight terrorism.

15. On 18 January 1983, the three officers, M, B and R, were interviewed again in the light of the available forensic evidence. Written records were made of these interviews.

16. The results of the RUC investigation were sent to the Director for Public Prosecutions (the DPP) to consider whether any prosecution should be brought. The DPP requested that further enquiries be made. On 19 and 20 July 1983, the three officers were interviewed, and on this occasion they stated that they had been briefed that the three deceased were the subject of surveillance and were believed to have set out to commit a murder.

17. Shortly afterwards, the DPP decided that charges should be brought against these three officers ("the three defendants"). The indictment was issued on 8 March 1984 and, as amended on 29 May 1984, charged B with the murder of Eugene Toman, and M and R with aiding, abetting, counselling and procuring B to commit that offence.

18. The trial of the three defendants took place in Belfast between 29 May and 5 June 1984 before Lord Justice Gibson, sitting without a jury. The prosecution case involved 27 witnesses appearing at the trial to give evidence, while statements from a further 11 witnesses were read out. Over 75 exhibits were introduced into evidence.

19. At the close of the prosecution case, Lord Justice Gibson found that the evidence against the three defendants did not establish their guilt and, concluding that there was no case to answer, acquitted them. In his judgment giving his reasons for this conclusion, he stated:

"The accused were tasked to arrest Toman and Burns on suspicion of having committed terrorist acts, including murder, and to prevent them carrying out a further murder which the police authorities had reason to believe was about to be attempted.

Each of the accused was so advised by his superiors and was further informed that the suspects would probably be armed and that they were both dedicated and dangerous terrorists who had let it be known that they would not be arrested alive. If they were arrested therefore it would be known to all concerned that firearms would probably have to be used to effect their arrest.

The degree of danger of the operation which was anticipated may be judged by the fact that the three accused were issued with one submachine gun, two Ruger rifles, three semi-automatic pistols and a total of almost 200 rounds of ammunition.

The deceased were under surveillance and according to information received they set off in a car driven by McKerr with the object of carrying out the proposed murder. A road block was then set up by the police in order to stop and arrest them.

They broke through the road block at high speed endangering the life of a police officer in so doing. The accused who were in a car nearby immediately gave chase. Shots were discharged after the escaping car.

At this point I had to be careful in assessing the evidence to leave out of account any self serving parts of statements made by the accused.

It was a dark wet November night and the forensic evidence satisfies me that bullets striking the rear window and other metal parts at the rear of the car would in such conditions emit flashes which could readily be mistaken for the muzzle flashes of guns fired from the back of the car especially after the rear window was broken as it was.

... I have no doubt that it was a reasonable conclusion that the accused were being fired at. In fact none of the persons escaping did have any firearms but each of the accused opened fire from their car as they travelled at high speed along the Tullygally East Road ...

I have no doubt that at this stage each of the accused was acting lawfully in shooting at the three deceased as being the only practicable means of effecting their arrest and if need be of killing them in order to stop their escape and prevent the perpetration of murder ...

Quite apart from any question of self defence which may have been raised as a result of the apparent gun flashes from the car, the car, driven by McKerr, was driven at high speed. It failed to negotiate a turn to the right to a slip road and it came to a rest a matter of 40 to 50 feet up the slip road just off the left hand verge and on the sloping ground giving a drop of some four feet. The car in which the three accused were pulled up on the other side of the road. All jumped out.

Without reference to the statements of the accused and relying exclusively on other Crown evidence it is clear that the passenger door of the car... opened. The front passenger was Toman and in the rear seat was Burns.

The evidence of [the forensic expert], which I accept, was that the following experiments which he carried out the opening of the passenger door from inside produced two distinct metallic sounds, the first like the slide of a gun hitting the back blade; the second like the slide hitting the front blade. These sounds were heard by him distinctly at a distance of twenty feet.

The Crown case is that after the door was opened ... some or all of the accused struck Toman in the back as he stood outside the car killing him instantly. ... the passenger side of the car would have been in shadow. In my view it matters not whether the accused on hearing the noise of the door being opened concluded that this was what was happening or whether they thought that one of the occupants of the car was preparing to open fire on them.

In either event the act of shooting was not murder. In any event the noise established that one or more of the occupants was alighting. If the noise was taken to be indicating that the front passenger was preparing to get out of the car that could only be interpreted as an attempt to get down the hill to escape into the country beyond or being an attempt to take up a position behind the car with the intention of opening fire. If on the other hand the noise was taken to be the operation of a gun slide it was unmistakable that a gunman proposed to open fire and immediate retaliatory action was required.

As seen and understood by the accused the car contained three men, at least two murderous gunmen who had not merely given no indication of submission but seemed prepared to shoot it out or at least escape in the dark. In those circumstances to open fire was to my mind the most obvious and only means of self defence and the only

step consistent with their duty. Apart from running away it was the only reasonable course open to them.

It was in my view the use by them of such as was reasonable in the circumstances as appreciated by them, including their understanding of the mortal danger in which they were to effect arrests even though it may be by killing and to prevent the commission of the contemplated murder.

Their use of gunfire into the car was therefore plainly lawful within the terms of Section 3 of the Criminal Law Act (Northern Ireland) 1967 as well as being the commensurate force for their own self-defence. ...

There was no time to my mind to weigh up the possibilities. At all costs and at all possible speed the danger had to be eliminated otherwise the consequences might have been fatal to themselves.

As I have read the papers and as I understand the evidence there never was the slimmest chance that the Crown could have hoped to secure a conviction. ..."

20. The judge concluded with these comments:

"I speak not of the inevitable concerns and worries of the accused or the additional danger that they are now likely to be in because their identities and appearances have been publicly exposed by this trial. I am thinking of the very widespread effects among other members of the police and indeed of the armed forces generally when a policeman or a soldier is ordered to arrest a dangerous criminal and ... to bring him back. How is he to consider his conduct?

May it not be that some may now ask 'Am I to risk my life carrying out this order knowing that if I survive my reward will be a further risk of life imprisonment as a murderer'. One would hope that they will accept the first risk as part of their duty but should they not also be entitled to expect that if they do so they will have the protection of the law unless it should appear with total blindness they may have overstepped the bounds of the criminal law.

As far as the three deceased men who unhappily forfeited their lives are concerned they died not because they were victims of murder but because knowing that two of them were wanted by the police on a charge of multiple murder and many other crimes they decided not to stop when confronted by the police and to risk all in an attempt to escape. It was a gamble which failed.

There is just one final observation which I would like to make. ... I want to make clear that having heard the entire Crown case exposed in open court I regard each of the accused as absolutely blameless in this matter.

I consider that in fairness to them that finding also ought to be recorded together with my commendation for their courage and determination in bringing the three deceased men to justice, in this case to the final court of justice."

Shortly after giving judgment, Lord Justice Gibson made a statement in open court:

"Having regard to the widespread publicity which parts of my judgment have received and the observations which have been made upon it in the press and elsewhere, I have considered it desirable to clarify my views on two matters.

First, I would point out that my observations related to the particular circumstances of that occasion and ought not to be read out of context. I would wish most emphatically to repudiate any idea that I would approve or that the law would countenance what has been described as a shoot-to-kill policy on the part of the police.

Like every other member of the public they have no right, in any circumstances, to use more force than appears to be reasonably necessary having regard to all the circumstances understood by them.

... I understand that in some quarters certain further words of mine have been thought to mean that I was contemplating that the police force might be regarded as entitled to mete out summary justice by means of the bullet.

I do not believe that on any fair analysis my words were capable of that interpretation. Indeed, nothing was further from my mind, nor would I or any other judge contemplate for a second that such a view was tenable."

B. Concerning the Stalker/Sampson investigation

21. In November and December 1982, there had been two further fatal shooting incidents involving the RUC in Armagh - the killing of Michael Tighe and serious wounding of Martin McAuley on 24 November 1982, and the killing of Peter Grew and Roderick Carrol on 12 December 1982. None of the deceased had been armed.

22. On 11 April 1984, the DPP exercised his statutory powers under Article 6(3) of the Prosecution of Offences (NI) Order 1972 to request the Chief Constable of the RUC to conduct further investigations into the three cases. The Government stated that he did so as it appeared that, in certain statements of evidence, material and important facts had been omitted and matters which were untrue and misleading in material and important respects had been included. He also requested that he be provided with full information about the circumstances in which false and misleading evidence had been provided by any officer of the RUC and to investigate whether there was evidence to suggest that any person was guilty of an offence of perverting the course of justice or any other offence in connection with the investigation of the three shooting incidents.

23. On 24 May 1984, John Stalker, then Deputy Chief Constable of the Greater Manchester Police, was appointed by the Chief Constable of the RUC to carry out the investigation, which was to investigate the circumstances in which certain members of the RUC provided any false or misleading evidence or purported evidence, and to investigate the conduct of members of the RUC in connection with the inquiries into the incidents.

24. In October 1984, three months after the defendants were acquitted, they were interviewed by the Stalker team, which included Detective Chief Superintendent Thorburn. Written records were kept of these statements. B also made a written statement. According to his book "John Stalker" (see further below paragraph 31), on 26 June 1985, Mr Stalker wrote to the Chief Constable of the RUC, Sir John Hermon, informing him of fresh evidence pointing to offences of unlawful killings by RUC officers. On 18 September 1985, Mr Stalker sent his Interim Report to the RUC¹ and, on 15 February 1986, Sir John Hermon sent the Report to the DPP for Northern Ireland. On 4 March 1986, the DPP instructed Sir John Hermon to release Special Branch files to Mr Stalker, which documents had been withheld on grounds of national security. The documents were handed over to Mr Stalker on or about 30 April 1986.

25. On 29 May 1986, Mr Stalker was removed from the inquiry and replaced by Colin Sampson, Chief Constable of West Yorkshire Police, who was also asked to investigate allegations of impropriety against Mr Stalker concerning matters unrelated to the present case.

26. On 6 August 1986, Mr Sampson completed his investigation into Mr Stalker and, on 22 August 1986, Mr Stalker was reinstated by the Police Committee. He did not however return to the inquiry.

27. On 26 November 1986, Mr Stalker's deputy on the inquiry, John Thorburn, left the police and, on 13 March 1987, Mr Stalker himself also left.

28. Mr Sampson delivered his report to Sir John Hermon and the DPP in three sections, on 22 October 1986, 23 March and 10 April 1997.

29. On 25 January 1988, Sir Patrick Mayhew, the then Attorney-General, made a statement in Parliament in which he said, *inter alia*, that:

"In regard to the shooting incidents... the [DPP] had considered all the facts and information ascertained and reported by Mr. Stalker and Mr Sampson, and he has re-examined the original RUC investigation files. He has concluded that the evidence does not warrant any further prosecution in respect of the shootings which occurred on 11 November 1982 and 12 December 1982 and which have already been the subject of prosecutions. ...

The [DPP] has however concluded that there is evidence of the commission of offences of perverting or attempting or conspiring to pervert the course of justice or of obstructing a constable in the execution of his duty, and that this evidence is sufficient to require consideration of whether prosecutions are required in the public interest and he has consulted me accordingly.

I have therefore taken steps to acquaint myself with all the relevant circumstances, including matters concerning the public interest and, in particular, considerations of

1. According to the RUC report on the Stalker book (see paragraph 33) this report consisted of 3,609 pages, in 20 separate volumes, including one album of maps and photographs.

national security that might properly affect the decision whether or not to institute proceedings.

I have informed the Director fully with regard to my consultations as to the public interest, and in the light of all the facts and information brought to his notice, the [DPP] has concluded, with my full agreement, that it would not be proper to institute any criminal proceedings. He has given directions accordingly."

30. Eight officers were, according to the Government, subject to disciplinary proceedings, and received admonitions and advice as to their future conduct.

31. In his book "John Stalker" published by Mr Stalker in 1988, the following descriptions of his investigation into the three shooting incidents appeared:

(Concerning the McKerr, Toman and Burns shooting)

"The Stalker inquiry discovered that the three victims of the shooting had been under surveillance for many hours by the police who planned to intercept them at a place different from where the killings occurred. No serious attempt to attract the attention of the driver was made, and no policeman was struck by the car. Immediately after the incident the police officers drove from the scene with their weapons and returned to their base for a debriefing by senior Special Branch Officers. Officers from the Criminal Investigation Department (CID) were denied access for many days to the police officers involved and to their car, clothes and weapons for forensic examination. On the night of the killings, CID officers were given incorrect information about where the shootings began and part of the forensic examination was conducted in the wrong place. Many cartridge cases of rounds fired were never found."

"We believed... that at least one officer had been in an entirely different position from that which he had claimed to be in when some fatal shots were fired. I also established that the police pursuit took place in a different manner from that described. But most damning of all, almost 21 months after the shooting we found fragments of the bullet that undoubtedly killed the driver still embedded in the car. That crucial evidence had lain undiscovered by the RUC and Forensic Science service... My conclusion in relation to the missing cartridge cases was that as many as twenty were deliberately removed from the scene. I could only presume that this was in order to mislead the forensic scientists and to hide the true nature and extent of the shooting."

"I had to regard the investigation of the matter as slipshod and in some aspects woefully inadequate. I was left with two alternative conclusions, either that some RUC detectives were amateur and inefficient at even the most basic of murder investigation routines; or that they had been deliberately inept."

(Concerning the three incidents as a whole):

"Even though six deaths had occurred over a five week period ... and involved in each case officers from the same specialist squad, no co-ordinated investigation had ever been attempted. It seemed that the investigating officers had never spoken to each

other. Worse still, despite the obvious political and public implications, no senior officer had seen fit to draw the reports together."

"We had expected a particularly high level of enquiry in view of the nature of the deaths, but this was shamefully absent. The files were little more than a collection of statements, apparently prepared for a coroner's enquiry. They bore no resemblance to my idea of a murder prosecution file. Even on the most cursory of readings I could see clearly why the prosecutions had failed."

32. According to *The Times* of 9 February 1988, Mr Stalker also stated:

"I never did find evidence of a shoot-to-kill policy as such. There was no written instruction, nothing pinned up on a noticeboard. But there was a clear understanding on the part of the men whose job it was to pull the trigger that that was what was expected of them."

33. In 1990, the RUC issued a response to the book by Mr Stalker. It stated in its introduction that the book contained many inaccuracies and distortions and gave a misleading impression. Their document aimed to highlight a selected number of misrepresentations. It was stated, in contradiction to Mr Stalker's assertions, that it was wrong to allege that the three investigations were carried out under different detectives as the same Detective Superintendent was in charge of two of the investigations; that the investigation files were presented to the DPP in the format approved by him; that it was already established in a police statement of 13 November 1992 that no police officer had been struck by the car driven by Gervaise McKerr; that it had been advisable, for the safety of the three officers, that they leave the scene immediately; that their weapons had been seized without delay by the scenes of crime officers; that no incorrect information was given to the investigating officers concerning where the shooting occurred, though uniformed officers had mistakenly positioned the tape on the junction and it was repositioned accurately shortly afterwards; it was accepted that all the cartridges were not recovered but due to the torrential rain at the time some could have been washed down the drains; the area had nonetheless been swept over two days with metal detectors.

Criticisms were also made that Mr Stalker had gone outside his remit to re-investigate the shooting incidents as well as a terrorist incident on 27 October 1992 in which three police officers had been killed and that his report, when submitted, lacked the clarity and precision normally associated with criminal investigations.

34. The Government have also submitted that on 23 June 1992 Mr John Thorburn on the occasion of his withdrawal of a libel action against the RUC Chief Constable made a statement in which he took the opportunity to submit publicly that he was satisfied that the RUC had not pursued a shoot-to-kill policy in 1982 and that the RUC Chief Constable had not condoned or authorised any deliberate or reckless killings by his officers. Other members of the Stalker/Sampson inquiry team also stated in June 1990 that

“The Greater Manchester officers wish to stress that the Stalker/Sampson Enquiry found no evidence of a ‘Shoot to Kill policy’”.

C. Concerning the inquest

35. An inquest into the deaths was opened by the Armagh Coroner, Mr Curran, on 4 June 1984 at the conclusion of the criminal trial. On or about 22 August 1984, Mr Curran resigned. The applicant alleged that this was due to irregularities in the RUC files concerning the deaths. The inquest was due to be heard in September 1984 before Mr Elliott but was adjourned on the application of Mrs Creaney’s legal representatives. The Coroner then waited until after the conclusion of the Stalker/Sampson investigation before scheduling the inquest to re-open on 14 November 1988.

36. The Coroner was provided with all the witness statements, forensic evidence, maps, and photographs which were obtained as part of the RUC investigation and the Stalker/Sampson investigations. Parts of some of the witness statements were deleted in the public interest for reasons of national security.

37. On 27 October 1988, the Coroner held a preliminary meeting, attended by the legal representatives of the interested parties, including the relatives of the deceased, at which he stated that he intended to admit into evidence the written statement of Sergeant M and officers B and R.

38. On 9 November 1988, Tom King, the then Secretary of State for Northern Ireland, issued a Public Interest Immunity Certificate (“PII Certificate”) which, the applicant alleged, prevented the disclosure of a substantial amount of information that would otherwise have been available to the inquest due to open five days later. The certificate covered any information or documents tending to reveal, *inter alia*:

- details of RUC counter-terrorist capabilities, including methods of operation, specialist training and equipment;
- details of the intelligence which gave rise to the belief that there was a conspiracy to murder an off-duty member of the security forces and the methods by which such intelligence was gleaned; and
- certain details of surveillance mounted by the RUC as part of the operation during which McKerr, Toman and Burns were killed.

39. On 14 November 1988, the inquest opened. The Coroner admitted unsworn evidence by the three officers M, B and R, who had declined to appear to give evidence at the inquest.

40. On 17 November 1988, an adjournment was granted at the request of Mrs Creaney’s solicitor who took proceedings for judicial review to challenge the admission of the unsworn statements. The application was refused on 22 November 1988 by Mr. Justice Carswell. On appeal, the Court of Appeal held on 20 December 1988 that the Coroners’ Practice and Procedure Rules (which conferred on the Coroner the discretion to admit the statements) were *ultra vires* since M, B and R were compellable witnesses.

Leave to appeal to the House of Lords was granted to the Crown on 19 April 1989. On 8 March 1990, the House of Lords overturned the judgment, holding that the Coroners' Rules of Practice and Procedure were not *ultra vires* and that these officers could not be compelled to attend the inquest.

41. The inquest proceedings, due to recommence on 23 April 1990, were adjourned further while Mrs Creaney commenced a second set of judicial review proceedings challenging the admission of the statements of the three officers. Mr Justice Carswell on 11 May 1990 and the Court of Appeal on 27 June 1990 rejected the application as raising no new issues.

42. On 20 July 1990, Mrs Creaney's legal representatives wrote to the Coroner requesting that the inquest not be resumed pending an appeal in judicial review proceedings relating to an inquest into the deaths of three other persons (the *Devine case*, where relatives of the deceased had challenged the power of the Coroner to admit written statements from the soldiers who had shot the deceased). The request was granted. Judgment was given by the Court of Appeal in that case on 6 December 1990 and by the House of Lords on 6 February 1992, upholding the power of Coroners to admit written statements.

43. On 5 May 1992, a second inquest resumed under Coroner John Leckey. The Coroner stated in his address to the jury:

"The purpose of an inquest is the investigation in public of all the facts and circumstances surrounding an unnatural death. It follows, therefore, that an inquest is usually unnecessary when those facts have already been investigated and made public in a criminal court on a prosecution for homicide. You may recall that in 1984 three police officers were prosecuted for the murder of one of the deceased, Eugene Toman, but were acquitted. In the course of their trial there was a very full examination of the facts surrounding the three deaths and had there not been another factor to consider, I would have decided that an Inquest was unnecessary. That factor, which makes the investigation of these deaths wholly exceptional, is a subsequent investigation carried out by the Greater Manchester Police: the so-called Stalker Inquiry. The statements they took have been made available to me and the public has a proper interest in knowing whether any further evidence came to light. For that reason and that reason alone, I am holding Inquests."

44. The inquest continued until 29 May 1992, in public, before a jury, and involved the hearing of about 19 witnesses over 13 days. Mrs Creaney was represented by a barrister, who cross-examined the witnesses and made extensive legal submissions. The RUC were also represented.

45. On 28 May 1992, a witness, officer D, said that he had had recourse to the statement he had made to the RUC on 13 November 1982, prior to giving evidence at the inquest. Counsel for Mrs Creaney asked to see this statement but the Coroner refused his request, as the witness did not have it about his person and it was the property of the RUC. On 29 May 1992, at the applicant's request, the inquest was adjourned. The same day, Mrs Creaney's solicitor sought leave in the High Court for judicial review

of, *inter alia*, the Coroner's decision refusing access to witness D's statement. Leave for judicial review was initially refused on 2 June 1992 but finally granted by the Court of Appeal on 8 June 1992.

46. On 21 December 1992, Nicholson J. ruled that Mrs Creaney had no right to see the statement and also declined to rule that she could have a list of the jurors, although he strongly recommended that the names of the jurors be read out in open court on resumption of the inquest. On 28 May 1993, the Court of Appeal overturned the former decision, holding that counsel was entitled to see the witness' statement of 13 November 1982 and that the Coroner could order production of the statement from the RUC, and, if it was not produced, could issue a subpoena.

47. On 2 November 1992, the Coroner wrote to Detective Chief Superintendent McIvor of the RUC, recalling that, prior to the adjournment of the inquest, he had expressed his view that four Greater Manchester Police witnesses (including John Thorburn, Mr Stalker's deputy at the inquiry) should be granted access to documents and papers relating to their investigation as members of the Greater Manchester Police Inquiry. Chief Superintendent McIvor replied that none of the police officers mentioned had requested access and that he therefore presumed they had been able to brief themselves on papers in their own possession.

48. On 16 November 1992, Mr Thorburn wrote to the Chief Constable of the Greater Manchester Police requesting access to the statement file and forensic evidence relating to the killing at Tullygally Road on 11 November 1982. By letter of 25 January 1993, the Coroner was informed that the Chief Constable of the RUC had advised the Greater Manchester Police that Mr Thorburn should not be allowed access to the documents requested. He was also informed that the documents were part of the inquiry and were therefore the property of the RUC, to which all subsequent requests should therefore be addressed.

49. Following a meeting on 9 September 1993 with the representatives of the interested parties, including Mrs Creaney, the Coroner served a subpoena on the Chief Constable of the RUC requiring him to attend with reports on the Stalker/Sampson investigations.

50. On 21 December 1993, the legal adviser of the RUC wrote to the Coroner stating that he had now been informed by the Greater Manchester Police that they did not hold any papers other than those held by the RUC, which, apart from the Stalker and Sampson reports, the Coroner already had in his possession. He also raised the fact that the documents were likely to be covered by public interest immunity. By letter of 4 January 1994, the Coroner referred to a conversation of 21 December 1993 with the legal adviser of the RUC, wishing to formally put on record his surprise at hearing that documents in the possession of the Greater Manchester Police had been destroyed. The RUC legal adviser replied on 12 January 1994, stating that he had never said that documents had been destroyed. On

13 January 1994, the Coroner requested the legal adviser to confirm that all documents referred to in the Schedule to the subpoena were in existence and to identify their location.

51. By letter dated 17 February 1994, the RUC legal adviser informed the Coroner that, contrary to information previously given to him, a number of filing cabinets containing documents from the inquiry had been located with the Greater Manchester Police. These had been handed over to the RUC and were in his view covered by the public interest immunity ("PII") Certificate.

52. Meanwhile, on 31 January 1994 the inquest was closed and the jury discharged. The inquest was re-opened on 22 March 1994. In re-opening the inquest, the Coroner informed Mrs Creaney's solicitors by letter dated 21 February 1994 that:

"Re: inquests into the deaths of –

(1) James Gervaise McKerr, Eugene Toman and John Frederick Burns

... A criminal trial arose out of each of these incidents and normally where that occurs an Inquest is unnecessary as all the facts are likely to have been fully investigated in public at the trial.

However, as you are aware, the circumstances surrounding these deaths was the subject of an investigation carried out by ... Mr. John Stalker ... and Mr. Colin Sampson ... between May 1984 and April 1987. Their reports were subsequently submitted to the Chief Constable of the Royal Ulster Constabulary. I am of the opinion that the public has a proper interest in knowing whether any further evidence came to light subject to this evidence being within the proper scope of an Inquest. Were it not for this unique aspect of the investigation into the deaths I would not hold Inquests but would proceed to register the deaths.

The purpose of formally opening these Inquests is to determine whether it will be possible for me to achieve my aim. One of the witnesses whom it is my present intention to call is ex-Detective Chief Superintendent John Thorburn ... who played a leading role in the ... investigation. He would be in a position to give material evidence only if he had access in advance of the Inquest to certain working papers and other documents which are presently in the custody of the Chief Constable. After a lapse of seven years it is important that he has the opportunity to refresh his memory by carefully re-examining these so that the evidence that he gives will be as accurate as possible ..."

53. The Coroner issued a fresh subpoena on 24 February 1994 requiring Sir Hugh Annesley, Chief Constable of the RUC, to attend before him in connection with the inquest and to produce:

- (i) a copy of the interim Stalker Report (including statement files, exhibits and forensic file);
- (ii) a copy of the draft and final Sampson Report (including documents and statement files);

- (iii) a copy of the draft and final Stalker Report (including statements, exhibits, and forensic files);
- (iv) 13 files of action sheets;
- (v) computer disks;
- (vi) photographs and maps;
- (vii) press cuttings, file and videos of TV programmes;
- (viii) interview notes of RUC officers;
- (ix) trial transcripts;
- (x) a book of hand-written notes of trials;
- (xi) interview indexes x 3;
- (xii) original RUC documents (ref. Ballynerry Road);
- (xiii) 15 document files designated B105, 119-129, 134, 137-146, 149 and 153; and
- (xiv) presentation documents.

54. On 20 April 1994, the Chief Constable for the RUC issued a summons to have the subpoena set aside on the grounds that he had no personal knowledge of the facts at issue at the inquest and should not therefore be required to give evidence; that the documents sought under the subpoena should not be disclosed as they consisted of documents which ought not to be disclosed in the public interest and to which a claim of public interest immunity properly attached; and that in the circumstances the issue of the subpoena was oppressive, vexatious and an abuse of the process of the court.

55. On 4 May 1994, the Coroner served an affidavit stating that he did not require the Chief Constable to give any evidence in respect of his personal knowledge but required him to produce the Stalker and Sampson Reports that were in his custody. He stated that he required the production of these Reports for the sole purpose of enabling ex-Director Chief Superintendent John Thorburn, who played a leading role in the investigations connected with, and in the preparation of the Reports, to refresh his memory, so that the evidence he gave at the inquest would be as accurate as possible. He further stated the following:

“8. I am of the opinion that the public has a proper interest in knowing whether any further evidence touching the causes of the material deaths came to light as a result of the said investigations, subject, of course, to that evidence being within the proper scope of the Inquests.

9. Were it not for this unique aspect of the investigation into the deaths (being the investigations which led to the production of the said Reports), I would not hold inquests, but would proceed to register the material deaths.

10. I have issued the material Writs of Subpoena only because the Royal Ulster Constabulary has refused Mr. Thorburn access to the original investigation papers.

11. Accordingly, if the material Writs of Subpoena are set aside, so that the said Reports are not available for the purposes of the Inquests, I will consider that there

will be no useful purposes to be served in proceeding with the Inquests, and I will close them, and proceed to register the material deaths.”

56. On 5 May 1994, Sir Patrick Mayhew (Secretary of State for Northern Ireland) issued a further PII Certificate stating that the disclosure of the Stalker and Sampson Reports would cause serious damage to the public interest and that he considered it his duty to make the Certificate in order to protect the public interest, in summary constituting the following:

“(a) the need to protect the operational efficiency of the special units of the Royal Ulster Constabulary and the Armed Forces and the Security Service;

(b) the need to protect the integrity of intelligence operations;

(c) the need to protect the future usefulness of Royal Ulster Constabulary, Armed Forces and Security Service personnel;

(d) the need to protect the lives and safety of Royal Ulster Constabulary, Armed Forces and Security Service personnel and their families, and the lives and safety of persons, and their families, who have provided or may provide information and intelligence to the security forces.”

57. The Secretary of State emphasised the need, first, to protect the integrity of the process of criminal investigations and the making of decisions as to prosecutions and, secondly, the need to protect the efficacy of the Crown’s efforts to counter terrorism and the safety from terrorist attack of persons involved in those efforts. As regards the work of special units of the RUC, he stated that these units and personnel carried out security, intelligence and surveillance work. The work of all these units required secrecy if it was to be effective. The disclosure of, or evidence about, the identity of members of the special units of the Royal Ulster Constabulary, Armed Forces and the Security Service could substantially impair their capability to perform the tasks assigned to them and could put their lives at risk.

58. On 16 May 1994, the Chief Constable swore a further affidavit in which he stated that he had been informed that copies of all witness statements, forensic evidence photographs and maps from the first two RUC investigations and the Stalker and Sampson inquiries had been provided to the Coroner subject to certain deletions from various statements and transcripts. He stated that the Coroner was therefore in possession of all the documentary evidence from the three investigations and should be in a position to identify any further evidence which came to light during the Stalker and Sampson inquiries. On 20 May 1994, the Chief Constable applied to the High Court for the writ of subpoena to be set aside.

59. On 25 May 1994, the Coroner swore a further affidavit stating that he was satisfied that relevant new material germane to the inquests had been found by the police during the Stalker and Sampson inquiries and that he had spoken to John Thorburn (Stalker’s deputy) and Mr Shaw (Sampson’s

deputy), who informed him that they required access to the documents in issue in order to identify the headings of the new material and give accurate evidence thereon.

60. On 11 July 1994, Nicholson J set aside the subpoenas on the grounds that they were not necessary to the proper purpose of the inquest and should not be disclosed in view of the PII Certificate. He stated, *inter alia*:

“... [The Coroner] stated that his enquiries satisfied him that there was relevant new material in the Reports. The source of this information must have been Mr Thorburn or Mr Shaw ...

It is not disputed by counsel for the Coroner that all witness statements have been given to the Coroner. There remain recommendations, expressions of opinion, comments, criticisms and the like. I can think of nothing else.

This leads me to the conclusion that the Coroner is seeking material about the ‘broad circumstances’ in which the killings took place in order to deal with rumours and suspicions that there was a ‘shoot to kill’ policy. ...

The recent decision of the Court of Appeal in Northern Ireland indicates that he is not entitled to do so. There is nothing to prevent him from calling Mr Thorburn or Mr Shaw if they can give relevant evidence touching the deaths of the deceased. But in my opinion it is not proper for Mr Thorburn to give an ‘overview’ to the jury. ...

The Reports are not relevant to the Coroner’s inquiry and the overriding public interest in the integrity of the criminal process makes it ‘oppressive and an abuse of the process of the Court’ to permit production of the Reports for the purpose sought by the Coroner. The writs of subpoena should be set aside for these reasons.

This is not a reflection or criticism of the Coroner. I am satisfied that he is genuinely concerned to deal openly with the fears and suspicions that there was a ‘shoot to kill’ policy. But the Coroner’s court is not the proper forum in which this kind of issue can properly be dealt with.

The third question with which I propose to deal with briefly is the claim to public interest immunity in the interests of national security ...

I accept that there is evidence that national security would be imperilled by the production of these two Reports. Were Mr Thorburn to use them to refresh his memory, other parties to the inquest would be entitled to call for them. ...”

61. On 8 September 1994 the Coroner issued a ruling abandoning the inquest into Gervaise McKerr’s death, stating:

“I am satisfied that my aim in deciding to hold inquests for the reasons I expressed to the jury when I opened the inquests into the deaths of Toman, Burns and McKerr is no longer achievable”.

D. Concerning civil proceedings

62. On 19 August 1991, Mrs Creaney issued a writ of summons against the Chief Constable of the RUC in the High Court, claiming damages under

the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) and the Fatal Accidents (Northern Ireland) Act 1977 for personal injuries, loss and damage sustained by her husband, his estate and dependants by reason of the assault, battery, conspiracy, negligence, nuisance and trespass to the person by the police officers involved in the security operation on 11 November 1982.

63. No further steps to proceed with the claims were taken by Mrs Creaney or, since her death, by the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Use of lethal force

64. Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides *inter alia*:

“1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.”

Self-defence or the defence of others is contained within the concept of the prevention of crime (see e.g. Smith and Hogan on Criminal Law).

B. Inquests

1. Statutory provisions and rules

65. The conduct of inquests in Northern Ireland is governed by the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. These provide the framework for a procedure within which deaths by violence or in suspicious circumstances are notified to the Coroner, who then has the power to hold an inquest, with or without a jury, for the purpose of ascertaining, with the assistance as appropriate of the evidence of witnesses and reports, *inter alia*, of *post mortem* and forensic examinations, who the deceased was and how, when and where he died.

66. Pursuant to the Coroners Act, every medical practitioner, registrar of deaths or funeral undertaker who has reason to believe a person died directly or indirectly by violence is under an obligation to inform the Coroner (section 7). Every medical practitioner who performs a *post mortem* examination has to notify the Coroner of the result in writing (section 29). Whenever a dead body is found, or an unexplained death or death in suspicious circumstances occurs, the police of that district are required to give notice to the Coroner (section 8).

67. Rules 12 and 13 of the Coroners Rules give power to the Coroner to adjourn an inquest where a person may be or has been charged with murder or other specified criminal offences in relation to the deceased.

68. Where the Coroner decides to hold an inquest with a jury, persons are called from the Jury List, compiled by random computer selection from the electoral register for the district on the same basis as in criminal trials.

69. The matters in issue at an inquest are governed by Rules 15 and 16 of the Coroners Rules:

“15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely: -

(a) who the deceased was;

(b) how, when and where the deceased came by his death;

(c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning his death.

16. Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule.”

70. The forms of verdict used in Northern Ireland accord with this recommendation, recording the name and other particulars of the deceased, a statement of the cause of death (e.g. bullet wounds) and findings as to when and where the deceased met his death. In England and Wales, the form of verdict appended to the English Coroners Rules contains a section marked “conclusions of the jury/coroner as to the death” in which conclusions such as “lawfully killed” or “killed unlawfully” are inserted. These findings involve expressing an opinion on criminal liability in that they involve a finding as to whether the death resulted from a criminal act, but no finding is made that any identified person was criminally liable. The jury in England and Wales may also append recommendations to their verdict.

71. However, in Northern Ireland, the Coroner is under a duty (section 6(2) of the Prosecution of Offences Order (Northern Ireland) 1972) to furnish a written report to the DPP where the circumstances of any death appear to disclose that a criminal offence may have been committed.

72. Until recently, legal aid was not available for inquests as they did not involve the determination of civil liabilities or criminal charges. Legislation which would have provided for legal aid at the hearing of inquests (the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, Schedule 1 paragraph 5) has not been brought into force. However, on 25 July 2000, the Lord Chancellor announced the establishment of an Extra-Statutory Ex Gratia Scheme to make public funding available for representation for proceedings before Coroners in exceptional inquests in Northern Ireland. In

March 2001, he published for consultation the criteria to be used in deciding whether applications for representation at inquests should receive public funding. This included *inter alia* consideration of financial eligibility, whether an effective investigation by the State was needed and whether the inquest was the only way to conduct it, whether the applicant required representation to be able to participate effectively in the inquest and whether the applicant had a sufficiently close relationship to the deceased.

73. The Coroner enjoys the power to summon witnesses who he thinks it necessary to attend the inquest (section 17 of the Coroners Act) and he may allow any interested person to examine a witness (Rule 7). In both England and Wales and Northern Ireland, a witness is entitled to rely on the privilege against self-incrimination. In Northern Ireland, this privilege is reinforced by Rule 9(2) which provides that a person suspected of causing the death may not be compelled to give evidence at the inquest.

74. In relation to both documentary evidence and the oral evidence of witnesses, inquests, like criminal trials, are subject to the law of public interest immunity, which recognises and gives effect to the public interest, such as national security, in the non-disclosure of certain information or certain documents or classes of document. A claim of public interest immunity must be supported by a certificate.

2. *The scope of inquests*

75. Rules 15 and 16 (see above) follow from the recommendation of the Brodrick Committee on Death Certification and Coroners:

“... the function of an inquest should be simply to seek out and record as many of the facts concerning the death as the public interest requires, without deducing from those facts any determination of blame... In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceeding which affords to others the opportunity to judge an issue and one which appears to judge the issue itself.”

76. Domestic courts have made, *inter alia*, the following comments:

“... It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but ‘how...the deceased came by his death’, a far more limited question directed to the means by which the deceased came by his death.

... [previous judgments] make it clear that when the Brodrick Committee stated that one of the purposes of an inquest is ‘To allay rumours or suspicions’ this purpose should be confined to allaying rumours and suspicions of how the deceased came by his death and not to allaying rumours or suspicions about the broad circumstances in which the deceased came by his death.” (Sir Thomas Bingham, MR, Court of Appeal, *R. v the Coroner for North Humberside and Scunthorpe ex parte Roy Jamieson*, April 1994, unreported)

“The cases establish that although the word ‘how’ is to be widely interpreted, it means ‘by what means’ rather than in what broad circumstances ... In short, the

inquiry must focus on matters directly causative of death and must, indeed, be confined to those matters alone ..." (Simon Brown LJ, Court of Appeal, *R. v. Coroner for Western District of East Sussex, ex parte Homberg and others*, (1994) 158 JP 357)

"... it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial..."

It is well recognised that a purpose of an inquest is that rumour may be allayed. But that does not mean it is the duty of the Coroner to investigate at an inquest every rumour or allegation that may be brought to his attention. It is ... his duty to discharge his statutory role - the scope of his enquiry must not be allowed to drift into the uncharted seas of rumour and allegation. He will proceed safely and properly if he investigates the facts which it appears are relevant to the statutory issues before him." (Lord Lane, Court of Appeal, *Rv. South London Coroner ex parte Thompson* (1982) 126 SJ 625)

3. Disclosure of documents

77. There was no requirement prior to 1999 for the families at inquests to receive copies of the written statements or documents submitted to the Coroner during the inquest. Coroners generally adopted the practice of disclosing the statements or documents during the inquest proceedings, as the relevant witness came forward to give evidence.

78. Following the recommendation of the Stephen Lawrence Inquiry, Home Office Circular No. 20/99 (concerning deaths in custody or deaths resulting from the actions of a police officer in purported execution of his duty) advised Chief Constables of police forces in England and Wales to make arrangements in such cases for the pre-inquest disclosure of documentary evidence to interested parties. This was to "help provide reassurance to the family of the deceased and other interested persons that a full and open police investigation has been conducted, and that they and their legal representatives will not be disadvantaged at the inquest". Such disclosure was recommended to take place 28 days before the inquest.

79. Paragraph 7 of the Circular stated:

"The courts have established that statements taken by the police and other documentary material produced by the police during the investigation of a death in police custody are the property of the force commissioning the investigation. The Coroner has no power to order the pre-inquest disclosure of such material... Disclosure will therefore be on a voluntary basis."

Paragraph 9 listed some kinds of material which require particular consideration before being disclosed, for example:

- where disclosure of documents might have a prejudicial effect on possible subsequent proceedings (criminal, civil or disciplinary);

- where the material concerns sensitive or personal information about the deceased or unsubstantiated allegations which might cause distress to the family; and
- personal information about third parties not material to the inquest.

Paragraph 11 envisaged that there would be non-disclosure of the investigating officer's report although it might be possible to disclose it in those cases which the Chief Constable considered appropriate.

C. Police Complaints Procedures

80. The police complaints procedure was governed at the relevant time by the Police (Northern Ireland) Order 1987 (the 1987 Order). This replaced the Police Complaints Board, which had been set up in 1977, by the Independent Commission for Police Complaints (the ICPC). The ICPC has been replaced from 1 October 2000 with the Police Ombudsman for Northern Ireland appointed under the Police (Northern Ireland) Act 1998.

81. The ICPC was an independent body, consisting of a chairman, two deputy chairmen and at least four other members. Where a complaint against the police was being investigated by a police officer or where the Chief Constable or Secretary of State considered that a criminal offence might have been committed by a police officer, the case was referred to the ICPC.

82. The ICPC was required under Article 9(1)(a) of the 1987 Order to supervise the investigation of any complaint alleging that the conduct of a RUC officer had resulted in death or serious injury. Its approval was required of the appointment of the police officer to conduct the investigation and it could require the investigating officer to be replaced (Article 9(5)(b)). A report by the investigating officer was submitted to the ICPC concerning supervised investigations at the same time as to the Chief Constable. Pursuant to Article 9(8) of the 1987 Order, the ICPC issued a statement whether the investigation had been conducted to its satisfaction and, if not, specifying any respect in which it had not been so conducted.

83. The Chief Constable was required under Article 10 of the 1987 Order to determine whether the report indicated that a criminal offence had been committed by a member of the police force. If he so decided and considered that the officer ought to be charged, he was required to send a copy of the report to the DPP. If the DPP decided not to prefer criminal charges, the Chief Constable was required to send a memorandum to the ICPC indicating whether he intended to bring disciplinary proceedings against the officer (Article 10(5)) save where disciplinary proceedings had been brought and the police officer had admitted the charges (Article 11(1)). Where the Chief Constable considered that a criminal offence had been committed but that the offence was not such that the police officer should be charged or where he considered that no criminal offence had been

committed, he was required to send a memorandum indicating whether he intended to bring disciplinary charges and, if not, his reasons for not proposing to do so (Article 11(6) and (7)).

84. If the ICPC considered that a police officer subject to investigation ought to be charged with a criminal offence, it could direct the Chief Constable to send the DPP a copy of the report on that investigation (Article 12(2)). It could also recommend or direct the Chief Constable to prefer such disciplinary charges as the ICPC specified (Article 13(1) and (3)).

D. The Director of Public Prosecutions

85. The Director of Public Prosecutions (the DPP), appointed pursuant to the Prosecution of Offences (Northern Ireland) 1972 (the 1972 Order) is an independent officer with at least 10 years' experience of the practice of law in Northern Ireland who is appointed by the Attorney General and who holds office until retirement, subject only to dismissal for misconduct. His duties under Article 5 of the 1972 Order are *inter alia*:

“(a) to consider, or cause to be considered, with a view to his initiating or continuing in Northern Ireland any criminal proceedings or the bringing of any appeal or other proceedings in or in connection with any criminal cause or matter in Northern Ireland, any facts or information brought to his notice, whether by the Chief Constable acting in pursuance of Article 6(3) of this Order or by the Attorney General or by any other authority or person;

(b) to examine or cause to be examined all documents that are required under Article 6 of this Order to be transmitted or furnished to him and where it appears to him to be necessary or appropriate to do so to cause any matter arising thereon to be further investigated;

(c) where he thinks proper to initiate, undertake and carry on, on behalf of the Crown, proceedings for indictable offences and for such summary offences or classes of summary offences as he considers should be dealt with by him.”

86. Article 6 of the 1972 Order requires *inter alia* Coroners and the Chief Constable of the RUC to provide information to the DPP as follows:

“(2) Where the circumstances of any death investigated or being investigated by a coroner appear to him to disclose that a criminal offence may have been committed he shall as soon as practicable furnish to the [DPP] a written report of those circumstances.

(3) It shall be the duty of the Chief Constable, from time to time, to furnish to the [DPP] facts and information with respect to -

(a) indictable offences [such as murder] alleged to have been committed against the law of Northern Ireland; ...

and at the request of the [DPP], to ascertain and furnish to the [DPP] information regarding any matter which may appear to the [DPP] to require investigation on the

ground that it may involve an offence against the law of Northern Ireland or information which may appear to the [DPP] to be necessary for the discharge of his functions under this Order.”

87. According to the Government’s observations submitted on 18 June 1998, it had been the practice of successive DPPs to refrain from giving reasons for decisions not to institute or proceed with criminal prosecutions other than in the most general terms. This practice was based upon the consideration that

- (1) if reason were given in one or more cases, they would be required to be given in all. Otherwise, erroneous conclusions might be drawn in relation to those cases where reasons were refused, involving either unjust implications regarding the guilt of some individuals or suspicions of malpractice;
- (2) the reason not to prosecute might often be the unavailability of a particular item of evidence essential to establish the case (e.g. sudden death or flight of a witness or intimidation). To indicate such a factor as the sole reason for not prosecuting might lead to assumptions of guilt in the public estimation;
- (3) the publication of the reasons might cause pain or damage to persons other than the suspect (e.g. the assessment of the credibility or mental condition of the victim or other witnesses);
- (4) in a substantial category of cases decisions not to prosecute were based on the DPP’s assessment of the public interest. Where the sole reason not to prosecute was the age, mental or physical health of the suspect, publication would not be appropriate and could lead to unjust implications;
- (5) there might be considerations of national security which affected the safety of individuals (e.g. where no prosecution could safely or fairly be brought without disclosing information which would be of assistance to terrorist organisations, would impair the effectiveness of the counter-terrorist operations of the security forces or endanger the lives of such personnel and their families or informants).

88. Decisions of the DPP not to prosecute have been subject to applications for judicial review in the High Court.

In *R v. DPP ex parte C* (1995) 1 CAR, p. 141, Lord Justice Kennedy held, concerning a decision of the DPP not to prosecute in an alleged case of buggery:

“From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:

- (1) because of some unlawful policy (such as the hypothetical decision in Blackburn not to prosecute where the value of goods stolen was below £100);

(2) because the Director of Public Prosecutions failed to act in accordance with his own settled policy as set out in the code; or

(3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.”

89. In the case of *R v. the DPP and Others ex parte Timothy Jones* the Divisional Court on 22 March 2000 quashed a decision not to prosecute for alleged gross negligence causing a death in dock unloading on the basis that the reasons given by the DPP – that the evidence was not sufficient to provide a realistic prospect of satisfying a jury – required further explanation.

90. *R v. DPP ex parte Patricia Manning and Elizabeth Manning* (decision of the Divisional Court of 17 May 2000) concerned the DPP’s decision not to prosecute any prison officer for manslaughter in respect of the death of a prisoner, although the inquest jury had reached a verdict of unlawful death - there was evidence that prison officers had used a neck lock which was forbidden and dangerous. The DPP reviewing the case still concluded that the Crown would be unable to establish manslaughter from gross negligence. The Lord Chief Justice noted:

“Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, *R. v. Director of Public Prosecutions, ex parte C* [1995] 1 Cr. App. R. 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director’s provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.”

As regards whether the DPP had a duty to give reasons, the Lord Chief Justice said:

“It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined cases which meet Mr Blake’s conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the State must always arouse concern, as recognised by section 8(1)(c), (3)(b) and (6) of the Coroner’s Act 1988, and if the death resulted from violence inflicted by agents of the State that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry (see *McCann v. United Kingdom* [1996] 21 EHRR 97, paragraphs 159 to 164). Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director’s decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court’s expectation that if a prosecution is not to follow a plausible explanation will be given. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake’s conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require.”

On this basis, the court reviewed whether the reasons given by the DPP in that case were in accordance with the Code for Crown Prosecutors and capable of supporting a decision not to prosecute. It found that the decision had failed to take relevant matters into account and that this vitiated the decision not to prosecute. The decision was quashed and the DPP was required to reconsider his decision whether or not to prosecute.

91. *In the Matter of an Application by David Adams for Judicial Review*, the High Court in Northern Ireland on 7 June 2000 considered the applicant’s claim that the DPP had failed to give adequate and intelligible reasons for his decision not to prosecute any police officer concerned in the

arrest during which he had suffered serious injuries and for which in civil proceedings he had obtained an award of damages against the police. It noted that there was no statutory obligation on the DPP under the 1972 Order to give reasons and considered that not duty to give reasons could be implied. The fact that the DPP in England and Wales had in a number of cases furnished detailed reasons, whether from increasing concern for transparency or in the interests of the victim's families, was a matter for his discretion. It concluded on the basis of authorities that only in exceptional cases such as the Manning case (see paragraph 90 above) would the DPP be required to furnish reasons to a victim for failing to prosecute and that review should be limited to where the principles identified by Lord Justice Kennedy (see paragraph 88 above) were infringed. Notwithstanding the findings in the civil case, they were not persuaded that the DPP had acted in such an aberrant, inexplicable or irrational manner that the case cried out for reasons to be furnished as to why he had so acted.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations

92. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles) were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

93. Paragraph 9 of the UN Force and Firearms Principles provides, *inter alia*, that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

94. Other relevant provisions read as follows:

Paragraph 10

"... law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Paragraph 22

"... Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control."

Paragraph 23

“Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.”

95. Paragraph 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions) provides, *inter alia*, that:

“There shall be a thorough, prompt and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ...”

96. Paragraphs 10 to 17 of the UN Principles on Extra-Legal Executions contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

Paragraph 10 states, *inter alia*:

“The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry ... shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify ...”

Paragraph 11 specifies:

“In cases in which the established investigative procedures are inadequate because of a lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided in these principles.”

Paragraph 16 provides, *inter alia*:

“Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as all information relevant to the investigation and shall be entitled to present other evidence ...”

Paragraph 17 provides, *inter alia*:

“A written report shall be made within a reasonable time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures, methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law ...”

97. The “Minnesota Protocol” (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions) provides, *inter alia*, in section B on the “Purposes of an inquiry”:

“As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek:

- (a) to identify the victim;
- (b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
- (c) to identify possible witnesses and obtain statements from them concerning the death;
- (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
- (e) to distinguish between natural death, accidental death, suicide and homicide;
- (f) to identify and apprehend the person(s) involved in the death;
- (g) to bring the suspected perpetrator(s) before a competent court established by law.”

In section D, it is stated that “In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established ...”

B. The European Committee for the Prevention of Torture

98. In the report on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1999, published on 13 January 2000, the European Committee for the Prevention of Torture (the CPT) reviewed the system of preferring criminal and disciplinary charges against police officers accused of ill-treating persons. It commented, *inter alia*, on the statistically few criminal prosecutions and disciplinary proceedings which were brought, and identified certain aspects of the procedures which cast doubt on their effectiveness:

The chief officers appointed officers from the same force to conduct the investigations, save in exceptional cases where they appointed an officer from another force, and the majority of investigations were unsupervised by the Police Complaints Authority.

It stated at paragraph 55:

“As already indicated, the CPT itself entertains reservations about whether the PCA [the Police Complaints Authority], even equipped with the enhanced powers which have been proposed, will be capable of persuading public opinion that complaints against the police are vigorously investigated. **In the view of the CPT, the creation of a fully-fledged independent investigating agency would be a most welcome development. Such a body should certainly, like the PCA, have the power to direct that disciplinary proceedings be instigated against police officers. Further, in the interests of bolstering public confidence, it might also be thought appropriate that such a body be invested with the power to remit a case directly to the CPS for consideration of whether or not criminal proceedings should be brought.**

In any event, **the CPT recommends that the role of the ‘chief officer’ within the existing system be reviewed.** To take the example of one Metropolitan Police officer to whom certain of the chief officer’s functions have been delegated (the Director of the CIB [Criminal Investigations Bureau]), he is currently expected to: seek dispensations from the PCA; appoint investigating police officers and assume managerial responsibility for their work; determine whether an investigating officer’s report indicates that a criminal offence may have been committed; decide whether to bring disciplinary proceedings against a police officer on the basis of an investigating officer’s report, and liaise with the PCA on this question; determine which disciplinary charges should be brought against an officer who is to face charges; in civil cases, negotiate settlement strategies and authorise payments into court. It is doubtful whether it is realistic to expect any single official to be able to perform all of these functions in an entirely independent and impartial way.

57. ...Reference should also be made to the high degree of public interest in CPS [Crown Prosecution Service] decisions regarding the prosecution of police officers (especially in cases involving allegations of serious misconduct). Confidence about the manner in which such decisions are reached would certainly be strengthened were the CPS to be obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommends that such a requirement be introduced.”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

99. The applicant submitted that his father Gervaise McKerr had been unjustifiably killed and that there had been no effective investigation into the circumstances of his death. He invoked Article 2 of the Convention which provides:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The submissions made to the Court

1. *The applicant*

100. The applicant submitted that the death of his father was the result of the unnecessary and disproportionate use of force by an RUC officer and that his father was the victim of a shoot-to-kill policy operated by the United Kingdom Government in Northern Ireland. He referred, *inter alia*, to reports by Amnesty International and the Human Rights Watch, as well as the statements made by John Stalker, a senior policeman, who carried out an investigation into allegations of such a policy. He argued that this case could not be looked at in isolation from the other cases in Northern Ireland involving the use of lethal force by State agents. In this context, it could be seen on analysis of the lethal force deaths between 1969 and 1994 that there was at the material time a practice whereby suspects were arbitrarily killed rather than arrested. He pointed to the common features of pre-planning based on intelligence from informers, the deployment of specialist military or police units and the maximal use of force. In this case, the specially trained RUC officers shot at the car using over 109 rounds, killing three unarmed men, without any attempt to effect an arrest rather than use lethal force. This could not be regarded as the use of minimum or proportionate force.

101. The inadequate investigations into this and other cases were also evidence of official tolerance on the part of the State of the use of unlawful lethal force. Here, the police officers involved in the shooting were allowed to leave the scene with their weapons; there was a delay before the CID were allowed access to those officers for questioning; CID officers were given incorrect information about where the shootings began; many cartridge cases of rounds fired were never found; 21 months after the event fragments of the bullet that killed the driver were found still embedded in the car and no adequate steps were taken to find independent eye witnesses. The applicant referred to the description of the police investigation contained in the book written by Mr Stalker, who said that there was a shockingly low standard of basic techniques, and asserted that police

officers had tampered with the scene and effectively obstructed the investigation.

102. The applicant also relied on the account of Mr Stalker as showing that the killing which he had investigated was unlawful and part of a tacit shoot-to-kill policy, and referred to evidence of further obstruction of investigations in the Tighe incident, where the surveillance tape had been withheld by MI5, as substantiating that the three incidents under Stalker's investigation were part of the shoot-to-kill policy. He submitted that a strict scrutiny of the available material showed that the deprivation of life did not result from the use of force which was no more than absolutely necessary. To the extent that the Court felt there were any issues to resolve, it should of its own motion obtain the necessary material by an investigation under Article 38 § 1 (a) of the Convention.

103. The applicant further submitted that there had been no effective official investigation carried out into the killing, relying on the international standards set out in the Minnesota Protocol. He argued that the RUC investigation was inadequate and flawed by its lack of independence and lack of publicity. The DPP's own role was limited by the RUC investigation, and any prosecution on the basis of that investigation was not capable of remedying those deficiencies. Further, at the trial, the judge dismissed the case without hearing the police officers, making controversial comments implying judicial approval of extra-judicial assassinations. The inquest was flawed by the delays, the limited scope of the enquiry, a lack of legal aid for relatives, a lack of access to documents and witness statements, the non-compellability of security force or police witnesses and the use of public interest immunity certificates. The Government could not rely on civil proceedings either as this depended on the initiative of the deceased's family.

2. The Government

104. While the Government did not accept the applicant's claims under Article 2 that his father was killed by any excessive or unjustified use of force, they considered that it would be wholly inappropriate for the Court to seek itself to determine the issues of fact arising on the substantive issues of Article 2. This might involve the Court seeking to resolve issues, and perhaps examining witnesses and conducting hearings, at the same time as the High Court in Northern Ireland, with a real risk of inconsistent findings. It would allow the applicant to forum-shop and would thus undermine the principle of exhaustion of domestic remedies. They submitted that there were in any event considerable practical difficulties for the Court to pursue an examination of the substantive aspects of Article 2 as the factual issues would be numerous and complex, involving live evidence with a substantial number of witnesses. This primary fact finding exercise should not be performed twice, in parallel, such an undertaking wasting court time and

costs and giving rise to a real risk of prejudice in having to defend two sets of proceedings simultaneously.

105. Insofar as the applicant invited the Court to find a practice of killing rather than arresting terrorist suspects, this allegation was emphatically denied. The Government submitted that such a wide ranging allegation, calling into question every anti-terrorist operation over the last thirty years, went far beyond the scope of this application and referred to matters not before this Court. They denied that there had been any obstruction to the police investigation in this case, pointing out that the allegations made by Mr Stalker had been disputed by the RUC as inaccurate and containing misrepresentations (see paragraph 33 above). It was necessary for the officers' safety for them to leave the scene and all the necessary crime scenes procedures had been carried out. To the extent that the three officers had been instructed not to refer to particular matters, this was uncovered by the investigating officers who were not hindered effectively in their task of establishing the facts. The Stalker/Sampson inquiry was a powerful indication of the commitment of the Government to punishing all crime, whoever the perpetrator. The results of the enquiry showed that certain obstruction offences had occurred and though it had not been in the public interest to institute any criminal proceedings, disciplinary proceedings had been brought against eight officers (paragraph 30 above).

106. The Government further denied that domestic law in any way failed to comply with the requirements of this provision. They argued that the procedural aspect of Article 2 was satisfied by the combination of procedures available in Northern Ireland, namely, the prompt and thorough police investigation, which was supervised by the Director of Public Prosecutions, the criminal trial, the inquest proceedings and civil proceedings. These secured the fundamental purpose of the procedural obligation, in that they provided for effective accountability for the use of lethal force by State agents. This did not require that convictions be achieved but that the investigation was capable of leading to a prosecution, which was the case in this application. They also pointed out that each case had to be judged on its facts since the effectiveness of any procedural ingredient may vary with the circumstances. In the present case, they submitted that the available procedures together provided the necessary effectiveness, independence and transparency by way of safeguards against abuse.

3. The Northern Ireland Human Rights Commission

107. Referring to relevant international standards concerning the right to life (e.g. the Inter-American Court's case-law and the findings of the UN Human Rights Committee), the Commission submitted that the State had to carry out an effective official investigation when an agent of the State was involved or implicated in the use of lethal force. Internal accountability

procedures had to satisfy the standards of effectiveness, independence, transparency and promptness, and facilitate punitive sanctions. It was however, in their view, not sufficient for a State to declare that while certain mechanisms were inadequate, a number of such mechanisms regarded cumulatively could provide the necessary protection. They submitted that the investigative mechanisms relied on in this case, singly or combined, failed to do so. They referred, *inter alia*, to the problematic role of the RUC in Northern Ireland, the allegedly serious deficiencies in the mechanisms of police accountability, the limited scope of and delays in inquests, and the lack of compellability of the members of the security forces who have used lethal force to appear at inquests. They drew the Court's attention to the form of enquiry carried out in Scotland under the Sheriff, a judge of criminal and civil jurisdiction, where the next-of-kin have a right to appear. They urged the Court to take the opportunity to give precise guidance as to the form which investigations into the use of lethal force by State agents should take.

B. The Court's assessment

1. General principles

108. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

109. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC] no. 21986/93, ECHR 2000-VII, § 100, and also *Çakıcı v. Turkey*, [GC] ECHR 1999- IV, § 85, *Ertak v. Turkey* no. 20764/92 [Section 1]

ECHR 2000-V, § 32 and *Timurta v. Turkey*, no; 23531/94 [Section 1] ECHR 2000-VI, § 82).

110. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (the McCann judgment, cited above, §§ 148-149).

111. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann judgment cited above, p. 49, § 161, and the *Kaya v. Turkey* judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 329, § 105). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *Ihan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 63).

112. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. *Güleç v. Turkey* judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Ö ur v. Turkey*, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the *Erg v. Turkey* judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84 where the public prosecutor investigating the death of a girl during an

alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

113. The investigation must also be 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 (e.g. *Kaya v. Turkey* judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 199-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

114. A requirement of promptness and reasonable expedition is implicit in this context (see *Ya a v. Turkey* judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, §§ 102-104; *Cak c v. Turkey* cited above, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, [Section I] ECHR 2000-III, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

115. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç v. Turkey*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Ö ur v. Turkey*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey* judgment, cited above, § 93).

2. Application in the present case

a. Concerning alleged responsibility of the State for the death of Gervaise McKerr

116. It is undisputed that Gervaise McKerr was shot and killed by police officers while he was unarmed. This use of lethal force falls squarely within the ambit of Article 2, which requires any such action to pursue one of the purposes set out in second paragraph and to be no more than absolutely necessary for that purpose. A number of key factual issues arise in this case, in particular whether the officers acted on the basis of an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, namely, that they were at risk from Gervaise McKerr or the other men in the car. Determining this issue would involve *inter alia* a consideration of the possibility that ricochets gave the impression of gun flashes from the car, the view which the officers had of the men in the car, the basis for which they considered that they were at risk and whether there was any possibility of attempting to effect an arrest. Assessment of the credibility and reliability of the various witnesses, in particular, the police officers who opened fire, would play a crucial role.

117. These are all matters which are currently pending examination in civil proceedings brought by Eleanor Creaney and continued by the applicant alleging death by wrongful act. The Court considers that in the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact finding tribunals. While the European Commission of Human Rights has previously embarked on fact finding missions in cases from Turkey where there were pending proceedings against the alleged security force perpetrators of unlawful killings, it may be noted that these proceedings were criminal and that they had terminated, at first instance at least, by the time the Court was examining the applications. In those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective (see e.g. *Salman v. Turkey*, cited above, § 107, where the police officers were acquitted of torture due to the lack of evidence resulting principally from a defective autopsy procedure; *Gül v. Turkey*, cited above, § 89, where *inter alia* the forensic investigation at the scene and autopsy procedures hampered any effective reconstruction of events).

118. In the present case, the Court does not consider that there are any elements established which would deprive the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of Gervaise McKerr's death (see further below concerning the applicant's allegations

concerning the defects in the police investigation, paragraphs 124-126). While it appears that the applicant has not pursued these proceedings with any vigour, they have not been withdrawn. Even if it may be questioned as to whether, almost twenty years after the events, the lapse of time will pose difficulties to the civil court's abilities to piece together the evidence, any such attempt should take place in a domestic forum, not an international jurisdiction.

119. Nor is the Court persuaded that it is appropriate to rely on the documentary material provided by the parties to reach any conclusions as to responsibility for the death of the applicant's father. Many of the written accounts and assertions made in various documents have not been tested in examination or cross-examination and would provide an incomplete and potentially misleading basis for any such attempt. The situation cannot be equated to a death in custody where the burden may be regarded as resting on the State to provide a satisfactory and plausible explanation.

120. The Court is also not prepared to conduct, on the basis largely of statistical information and selective evidence, an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force. This would go far beyond the scope of the present application.

121. Conversely, as regards the Government's argument that the availability of civil proceedings provided the applicant with a remedy which he has yet to exhaust as regards Article 35 § 1 of the Convention and, therefore, that no further examination of the case is required under the Article 2, the Court recalls 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; *Ya a 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. The Court therefore examines below whether there has been compliance with this procedural aspect of Article 2 of the Convention.

b. Concerning the procedural obligation under Article 2 of the Convention

122. Following the death of Gervaise McKerr and the two other men in the car, an investigation was commenced by the RUC. On the basis of that investigation, there was a decision by the DPP to prosecute three officers. They were acquitted at a criminal trial. An independent police inquiry was launched to investigate suspicions of obstruction in the police investigations of this and two other incidents. An inquest was opened on 4 June 1984 and abandoned on 8 September 1994, without reaching any conclusion.

123. The applicant has made numerous complaints about these procedures, while the Government have contended that even if one part of the procedure failed to provide a particular safeguard, taken as a whole, the

system ensured the requisite accountability of the police for any unlawful act.

(i) The police investigation

124. Firstly, concerning the police investigation, the Court observes that the applicant's criticisms of the procedures are based largely on the book written by Mr Stalker. His assertions, based on his own inquiries in 1984-5, have however been disputed by the RUC in a report issued in 1990. This gives an explanation for a number of the points raised by the applicant - for example, the failure to find the missing cartridges was perhaps due to the torrential rain washing items into the drains and a mistaken identification of an incident location was speedily corrected. On other points, the RUC asserted that Mr Stalker was simply inaccurate or mistaken.

125. The Court is not in a position to adjudicate between the rival assertions, some of which are more serious than others. It has not been shown, for example, that the RUC failed to look for or find relevant witnesses. Appeals were made to the public, and enquiries carried out with local residents. The fact that Mr Stalker found one potential witness who had not been contacted by the RUC is not of undue importance.

126. Nevertheless, it is not disputed that the police officers' weapons were not handed over to the Scene of Crimes Officer until the next day and that the officers were not interviewed until 15 November 1982, some three to four days after the incident. There is no indication, however, whether the lapse of time with regard to the guns was a few hours or substantially longer. It is perhaps surprising that the guns were not required to be surrendered as soon as possible and that the officers were not interviewed at an earlier stage. The Government stated that the latter was a conscious decision of the investigating officers who wished to collect other evidence prior to the interview. It may be noted that other interviews took place still later to seek further clarification in the light of forensic evidence. It is not altogether obvious, therefore, that it was necessary to wait for several days before questioning the officers for the first time. That said however, there is no indication of any difficulty arising from the forensic evidence concerning the use of the guns or the number of rounds fired. Nor was the delay of some days in interviewing potentially key suspects in itself a matter of serious prejudice to the investigation as a whole. It does however lend weight to assertions that investigations into the use of lethal force by police officers give the appearance of being qualitatively different from those concerning civilian suspects.

127. It is further undisputed that the three police officers were instructed not to reveal certain information to the RUC officers investigating the shooting, namely that they were Special Branch officers and were working on information obtained from intelligence operations. This was, as stated by the Government, discovered by the RUC investigators. It sparked off further

enquiries, which disclosed evidence of obstruction amounting to criminal offences and led eventually to disciplinary proceedings. Whether the inquiries revealed any further examples of withholding information from the investigation or attempts to obstruct the investigation by police officers in this case is not known, as the Stalker and Sampson reports have never been disclosed. It is however of serious concern that any attempts were made, on the instructions of a senior officer, to conceal information from the investigation. It raises legitimate doubts as to the overall integrity of the investigative process.

128. In such a context, the necessity for safeguards against undue influence and a lack of impartiality is thrown into prominence. It must be noted that the investigation into the killing by RUC police officers was headed and carried out by other RUC officers. It appears likely, though no direct submissions have been on the point, that, as required by law, this investigation was supervised by the ICPC, an independent police monitoring authority. Their approval would have been required of the officer leading the investigation, and it would appear that they found the conduct of the investigation satisfactory. There was nonetheless a hierarchical link between the officers in the investigation and the officers subject to investigation, both of whom were under the responsibility of the RUC Chief Constable, who played a role in the process of instituting any disciplinary or criminal proceedings (see paragraphs 82-84 above). The power of the ICPC to require the RUC Chief Constable to refer the investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation. The Court notes the recommendation of the CPT that a fully independent investigating agency would help to overcome the lack of confidence in the system which exists in England and Wales and is in some respects similar (see paragraph 98 above).

129. As regards the lack of public scrutiny of the police investigations, the Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures.

(ii) The role of the DPP

130. The Court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences carried out by a police officer. He is not required to give reasons for any decision not to prosecute and in this

case he did not do so. No challenge by way of judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of a death.

131. The Court does not doubt the independence of the DPP. In this case, he directed that a prosecution of three police officers take place. No issue therefore arises concerning the lack of transparency in a decision not to prosecute. The applicant nonetheless argued that the DPP's decision could not be regarded as remedying the deficiencies in the police investigation. However, the Court is not persuaded by the material before it that there was any fundamental flaw in the investigation which can be said to have undermined the prosecution *ab initio* or deprived it of any efficacy.

132. The Court examines further below whether the criminal trial furnished the investigation required by Article 2 of the Convention.

(iii) The criminal trial of the three police officers

133. As stated above (paragraph 113), a crucial aspect of the investigation into a killing by State agents is that it is capable of leading to the prosecution and punishment of those responsible. In this case, three police officers were charged with the murder of one of the men in the incident, presumably for tactical reasons. It is clear that the evidence submitted by the prosecution related to the incident as a whole and the judge in his decision referred to the killing of all three men. If the trial had resulted in convictions, it would have, at least indirectly, concerned the killing of the applicant's father and would have arguably satisfied the prosecution and punishment requirement of Article 2.

134. In the normal course of events, a criminal trial, with an adversarial procedure before an independent and impartial judge, must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility. The applicant has pointed to the fact that in this case the judge acquitted the officers on the basis of "no case to answer", without waiting to hear the defence case, in particular, the oral testimony of those officers. In addition, he drew attention to the comments of the judge which gave rise to considerable controversy in appearing to praise the three officers for sending the three unarmed IRA suspects to face divine judgment.

135. It is true that the accounts of the killings given in the statements of the three officers were not subject to examination or cross-examination. However, it is not for this Court to substitute its own opinion as to whether the prosecution had adduced sufficient evidence to require the defendants to

answer it for that of the trial judge, who heard the witnesses and had a better overall picture of the evidence than it can hope to have at this late stage. Nor, though it can understand why the judge's remarks were ill-received, does it consider that these disclosed any lack of impartiality or bias. On the judge's findings that the use of force was reasonable, no question of condonation of unlawful killings arose.

136. However, the scope of the criminal trial was restricted to the criminal responsibility of the three officers. The applicant, relying *inter alia* on the Minnesota Protocol (see paragraph 97 above) argued that the trial was not capable of addressing wider concerns about other aspects of official involvement in the killings. One of these aspects was the deliberate instructions of a senior officer to the suspects to conceal information from the investigating officers, which raised doubts as to what other information or obstruction might have occurred. Another was the fact that there had been two other incidents in Armagh within a month in which police officers from the special mobile support units had used lethal force, killing Michael Tighe on 24 November 1992 and Seamus Grew and Roddy Carroll on 12 December 1992, all of whom had been unarmed. A prosecution had occurred concerning the latter incident and had also resulted in an acquittal. It was alleged that police officers involved in these incidents had similarly been instructed to conceal evidence.

137. The Court considers that there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require a wider examination. Serious concerns arose from these three incidents as to whether police counter-terrorism procedures involved an excessive use of force, whether deliberately or as an inevitable by-product of the tactics that were used. The deliberate concealment of evidence also cast doubts on the effectiveness of investigations in uncovering what had occurred. In other words, the aims of re-assuring the public and the members of the family as to the lawfulness of the killings had not been met adequately by the criminal trial. In this case therefore, the Court finds that Article 2 required a procedure whereby these elements could be examined and doubts confirmed, or laid to rest. It considers below whether the authorities adequately addressed these concerns.

(iv) The independent police enquiry

138. The DPP was aware from an early stage that problems had arisen in this case as to concealment of evidence. Prior to the trial he had requested in or about July 1983 that further enquiries be made (see paragraph 16 above). On 11 April 1984, he took the step of exercising his statutory powers under section 6(3) of the Prosecution of Offences (NI) Order 1972 to request the Chief Constable of the RUC to conduct further investigations into the three cases. This was intended not as a re-investigation of the incidents themselves but instead to establish whether there was evidence of perverting

the course of justice. The Chief Constable appointed Mr Stalker, a senior police officer from a different police force in England, to carry out the investigation.

139. The enquiry which followed sparked considerable controversy, which lasts to the present day. Mr Stalker was removed from the enquiry on 29 May 1986 and replaced by Mr Sampson, also a senior police officer from outside Northern Ireland. None of the Reports was made public. That misconduct had been uncovered was revealed in a short statement by the Attorney General on 25 January 1988 which at the same time announced that the DPP had decided that no prosecution of police officers for offences of obstruction was justified in the public interest.

140. The Court considers that the enquiry may be regarded as sufficiently independent, though it appears that the RUC Chief Constable played a role in the disposal of the Reports that issued. Indeed the Report and the investigation materials were regarded as the property of the RUC. It cannot however be regarded as having proceeded with reasonable expedition. It took three years and nine months to culminate in a statement to Parliament. There was a delay between the issue of Mr Stalker's Interim Report on 18 September 1985 to the RUC Chief Constable and the transfer of the Report by him to the DPP on 15 February 1986, a gap of almost five months. Following Mr Stalker's removal on 29 May 1986, it took a further ten months for Mr Sampson to issue the final part of his own Report on 10 April 1987. It took another nine months before the Attorney General reported on the matter in Parliament.

141. Moreover, since the Reports and their findings were not published, in full or in extract, it cannot be considered that there was any public scrutiny of the investigation. This lack of transparency may be considered as having added to, rather than dispelled, the concerns which existed. No reasons were given to explain the decision that prosecutions were not considered in the public interest, and no possibility existed of challenging the failure to give such reasons.

(v) The inquest

142. In Northern Ireland, as in England and Wales, investigations into deaths may also be conducted by inquests. Inquests are public hearings conducted by coroners, independent judicial officers, normally sitting with a jury, to determine the facts surrounding a suspicious death. In the case of *McCann and Others v. the United Kingdom* (cited above, p. 49, § 162), the Court found that the inquest held into the deaths of the three IRA suspects shot by the SAS on Gibraltar satisfied the procedural obligation contained in Article 2, as it provided a detailed review of the events surrounding the killings and provided the relatives of the deceased with the opportunity to examine and cross-examine witnesses involved in the operation.

In this case, a fact-finding function had already been carried out by the criminal court. This had however dealt with the criminal responsibility for the death of one of the men in the car. It had not covered the allegations of a cover-up and shoot-to-kill policy that the independent police enquiry had dealt with. The Court has considered whether the inquest provided a public and effective examination of these matters.

It has concluded, however, that while the inquest was indeed public it was not effective. Its effectiveness was handicapped in a number of ways.

143. The scope of the inquest was limited to the facts immediately relevant to the deaths under examination. According to the case-law of the national courts, the Coroner is required to confine his investigation to the matters directly causative of the death and not extend his inquiry into the broader circumstances. While the domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about, they have considered it important that such an inquiry should not be allowed "to drift into the uncharted seas of rumour and allegation" (see paragraphs 75-76). The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. However, in this case, legitimate and serious concerns had arisen. The Coroner had identified these in his address to the jury on 5 May 1992, when he pointed out that a criminal trial had already taken place and that he was only holding an inquest as it appeared that further evidence might have come to light subsequently. He was however unable to obtain copies of either the Stalker or Sampson Reports or other alleged associated material as the High Court, upholding the RUC Chief Constable's objections, held that disclosure of the documents was not necessary for the purpose of the inquest. The High Court judge commented that the inquest was not an appropriate place for dealing properly with issues of an alleged shoot-to-kill policy.

144. In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence (Rule 9(2) of the 1963 Coroners Rules, see paragraph 73 above). In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. In the inquest in this case, the police officers involved in the shooting were not required to appear at the inquest and declined to do so. Sergeant M and officers B and R were therefore not subject to examination concerning their account of events. Their statements were made available to the Coroner instead. This did not enable any satisfactory assessment to be made of either their reliability or credibility on crucial factual issues. It detracted from the inquest's capacity to establish the facts relevant to the death, and thereby to achieve one of the purposes required by Article 2 of the Convention (see

also paragraph 10 of the United Nations Principles on Extra-Legal Executions cited at paragraph 96 above).

145. The jury's verdict in this case could only give the identity of the deceased and the date, place and cause of death (see paragraph 70 above). In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including "unlawful death". As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, a criminal prosecution had already occurred. The only relevance that the inquest could have had to any further prosecutions was that the Coroner could have sent a written report to the DPP if he considered that a criminal offence might have been committed. It is not apparent however that the DPP would have been required to take any decision in response to this notification or to provide detailed reasons for not making any response. The inquest therefore was unable to play any effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.

146. While the public nature of the inquest proceedings was not in dispute, the applicant complained that the ability of his family to participate in the proceedings as next-of-kin to the deceased was significantly prejudiced as legal aid was not available in inquests and documents were not disclosed in advance of the proceedings.

The Court notes however that, as with the next-of-kin in the McCann case, the family were represented by a solicitor and counsel at the inquest and had been granted legal aid for the judicial review applications associated with it. It cannot therefore be said that the applicant's family was prevented, by the lack of legal aid, from obtaining any necessary legal assistance at the inquest.

147. As regards access to documents, the family of the deceased at that time was not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the McCann case, where the Court considered that this had not substantially hampered the ability of the families' lawyers to question the witnesses (cited above, p. 49, § 62). However it must be noted that the inquest in the McCann case was to some extent exceptional when compared with the proceedings in a number of cases in Northern Ireland (see also the cases of *Jordan v. the United Kingdom*, no. 24746/94, *Kelly and Others v. the United Kingdom*, no. 30054/96 and *Shanaghan v. the United Kingdom*, no. 37715/97). The promptness and thoroughness of the inquest in the McCann case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, contribute any significant handicap.

However, since that case, the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information (see *Ö ur v. Turkey*, cited above, § 92).

Further, the Court notes that the practice of non-disclosure has changed in the United Kingdom in the light of the Stephen Lawrence Inquiry and that it is now recommended that the police disclose witness statements 28 days in advance (see paragraph 78 above).

148. In this case, it may be observed that the lack of access to the witness statements was the reason for several long adjournments in the inquest. This contributed significantly to prolonging the proceedings. The Court considers this further below in the context of the delay (see paragraph 152). The previous inability of the applicant's family to have access to witness statements before the appearance of the witness must also be regarded as having placed them at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the RUC who had the resources to provide for legal representation and full access to relevant documents. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. The Court is not persuaded that the applicant's interests as next-of kin were fairly or adequately protected in this respect.

149. Reference has also been made to the allegedly frequent use of public interest immunity certificates in inquests to prevent certain questions or disclosure of certain documents. In this case, the Secretary of State for Northern Ireland issued a certificate on 9 November 1988 covering, for example, the counter-terrorism capabilities of the RUC and information or documents revealing details of the intelligence operation. A second certificate was issued on 5 May 1994 to prevent disclosure of the Stalker and Sampson Reports on the grounds, *inter alia*, of the need to protect the effectiveness of special units and the integrity of intelligence operations.

150. It is not apparent that the first certificate prevented any relevant questioning of witnesses. As regards the second certificate, the Court recalls that the Chief Constable, in contesting the relevance of the Stalker and Sampson Reports to the inquest, declared that all witness statements and evidence in the inquiry had been provided to the Coroner (see paragraph 58 above). In the High Court, Nicholson J. considered that all that remained undisclosed were statements of opinion, criticisms, recommendations etc. It is not apparent that Nicholson J. was able himself to examine the Reports to verify whether anything relevant to the inquest was contained in them. Nicholson J. also commented that there was nothing to prevent Mr Thorburn giving evidence to the inquest concerning relevant matters pertaining to the deaths, but that he could not seek to rely on the Reports to

give any “overview” to the jury. The Court observes that if Mr Thorburn had attempted to give evidence about the contents of the Reports, some seven to eight years after they had been compiled, his memory was unlikely to be accurate in detail. It would also have been probable that objection would have been made by the Government under the PII certificate.

151. This Court is not in a position to assert whether the Stalker and Sampson Reports contained any material relevant to the issue of the existence of any shoot-to-kill policy. There are strong indications that the Stalker Interim Report did so - the RUC have criticised Mr Stalker’s attempt to re-investigate the shootings in addition to the obstructions of justice. In his statement to Parliament, the Attorney-General referred to the DPP reviewing the Reports and the evidence concerning the shooting incidents also. The Reports in any event dealt with the evidence of obstruction of justice, which was relevant to the wider issues thrown up by the case. The Court finds that the inquest was prevented thereby from reviewing potentially relevant material and was therefore unable to fulfil any useful function in carrying out an effective investigation of matters arising since the criminal trial.

152. Finally, the Court has had regard to the delay in the proceedings. The inquest opened on 4 June 1984, after the conclusion of the criminal proceedings. It then adjourned for successive periods:

- from September 1984 to November 1988, pending the independent police enquiry under Mr Stalker and Mr Sampson;
- from 17 November 1988 to 8 March 1990, a period of about fifteen months, while the family challenged the admission in evidence of the written statements of the police officers;
- from 20 July 1990 to 6 February 1992, another eighteen months pending a challenge to such statements in another case;
- from 29 May 1992 to 28 May 1993, a year, pending the family’s challenge of the refusal to give them access to a witness statement;
- while the inquest resumed on 31 January 1994, it was almost immediately delayed while the Coroner and Chief Constable entered into a dispute about the disclosure of documents. The judicial review proceedings ended on 11 July 1994 and the inquest was abandoned a few months later.

153. The Court observes that a number of the adjournments were requested by the applicant’s family. They related principally to legal challenges to procedural aspects of the inquest which they considered essential to their ability to participate – in particular access to the documents. While it is therefore the case that the applicant’s family contributed significantly to the delays, this to some extent resulted from the difficulties facing relatives in participating in inquest procedures (see paragraph 148 above concerning the non-disclosure of witness statements). It cannot be regarded as unreasonable that the applicant made use of the

legal remedies available to him to challenge these aspects of the inquest procedure.

154. Long delay had already resulted from the Coroner's decision to await the outcome of the independent police enquiry. This may have been a reasonable step where the enquiry provided an effective investigation into the remaining issues after the criminal trial. The Court has found above that it was lacking in expedition and transparency. While the enquiry ended in a public statement in Parliament in January 1988, the inquest was not rescheduled to start until 14 November 1988, almost six years after the events. The Coroner's unsuccessful attempt to obtain documents which he considered relevant to the inquest accounted for the period from September 1993 to May 1994. When the inquest was abandoned by the Coroner on 8 September 1994, little evidence had been heard.

155. In the circumstances it cannot be considered that the inquest was held either promptly or progressed with reasonable expedition (see *mutatis mutandis* concerning speed requirements under Article 6 § 1 of the Convention, *Scopelliti v. Italy* judgment of 23 November 1993, Series A no. 278, p. 9, § 25). The frequent and lengthy adjournments call into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family, and the necessary documents for the Coroner's examination of the issues.

(vi) *Civil proceedings*

156. As found above (see paragraph 118), civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.

(vii) *Conclusion*

157. The Court finds that the proceedings for investigating the use of lethal force by the police officers have been shown in this case to disclose the following shortcomings:

- a lack of independence of the police officers investigating the incident from the officers implicated in the incident;
- a lack of public scrutiny, and information to the victim's family concerning the independent police investigation into the incident, including the lack of reasons for the decision of the DPP not to prosecute any police officer at that stage for perverting or attempting to pervert the course of justice;

- the inquest procedure did not allow for any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed;
- non-disclosure of witness statements prior to their appearance at the inquest which prejudiced the ability of the applicant's family to participate in the inquest and contributed to long adjournments in the proceedings;
- the PII certificate had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case;
- the police officers who shot Gervaise McKerr could not be required to attend the inquest as witnesses;
- the independent police investigation did not proceed with reasonable expedition;
- the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

158. The lack of independence of the RUC investigation, and the lack of transparency regarding the subsequent enquiry into the alleged police obstruction in that investigation, may be regarded as lying at the heart of the problems in the procedures which followed. The domestic courts commented that the inquest was not the proper forum for dealing with the wider issues in the case. No other public, accessible procedure however was forthcoming to remedy the shortcomings.

159. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.

160. The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated *inter alia* by the

submissions made by the applicant concerning the alleged shoot-to-kill policy.

161. The Court finds that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

162. The applicant invoked Article 14 of the Convention, which provides:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

163. The applicant submitted that the circumstances of the killing of his father disclosed discrimination. He alleged that, between 1969 and March 1994, 357 people had been killed by members of the security forces, the overwhelming majority of whom were young men from the Catholic or nationalist community. When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have been relatively few prosecutions (31) and only a few convictions (four, at the date of his application), this showed that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority.

164. The Government replied that there was no evidence that any of the deaths which occurred in Northern Ireland were analogous or that they disclosed any difference in treatment. Bald statistics (the accuracy of which was not accepted) were not enough to establish broad allegations of discrimination against Catholics or nationalists.

165. Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. There is no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.

166. The Court finds that there has been no violation of Article 14 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

167. The applicant complained that he had no effective remedy in respect of his complaints, invoking Article 13 which provides:

“Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

168. The applicant referred to his submissions concerning the procedural aspects of Article 2 of the Convention, claiming that in addition to the payment of compensation where appropriate Article 13 required a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

169. The Government submitted that the complaints raised under Article 13 were either premature or ill-founded. They claimed that the combination of available procedures, which included the pending civil proceedings and the inquest, provided effective remedies.

170. The Court’s case-law indicates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant’s complaint under the Convention. Nevertheless, the remedy required by Article 13 must be “effective” in practice as well as in law (see the *Aksoy v. Turkey* judgment of 18 December 1996, *Reports* 1996-IV, p. 2286, § 95; the *Aydin v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; the *Kaya v. Turkey* judgment cited above, pp. 329-30, § 106).

171. In cases of the use of lethal force or suspicious deaths, the Court has also stated that, given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure (see the *Kaya v. Turkey* judgment cited above, pp. 330-31, § 107). In a number of cases it has found that there has been a violation of Article 13 where no effective criminal investigation had been carried out into a suspicious death, noting that the requirements of Article 13 were broader than the obligation to investigate imposed by

Article 2 of the Convention (see also *Erg v. Turkey*, cited above, p.1782, § 98; *Salman v. Turkey* cited above, § 123).

172. It must be observed that these cases derived from the situation pertaining in south-east Turkey, where applicants were in a vulnerable position due to the ongoing conflict between the security forces and the PKK and where the most accessible means of redress open to applicants was to complain to the public prosecutor, who was under a duty to investigate alleged crimes. In the Turkish system, the complainant was able to join any criminal proceedings as an intervenor and apply for damages at the conclusion of any successful prosecution. The public prosecutor's fact finding function was also essential to any attempt to take civil proceedings. In those cases, therefore, it was sufficient for the purposes of former Article 26 (now Article 35 § 1) of the Convention, that an applicant complaining of unlawful killing raised the matter with the public prosecutor. There was accordingly a close procedural and practical relationship between the criminal investigation and the remedies available to the applicant in the legal system as a whole.

173. The legal system pertaining in Northern Ireland is different and any application of Article 13 to the factual circumstances of any case from that jurisdiction must take this into account. An applicant who claims the unlawful use of force by soldiers or police officers in the United Kingdom must as a general rule exhaust the domestic remedies open to him or her by taking civil proceedings by which the courts will examine the facts, determine liability and if appropriate award compensation. These civil proceedings are wholly independent of any criminal investigation and their efficacy has not been shown to rely on the proper conduct of criminal investigations or prosecutions (see e.g. *Caraher v. the United Kingdom*, no. 24520/94, decision of inadmissibility [Section 3] 11.01.00).

174. In the present case, the applicant has lodged civil proceedings, which are pending. The Court has found no elements which would prevent those proceedings providing the redress identified above in respect of the alleged excessive use of force (see paragraph 118 above).

175. As regards the applicant's complaints concerning the investigation into the death carried out by the authorities, these have been examined above under the procedural aspect of Article 2 (see paragraphs 122-161). The Court finds that no separate issue arises in the present case.

176. The Court concludes that there has been no violation of Article 13 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

177. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

178. The applicant submitted that he was entitled to damages in respect of the unlawful deprivation of the life of his father Gervaise McKerr.

179. The Government disputed that any award of damages would be appropriate in the present case.

180. The Court recalls that in the case of *McCann and Others* (cited above, p. 63, § 219) it found a substantive breach of Article 2 of the Convention, concluding that it had not been shown that the killing of the three IRA suspects constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence. However, the Court considered it inappropriate to make any award to the applicants, as personal representatives of the deceased, in respect of pecuniary or non-pecuniary damage, “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar”.

181. In contrast to the *McCann* case, the Court in the present case has made no finding as to the lawfulness or proportionality of the use of lethal force which killed Gervaise McKerr, or as to the factual circumstances, including the activities of the deceased which led up to the killing, which issues are pending in the civil proceedings. Accordingly, no award of compensation falls to be made in this respect. On the other hand, the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention.

182. Making an assessment on an equitable basis, the Court awards the sum of 10,000 pounds sterling (GBP).

B. Costs and expenses

183. The applicant claimed a total of GBP 36,437.50. This included GBP 17,625 for senior counsel (inclusive of VAT), GBP 10,000 for junior counsel and solicitors’ fees of GBP 8,812.50 (inclusive of VAT).

184. The Government submitted that these claims were excessive, noting that the issues in this case overlapped significantly with the other cases examined at the same time and proposed that a figure of GBP 15,000 was reasonable.

185. The Court recalls that this case has involved several rounds of written submissions and an oral hearing, and may be regarded as factually and legally complex. Nonetheless, it finds the fees claimed to be on the high side when compared with other cases from the United Kingdom and is not persuaded that they are reasonable as to quantum. Having regard to equitable considerations, it awards the sum of GBP 25,000, plus any value added tax which may be payable. It has taken into account the sums received by the applicant by way of legal aid from the Council of Europe.

C. Default interest

186. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* 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;
2. *Holds* that there has been no violation of Article 14 of the Convention;
3. *Holds* that there has been no violation of Article 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, plus any value-added tax that may be chargeable;
 - (i) 10,000 (ten thousand) pounds sterling in respect of non-pecuniary damage;
 - (ii) 25,000 (twenty five thousand) pounds sterling in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 7,5% shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 4 May 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P.COSTA
President