House of Lords

In re McKerr (AP) (Respondent) (Northern Ireland) [2004] UKHL 12
on appeal from: [2003] NICA 1
THURSDAY 11 MARCH 2004

The Appellate Committee comprised:
Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Brown of Eaton-under-Heywood

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. This is a test case. It arises out of the absence of adequate public investigations into some fatal shootings in Northern Ireland over 20 years ago. This particular case relates to the death of Mr Gervaise McKerr. His son Jonathan seeks an order compelling the Secretary of State for Northern Ireland to hold an effective investigation into the circumstances of his father's death. He bases his claim primarily on the provisions of the Human Rights Act 1998 even though his father died many years before the Act came into force. He also advances a claim based on the common law.

The deaths

2. [facts]
3. [context – allegations of shoot-to-kill]
4. Currently nine cases…are pending in the courts of Northern Ireland awaiting the outcome of this appeal. In addition numerous requests have been made to the police and the Director of Public Prosecutions of Northern Ireland for new investigations into deaths involving the police or security forces many years ago. This surge of activity has been prompted by four judgments given by the European Court of Human Rights in May 2001 and the government's response to them.

The investigations

5. [criminal proceedings]
6. [police investigation - Stalker]
7. [inquest – finally abandoned on 8 September 1994]

The application to Strasbourg

8. [history of application]
9. The court gave its judgment in all four cases on 4 May 2001. … the court found that the various investigatory proceedings disclosed a number of shortcomings…
10. The court held unanimously that article 2 of the Convention had been violated by failure to comply with the obligation, implicit in article 2, to hold an effective official investigation when an individual has been killed by the use of force: see (2002) 34 EHRR 20, paras 157-161.

The court awarded Mr Jonathan McKerr £10,000 as just satisfaction in respect of the frustration, distress and anxiety he must have suffered. A finding of violation was not sufficient compensation.

11. The government duly paid the sum awarded. In response to the judgment the United Kingdom also presented a package of proposals to the committee of ministers of the Council of Europe. Under article 46(2) of the Convention the committee of ministers has responsibility for supervising execution of the judgment of the court. This includes considering what are the practicable steps a state should be required to take in order to make good the violations found by the court: see Finucane v United Kingdom (2003) 37 EHRR 29, para 89. The government's package did not include any proposal to carry out a further investigation into the death of Gervaise McKerr. The government's stance is that, subject to any ruling of the courts, it does not propose to take any steps to hold a further investigation. The committee of ministers has not yet ruled on the adequacy of the government's proposals as an effective implementation of article 2.

The present proceedings

12. On 30 January 2002 he commenced these judicial review proceedings.

13. On 26 July 2002 Campbell LJ dismissed the application. The Human Rights Act 1998 did not have retrospective effect. But the obligation to hold a proper investigation into a pre-Act death continued until either the obligation was fulfilled or a competent court vindicated the right in some other way. In the present case the continuing obligation to hold an investigation compliant with article 2 came to an end when the European Court of Human Rights made a finding of violation of article 2 and ordered payment of just satisfaction to Mr Jonathan McKerr.

14. Mr Jonathan McKerr appealed, and on 10 January 2003 the Court of Appeal allowed the appeal. Carswell LCJ delivered the judgment of himself and McCollum LJ and Coghlin J. The court agreed with Campbell LJ that the obligation to hold an investigation which complied with the requirements of article 2 was a continuing one. Counsel for the Secretary of State did not seek to uphold the judge's view that payment of compensation automatically brought the article 2 obligation to an end. Counsel contended that once just satisfaction had been awarded and paid, Mr Jonathan McKerr was no longer a 'victim' within section 7 of the Human Rights Act 1998 and accordingly he could not complain of any breach of the continuing obligation. The Court of Appeal rejected this argument. The court made a declaration that the government has failed to carry out an investigation complying with article 2. The court considered it inappropriate to grant any other relief because the committee of ministers had not yet ruled on the proposals made to them by the United Kingdom government. From that decision the Secretary of State appealed to your Lordships' House.

Retrospectivity

15. The primary contention advanced by the Attorney General on behalf

of the Secretary of State was not advanced in the courts below. In short, the Attorney General submitted to your Lordships' House that section 6 of the Human Rights Act 1998 is not applicable to deaths occurring before the Act came into force on 2 October 2000. I shall consider this submission first.

16. **It is now settled, as a general proposition, that the Human Rights Act is not retrospective.** The Act itself treats section 22(4) as an exception. This general proposition, however, raises almost as many questions as it answers. Past events have continuing effects. For instance, agreements made before the Human Rights Act came into force will often generate obligations requiring performance after 2 October 2000.

17. In the present case the question of retrospectivity arises in the context of section 6 of the Act and article 2 of the Convention. It arises in this way. Section 6 of the Act creates a new cause of action by rendering certain conduct by public authorities unlawful. Section 7(1)(a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by section 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation into the death of Gervaise McKerr is unlawful within the meaning of section 6(1), these proceedings brought by his son fall squarely within section 7; if not, not.

18. So **the key question is whether the government's failure to hold a further investigation in this case is conduct which is prohibited by section 6(1).** Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a 'Convention right' as defined in the statute. An act includes a failure to act. The relevant Convention right is article 2. Article 2 of the Convention concerns the most fundamental right of all: the right to life.

19. This article expressly imposes a positive obligation on the state to protect everyone's life. The state must take appropriate steps to safeguard the lives of those within its bounds. But the state's obligation does not stop there. The European Court of Human Rights has held that by implication article 2 also requires there should be some form of effective official investigation when individuals have been killed as a result of the use of force … The purpose of the investigation is to secure that domestic laws protecting the right to life are effectively implemented and, in cases involving state agencies, to ensure those responsible for deaths are made properly accountable… The requisites of an investigation, if it is to fulfil this procedural obligation inherent in article 2, were considered recently by your Lordships' House in R (Amin) v Secretary of State for the Home Department [2003] UKHL 51, [2003] 3 WLR 1169.

20. Thus article 2 may be violated by an unlawful killing. **The application of section 6(1) of the Human Rights Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.**

21. **The position is not so clear where the violation comprises a**

failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. **On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?**

22. **In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death.** The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. **If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death.** Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. **The event giving rise to the article 2 obligation to investigate must have occurred post-Act.**

23. **I think this is the preferable interpretation of section 6 in the context of article 2.** This interpretation has the effect, for the transitional purpose now under consideration, of treating all the obligations arising under article 2 as parts of a single whole. **Parliament cannot be taken to have intended that the Act should apply differently to the primary obligation (to protect life) and a consequential obligation (to investigate a death). For this reason I consider these judicial review proceedings are misconceived so far as they are sought to be founded on the enabling power in section 7 of the Human Rights Act.**

24. I refer briefly to the court decisions on this point. There have been several cases where everyone concerned appears to have assumed that section 6 of the Human Rights Act could apply to a failure to investigate a death which took place before the Act came into force. These include two decisions of your Lordships' House: R (**Amin**) v Secretary of State for the Home Department [2003] 3 WLR 1169 and R (**Middleton**) v Coroner for the Western District of Somerset [2004] UKHL 10. **In none of these cases, so it seems, was this point the subject of argument. So they do not assist.**

25. **In other cases, where the point has arisen for decision, differences in judicial view have emerged.** In R (**Wright**) v Secretary of State for the Home Department [2001] LLR (Med) 478, a case concerning a death in prison in 1996, Jackson J held the claimants were entitled to a remedy under the Act in respect of the Secretary of State's 'continuing breach of the procedural obligations under articles 2 and 3' of the Convention: see paragraph 67. In R (**Khan**) v Secretary of State for Health [2003] EWHC 1414 (Admin) Silber J reached a contrary conclusion. He regarded the time of death as the governing factor. There the death occurred in October 1999. In **Hurst** v Coroner for the Northern District of London [2003] EWHC 1721 (Admin), which concerned a death in May 2000, the Divisional Court disagreed with Silber J. The relevant time was when the decision was made in relation to the article 2 duty. At that time 'article

2 was part of English law': paragraph 20. This decision of the Divisional Court was followed by the Court of Appeal when the **Khan** case reached that court: see [2003] EWCA Civ 1129. The Human Rights Act had been in force for nearly two years when, in July 2002, the Secretary of State first denied the parents of the dead child the relief they were seeking: paragraph 85.

26. Having had the advantage of much fuller arguments **I respectfully consider that some of these courts, including the Divisional Court in the Hurst case and the Court of Appeal in the Khan case, fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the Convention and (2) rights created by the Human Rights Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the Human Rights Act 1998 and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the Human Rights Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the Human Rights Act, depends upon the proper interpretation of that Act. It by no means follows that the continuing existence of a right arising under the Convention in respect of an act occurring before the Human Rights Act came into force will be mirrored by a corresponding right created by the Human Rights Act. Whether it finds reflection in this way in the Human Rights Act depends upon the proper interpretation of the Human Rights Act.**

The 'victim' point

27. **Had I reached the contrary conclusion I would not have accepted the Secretary of State's argument that Mr Jonathan McKerr had no standing to bring these proceedings because he ceased to be a 'victim' within the meaning of section 7 of the Human Rights Act once he had been paid the amount of money awarded by the European Court of Human Rights as just satisfaction. Mr McKerr was awarded this amount for his frustration, distress and anxiety over the years. All too obviously he is still not in the position intended to be achieved by fulfilment of the obligation to hold an effective investigation into his father's death. Crucial questions remain unanswered. As already noted, the European Court of Human Rights did not itself decide whether Gervaise McKerr had been killed by the use of unnecessary or disproportionate force. Nor did the court decide whether Gervaise McKerr had been the victim of a shoot-to-kill policy operated by some members of the Royal Ulster Constabulary.**

An overriding common law right?

28. … Mr Treacy … submitted that the right to an effective official

investigation is as much a feature of the common law as it is of the European Convention… He relied heavily upon an observation made by Lord Bingham of Cornhill in R (Amin) v Secretary of State for the Home Department [2003] 3 WLR 1169, 1185, para 30:

> 'A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it.'

29. [no challenge to lawfulness of inquest]

30. [ditto]

31. Instead, counsel propounded a separate overriding common law right corresponding to the procedural right implicit in article 2 of the Convention…

32. **I have grave reservations about the appropriateness of the common law now fashioning a free standing positive obligation of this far reaching character.** Such a development would be far removed from the normal way the common law proceeds. But I need not pursue this wider question. The submission fails for more straightforward, orthodox reasons. **The effect of counsel's submission, if accepted, would be that the court would create an overriding common law obligation on the state, corresponding to article 2 of the Convention, in an area of the law for which Parliament has long legislated. The courts have always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. Rightly so, because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament.** R v **Lyons** [2002] UKHL 44, [2003] 1 AC 976 is a recent instance where the House rejected a submission having this effect.

33. **The argument in the present case suffers from the same flaw. The suggested new common law right is sought as a means of supplementing, or overriding, the statutory provisions relating to the holding of coroners' inquests. That is not an appropriate role for the common law.**

34. **This view is confirmed by another feature of the case. As already emphasised, by enacting the Human Rights Act 1998 Parliament created domestic law rights corresponding to rights arising under the Convention. When doing so Parliament chose not to give the legislation retroactive effect.** In relation to article 2 the intention of Parliament, as interpreted above, was not to create an investigative right in respect of deaths occurring before the Act came into force. The common law right urged on behalf of Mr McKerr would accord ill with this legislative intention. **The effect of the propounded right would be to impose positive human rights obligations on the state as a matter of domestic law in advance of the date on which a corresponding positive obligation arose under the Human Rights Act.**

35. These considerations point ineluctably to the conclusion that the suggested common law right cannot properly be fashioned by the courts. **I would allow this appeal and dismiss these proceedings.**

LORD STEYN

My Lords,

36. **The deliberate killing of individuals under suspicion of subversive activities by agents of the state is something that one associates with lawless totalitarian regimes. That is not to say that in liberal democracies such events cannot occur. The difference between totalitarian states and democracies lie in their response to a serious allegation that such targeted killings took place. It would be antithetical to the nature of a totalitarian state to permit such killings to be investigated. On the other hand, in modern times liberal democracies have progressively become ready to undertake investigations in such cases.** In the domain of the European Convention on Human Rights Article 2 spells out a fundamental right to life, and by the jurisprudence of the European Court of Human Rights, a fundamental right of the family of a person killed by agents of the state to demand that the state must promptly and effectively investigate the circumstances in which the death occurred.

37. In a period of about a month between November and December 1982, in three separate incidents, six men were shot and killed by police officers of a special mobile support unit of the Royal Ulster Constabulary. The killings took place in Armagh. None of the men killed were armed. One man was shot in the back. There were two trials but none of the police officers were convicted. The present case relates to Gervaise McKerr who was shot and killed, with others, on 11 November 1982. A criminal trial of three police officers resulted in their acquittal. **Gervaise McKerr's family wanted a proper and effective inquest into the circumstances of his death. The government strongly resisted an investigation.**

38. [EcrtHR finding]

39. [concerns of ECrtHR]

40. [outcome of Council of Ministers not yet known]

41. [Northern Ireland CA decision]

42. **Mr McKerr's case is crucially dependent on the applicability of section 6(1) of the Human Rights Act 1998.**

43. **On the facts of the present case, and because Mr McKerr has received compensation, the Government argues that he lacks the standing of being a victim. On this simple ground it is said that the door of the court is closed to him. In my view this argument is wrong. But for the receipt of compensation Mr McKerr was unquestionably a victim. After all, he is a son questioning why his father was killed by agents of the state. The E.Ct.H.R. made the award of compensation on the basis that, due to the violation of the procedural obligation, the son "suffered feelings of frustration, distress and anxiety**": para 181. In other words, the failure to carry out an investigation promptly and effectively caused the son mental suffering and for that an award of compensation was made. The procedural obligation remains unfulfilled. **The state has never conducted a proper investigation into the death of Mr McKerr's father. The compensation was plainly not intended by the E.Ct.H.R. to be the price**

which, if paid, relieved the Government of its unfulfilled procedural obligation even in circumstances where such an obligation was still capable of being fulfilled. Nothing in the judgment of the E.Ct.H.R. supports such an implausible idea. I would reject this argument.

44. It is now necessary to turn to the principal issues. They are formulated in the Agreed Statement of Facts and Issues as follows:

> "(1) … has the Secretary of State acted or failed to act on or after 2 October 2000 in a way which is incompatible with the Respondent's Article 2 Convention rights contrary to Section 6(1) of the Human Rights Act 1998 (the retrospectivity issue)?"
>
> "(2) Does the common law now impose an obligation upon the United Kingdom Government to hold an effective official investigation into the circumstances of the Respondent's father's death irrespective of the Human Rights Act 1998 (the common law issue)?"

Before I consider these legal issues it is necessary to consider a separate and anterior point which, if meritorious, makes it unnecessary to consider these important points of law.

45. On behalf of the Government **the Attorney-General placed before the House in written and oral submissions an argument that an effective enquiry is as a matter of fact no longer possible.** He referred the House to the decision of the E.Ct.H.R. in **Finucane** v United Kingdom (2003) 37 EHRR 29, and in particular to paragraph 89 of the decision of the court which reads as follows:

> "As regards the applicant's views concerning provision of an effective investigation, the Court has not previously given any indication that a Government should, as a response to such a finding of a breach of Article 2, hold a fresh investigation into the death concerned and has on occasion expressly declined to do so. Nor does it consider it appropriate to do so in the present case. It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or by way of providing transparency and accountability to the wider public. The lapse of time, the effect on evidence and the availability of witnesses, may inevitably render such an investigation an unsatisfactory or inconclusive exercise, which fails to establish important facts or put to rest doubts and suspicions. Even in disappearance cases, where it might be argued that more is at stake since the relatives suffer from the ongoing uncertainty about the exact fate of the victim or the location of the body, the Court has refused to issue any declaration that a new investigation should be launched. It rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may practicably be required by way of compliance in each case."

The Attorney-General submitted that in this case an effective enquiry is no longer possible. He **submitted that there cannot be a continuing duty to do something when it is impossible to do it. If this premise is right, I would accept that it would be the end of the matter under domestic law.** The domestic court, in this case the House of Lords, would not make an order designed to ensure that a plainly useless enquiry is embarked on. This would be a sufficient basis for allowing the appeal of the

Government. The question is whether this submission is right. It having been advanced I must deal with it.

46. **One would have expected an affidavit from the state explaining why an investigation is impossible. To such an affidavit I would have paid the closest attention. There is no affidavit. The strategy has been to steer clear of the facts. The observations of the Attorney-General that an enquiry is no longer possible, unsupported by evidence, have no more weight before the House than that of any other advocate or litigant in this case who is parti pris. In any event, counsel for Mr McKerr pointed out that the fruits of police investigations are still in existence; the transcripts of the criminal trials are available; and there is available the Stalker/Sampson report consisting of 3609 pages in twenty separate volumes including one album of maps and photographs. If an inquest were to be held, it would be up to the coroner to read the latter report and consider whether it should be put in evidence. So far neither the coroner in Northern Ireland nor any judge considering the matter has read the report. In Northern Ireland judicial review proceedings it was held that the report is irrelevant. How one can say, in advance of studying it, that it is not relevant I do not understand. The E.Ct.H.R. was clearly sceptical. So am I.**

47. A subtext of the Attorney General's submission was the suggestion that there are legal impediments to holding an enquiry. So far as the Attorney-General said that witnesses would not be compellable, this problem has been removed by legislation: Coroners (Practice and Procedure) (Amendment Rules (Northern Ireland) 2002. **In the domestic legal system there is also no impediment to making an order that the inquest should be re-opened**: Leckey and Greer, Coroners' Law and Practice in Northern Ireland, 1998, 15-02; In re McCaughey and Another (Unreported) 20 January 2004, per Weatherup J., N.I.

48. **I am not persuaded that on the basis of materials available an effective investigation of sensible scope is impossible.**

49. The critical question in this case is, however, whether the court has jurisdiction to make an order designed to lead to the investigation of a death which occurred before the 1998 Act came into force.

50. The retrospectivity issue now arises. Mr McKerr's case is founded on section 6 of the 1998 Act. Leaving aside proceedings taken at the instigation of a public authority, which are not under consideration, it is now settled law that section 6 is not retrospective: section 22(4) of the 1998 Act; R v Lambert [2002] 2 AC 545; R v Kansal (No. 2) [2002] 2 AC 69; Wilson v First County Trust Ltd (No. 2) [2003] 3 WLR 568 (HL). Mr McKerr's father was killed in 1982. The 1998 Act came into force on 2 October 2000. **The Court of Appeal held that there is a continuing breach of Article 2 which requires to be addressed by the Government: para 13. In my view the Attorney-General has demonstrated that this reasoning cannot be sustained. The Government may have been in breach of its obligations under international law before 2 October 2000 to set up a prompt and effective investigation. But those treaty obligations created no rights under domestic law, not even after the right to petition to Strasbourg was**

created by the United Kingdom Government in 1966. The very purpose of the 1998 Act was "to bring home rights" which were previously justiciable only in Strasbourg: The Government White Paper, October 1997 (Cm 3782). That appears, in any event, to be the consequence of the rule enunciated by the House of Lords in the International Tin Council case that an unincorporated treaty can create no rights or obligations in domestic law: J. H. Rayner (Mincing Lane) Limited v Department of Trade and Industry [1990] 2 AC 418. As Lord Hoffmann has pointed out this rule has been affirmed by the House in R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696 and in R v Lyons [2003] 1 AC 976, and in particular in the leading judgment of Lord Hoffmann in the latter case: para 27. The later decisions rest, however, on the pivot of the International Tin Council decision.

51. Since the **International Tin Council** decision is regularly cited in our courts, a brief reference to its reception in subsequent jurisprudential analysis may not be out of place. In doing so I acknowledge that the point has not been the subject of argument. A comprehensive re-examination must await another day. But distinguished commentators have criticised what has been called the narrowness of the decision in the House of Lords: see the criticism of Sir Robert Jennings in his 1989 F.A. Mann Lecture ((1990) 39 ICLQ 513, at 524-526); and of Dame Rosalyn Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law", in Developing Human Rights Jurisprudence, 1993, Vol. 5, 16-23. The latter writer observed (at 20):

> " … international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract, but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international instrument, partly because relatively 'new' rights may also be included, and partly because the treaty may involve procedural undertaking for the States Parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such - and even were these rights not already secure through a separate domestic historic provenance - they would be part of the common law by virtue of being rules of general international law."

There is also growing support for the view that human rights treaties enjoy a special status: Murray Hunt, Using Human Rights Law in English Courts, 1998, pp 26-28. Commenting on Lewis v Attorney General of Jamaica [2001] 2 AC 50 Mr Justice Collins commented that "it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases": Foreign Relations and the Judiciary 2002, 51 ICLQ 485, at 497. That is not to say that the actual decision in the International Tin Council case was wrong. On the contrary, the critics would accept the principled analysis of Kerr LJ in the Court of Appeal that the issue of the liability of member states under international law

is justiciable in the national court, and that under international law the member states were not liable for the debts of the international organisation: see Mr Justice Lawrence Collins, op cit, at 497.

52. The rationale of the dualist theory, which underpins the International Tin Council case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. **A critical re-examination of this branch of the law may become necessary in the future.**

53. That brings me to the **common law issue**. In a careful and helpful argument Mr Treacy Q.C. invited the House to hold that the common law should be developed to recognise a substantive right to life, coupled with a procedural right co-extensive with that enunciated in 1995 in McCann. He pointed out that, unlike cases such as Lyons where there was what he called a legislative "block" in play, there is none in the present case. This argument has considerable force. The fact that there is no authority for such a development is not in itself fatal. In R v Chief Constable R.U.C. ex parte Begley [1997] 1 WLR 1475, Lord Browne-Wilkinson, in giving the unanimous opinion of the House, observed (at 1480):

> "It is true that the House has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament."

Before embarking on such a course the House would have to take into account that, by and large, the law regarding inquests has been developed in Northern Ireland by statute: see Leckey and Greer, Coroner's Law and Practice in Northern Ireland, 1998, passim. Moreover, the House would have to confront another difficulty. It must be sound principle for a supreme court to develop the law only when it has been demonstrated that the just disposal of cases compellingly requires it. **Given that the right to life is comprehensively protected under Article 2 of the Convention as incorporated in our law by the 1998 Act, why is there now a need to create a parallel right to life under the common law? Given that the procedural obligation under Article 2 is comprehensively protected under our law, as held by the House of Lords in R (Amin) v Secretary of State of the Home Department [2003] 3 WLR 1169, why is there now a need to create a parallel right under the common law?**

54. At a late stage of the appeal before the House I did wonder whether **customary international law may have a direct role to play in the argument about the development of the common law**… **The point has not been in issue in the present case. It has not been researched, and it was not the subject of adversarial argument. It may have to be considered in a future case. The impact of evolving customary international law on our domestic legal system is a subject of increasing importance.**

55. **I conclude that the common law development has not been made out.**

56. **I would allow the appeal and dismiss the application for judicial review.**

LORD HOFFMANN

My Lords,

57. [background]

58. [ECrtHR application]

59. [ECrtHR findings]

60. [ditto: compensation; Council of Ministers]

61. [JR proceedings]

62. [relevant provisions Human Rights Advisors 1998]

63. [Court of Appeal findings]

64. **In my opinion the reasoning which the Court of Appeal accepted does not sufficiently distinguish between the obligations under international law which the United Kingdom (as a State) accepted by accession to the Convention and the duties under domestic law which were imposed upon public authorities in the United Kingdom by section 6 of the 1998 Act. These obligations belong to different legal systems; they have different sources, are owed by different parties, have different contents and different mechanisms for enforcement.**

65. **It should no longer be necessary to cite authority for the proposition that the Convention, as an international treaty, is not part of English domestic law.** R v Secretary of State for the Home Department, ex parte **Brind** [1991] 1 AC 696 and R v **Lyons** [2003] 1 AC 976 are two instances of its affirmation in your Lordships' House. **That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.**

66. This last point is demonstrated by the provision in section 2(1) that a court determining a question which has arisen in connection with a Convention right must "take into account" any judgment of the Strasbourg court. Under the Convention, the United Kingdom is bound to accept a judgment of the Strasbourg court as binding: Article 46(1). But **a court adjudicating in litigation in the United Kingdom about a domestic "Convention right" is not bound by a decision of the Strasbourg court. It must take it into account.**

67. If one keeps the distinction between international and domestic obligations firmly in mind, the fallacy in the respondent's reasoning becomes apparent. It can be illustrated by reference to a passage in the judgment of Jackson J in R (**Wright**) v Secretary of State for the Home Department [2001] Lloyd's Rep (Med) 478. Mr Wright was a prisoner who died after an asthma attack in 1996. The judge found that the investigation into his death did not comply with articles 2 and 3. He then considered whether this gave rise to any rights enforceable in judicial review

proceedings:

> "The [Home Secretary] came under an obligation pursuant to articles 2 and 3 of the Convention to set up an effective official investigation. [He] never discharged that obligation. [His] breach of that obligation was not actionable in the English courts before 2 October 2000… Can the claimants now claim any remedy pursuant to sections 6, 7 and 8 of the Act for the continuing breach of articles 2 and 3 since 2 October 2000?"

68. After rejecting a floodgates argument, the judge decided that he could. But **the fallacy of the reasoning lies in the notion of a "continuing breach" of articles 2 and 3. The judge was concerned with the rights of the claimants in domestic law. Before 2 October 2000, there could not have been any breach of a human rights provision in domestic law because the Act had not come into force. So there could be no continuing breach.** There may have been a breach of article 2 as a matter of international law and this may have "continued" after 1 October 2000, although, for the reasons given by my noble and learned friend Lord Brown of Eaton-under-Heywood, I think it unlikely. But that is irrelevant to whether the claimants had rights in domestic law, for which there can be no source other than the 1998 Act. **The Act did not transmute international law obligations into domestic ones. It created new domestic human rights.** The simple question is whether as a matter of construction, those rights applied to deaths which occurred before the Act came into force.

69. **Your Lordships' House have decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by article 2 can have had no application to a person who died before the Act came into force. His killing may have been a crime, a tort, a breach of international law but it could not have been a breach of section 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one could have to go back into history and carry out investigations.** In R (Wright) v Secretary of State for the Home Department Jackson J. was prepared to accept the possibility of investigations into breaches of article 2 "during the 50-year period between the UK's accession to the Convention and the coming into force of the [1998 Act]". But that was because he regarded an international law right under the Convention as a necessary (and sufficient) springboard for a domestic claim on the basis of a "continuing breach". In my opinion, however, the international law obligation is irrelevant. Either the Act applies to deaths before 2 October 2000 or it does not. If it does, there is no reason why the date of accession to the Convention should matter. It would in principle be necessary to investigate the deaths by state action of the Princes in the Tower.

70. I therefore agree with the opinion of Silber J in R (Khan) v Secretary of State for Health [2003] EWHC 1414 (Admin) that **the duty to investigate under article 2 did not arise in domestic law in respect of deaths before 2 October 2002**. In the Court of Appeal in that case ([2003] EWCA Civ 1129), Brooke LJ, giving the judgment of the Court, disagreed. He said "we do not believe the court at Strasbourg would look at the matter

in this way." I daresay it would not. But that is because the court would be concerned with the international obligations of the United Kingdom and not with the extent to which the 1998 Act was retrospective.

71. Mr Treacy QC, who appeared for the respondent, said that courts could deal with applications for investigations into past deaths in a pragmatic way. If an inquiry would no longer serve any purpose, they would refuse one. That was a question of remedy rather than the existence of the right. Likewise in the Khan case, Brooke LJ said "If this decision causes practical difficulties in other cases, the solution to those difficulties will have to be worked out on a case by case basis." I do not think it appropriate for human rights to be reduced to a matter of broad judicial discretion in this way. **In my opinion Parliament intended section 6 of the 1998 Act to be enforced, but enforced only in respect of breaches occurring after it came into force.**

72. Mr Treacy submitted in the alternative that, independently of the 1998 Act, the common law had created a right to an investigation which made it unlawful for the Secretary of State to refuse to order one. In my opinion this is an impossible contention. It is true that in R (Amin) v Secretary of State for the Home Department [2003] 3 WLR 1169 Lord Bingham of Cornhill said (at p. 1185) that "a profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention." It is perfectly true that the sanctity of life is a value which has directed the development of the common law and the enactment of many statutes which are intended to protect life, provide for the investigation of unnatural deaths and secure the detection and punishment of those who unlawfully kill. A number of statutes concerned with inquests into deaths in England and Wales are mentioned by Lord Bingham in paragraphs 16 and 17 of his judgment and there are similar statutes applicable to Northern Ireland. Some of the grounds upon which the Strasbourg court found that the investigative procedures in Mr McKerr's case did not satisfy article 2 (for example, the rule by which a person suspected of causing the death was not a compellable witness and the limited nature of the verdicts which could be returned by the coroner's jury) were deficiencies in these statutory provisions. But **no successful challenge to the legality of the various investigative procedures (the criminal trial, the police inquiries, the inquest) was made at the time and it is far too late to make such a challenge now.** Nor is any attempt being made to invoke domestic law procedures to quash the decision of the coroner to abandon the inquest or require another to be held.

73. Instead, the respondent, in this part of the argument, asserts a broad common law principle equivalent to article 2 against which the whole of the complex set of rules which governed the earlier investigations can be tested and by which they can be found wanting and be ordered to be rerun under different rules. My Lords, in my opinion there is no such overarching principle and I venture to suggest that **the very notion of such a principle, capable of overriding detailed statutory and common law rules, is alien to the traditions of the common law. The common law develops from case to case in harmony with statute. Its principles are**

generalisations from detailed rules, not abstract propositions from which those rules are deduced. Still less does it provide a solvent for any difficulties which may exist in the rules enacted by Parliament. It is in this respect quite different from the general statements which have now been enacted by the 1998 Act and to which the House gave effect in R (Amin) v Secretary of State for the Home Department [2003] 3 WLR 1169.

74. **I would allow the appeal and dismiss the application for judicial review.**

LORD RODGER OF EARLSFERRY

My Lords,

75. My Lords, **I too would allow the appeal, for the reasons given by my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Brown of Eaton-under-Heywood.** I merely wish to add a short comment on the application of the Human Rights Act 1998 ("the Act") in relation to the death of Gervaise McKerr.

76. Ever since the European Convention on Human Rights and Fundamental Freedoms came into effect in international law, the United Kingdom has been bound by its terms. The position under international law did not change in any way on 2 October 2000: that was a significant day in terms of the domestic legal systems of the United Kingdom, but not in terms of international law. Both before and after that date, the obligation on the United Kingdom under article 1 of the Convention was to secure to everyone within its jurisdiction the rights and freedoms defined in Section I of the Convention. Similarly, both before and after that date, the United Kingdom aimed to secure the enjoyment of those rights and freedoms by means of a raft of common law and statutory provisions in its domestic law. If the rights and remedies available in our domestic law proved to be insufficient for this purpose in any given case, then the European Court of Human Rights would find that the United Kingdom had failed to secure the right or freedom and so was in violation of its international law obligation under the Convention. The only difference that the commencement of the Act made - and it was, of course, a significant difference - was to increase the range of provisions available in our domestic law to ensure that people within the jurisdiction enjoyed those rights and freedoms. On the international plane this meant that the United Kingdom should be better placed to fulfil its obligation under article 1 of the Convention.

77. Over the years, Parliament has passed many Acts, and public authorities have taken many steps, to secure that, under our domestic law, people should enjoy the rights and freedoms guaranteed by the Convention. The legislation dealt with particular situations, whether or not brought to light by a ruling from Strasbourg. In 1998 Parliament adopted a more elegant and comprehensive solution. The Act reproduces as rights in our domestic law the rights that are to be found in certain specified articles in the Convention and in two of the Protocols: section 1(1) - (3). It then makes it unlawful for public authorities to act or to fail to act in a way which is incompatible with those rights: section 6(1) and (6). Those affected by a breach can rely on these rights; courts and tribunals can

grant the relief, remedy or order that they consider just and appropriate if a public authority is found to have acted unlawfully by violating one of them: sections 7 and 8. In any given situation, therefore, a person may rely not only on all the pre-existing rights and remedies afforded by the common law and statute, but also on the relevant new domestic rights set out in schedule 1 to the Act. And, correspondingly, the courts can grant not only the remedies that would have been available to give effect to the pre-existing common law and statutory rights, but also the just and appropriate remedy to give effect to the relevant rights under the Act.

78. In the present case the respondent relies on his rights under the domestic law of Northern Ireland. In particular, he says that, by reason of the Convention right under article 2 as set out in schedule 1 to the Act ("article 2 Convention right"), he has the right to a prompt and effective investigation of his father's death. By refusing to carry out such an investigation, he says, the Secretary of State has acted, and continues to act, incompatibly with that right and so unlawfully in terms of section 6(1).

79. The respondent's father, Gervaise McKerr, was shot by an RUC officer or officers in 1982. Your Lordships' House has established that, subject to section 22(4), which does not apply in the present case, **the Act does not have retroactive effect. So none of its provisions applies to the position in 1982. This means that, in the domestic law of Northern Ireland, the legal rights and duties of the people involved in the events of 1982 are not altered by the Act. In particular, Gervaise McKerr did not enjoy, and is not now to be regarded as having enjoyed, any article 2 Convention right to life under the Act. It follows that his killing, however it may have come about, is not to be regarded as having been incompatible with that Convention right or as unlawful by reason of section 6(1).**

80. The respondent accepts this, but he fastens on another aspect of article 2. **Where the article applies, it is interpreted as requiring the relevant public authority to carry out an effective official investigation of any death which may have resulted from the use of force by agents of the state**: McCann v United Kingdom (1996) 21 EHRR 97, 163, para 161. This obligation is variously described as procedural or adjectival, but its purpose is to ensure that the lawfulness of the use of force by state agents resulting in death is reviewed. Without such a procedure the guarantee in article 2 would be ineffective. The Secretary of State does not dispute that interpretation of the article 2 Convention right. It follows, of course, that **deaths will have to be investigated even though, as it turns out, the killing was lawful and not in breach of that right. To that extent the right to an investigation can properly be regarded as freestanding.**

81. **What the respondent claims, however, is an article 2 Convention right under the Act to have his father's death investigated even though, as he accepts, the killing did not violate, and is not to be regarded as having violated, any article 2 Convention right under the Act. Such a claim is fatally flawed and must be rejected.**

82. **Like Lord Brown I am doubtful whether, even in international law**

terms, there was by October 2000 any continuing breach of the relatives' right to an effective investigation of Gervaise McKerr's death under article 2 of the Convention. But, even supposing that there was, that continuing breach of an international obligation was not turned into a continuing breach of an article 2 Convention right in domestic law when the Act came into force. Any breach that there was remained a breach in international law and nothing more. The respondent relies on the Act as part of the domestic law of Northern Ireland. Under the Act the right to an investigation, deriving from an article 2 Convention right, presupposes that the killing could have been in violation of that selfsame Convention right. So, when the respondent's father was killed in 1982, his relatives had no right to an investigation under the Act. Moreover, since the Act is not retroactive, they are not now to be regarded as having had such a right in 1982 or at any time after that. Conversely, the Secretary of State is not to be regarded as having been in breach, or continuing breach, of such a right either in 1982 or at any time after that.

83. What the respondent is really saying, therefore, is that, when the Act came into force, it conferred on him a right under article 2 to have his father's death investigated even though his killing was not, and is not to be regarded as having been, in breach of any article 2 Convention right under the Act. Therefore, the respondent is not asking the courts to apply the Act according to its terms, but to amend them so as to fit this case. That cannot be done. If Parliament had intended the rights under article 2 to be split up, with the Act applying differently to the different aspects, then it would have provided for this expressly. The potential objections are obvious. It would be curious to give a right, under the Act, to an investigation of a killing to which the Act did not apply. If there were to be such a right to an investigation, how far back would it go? Speculation is fruitless: what matters is that Parliament could have made, but did not make, any such transitional provision. **The obvious conclusion is that the right to an investigation under the Act is confined to deaths which, having occurred after the commencement of the Act, may be found to be unlawful under the Act. The respondent seeks to contradict the policy of Parliament.**

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

84. [background]

85. [ditto]

86. [ditto]

87. [difference between the parties]

88. history of JR and appeal]

89. [issue now is retrospection]

90. **The argument essentially comes to this. Under domestic law it only became unlawful for a public authority to act incompatibly with a Convention right on 2 October 2000. Whatever the circumstances of Mr McKerr's death, therefore, Article 2 of the Convention was not engaged by it. On the domestic plane the appellant could not be said to have breached the substantive obligations arising under Article 2. Nor, moreover, could**

he be said to have breached the procedural obligation to hold a sufficient inquiry into the death—an obligation which the ECtHR first found to be implicit in Article 2 in McCann v United Kingdom (1995) 21 EHRR 97 (the Death on the Rock case) and has developed in subsequent caselaw to the point now reached in this very case, McKerr v United Kingdom (2001) 34 EHRR 20 (and the other three Northern Ireland cases determined in parallel with it). **Plainly no Article 2 obligation to investigate McKerr's death could arise under domestic law prior to 2 October 2000. But no more could it arise after that date.** …

91. **The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when Article 2 rights were enforceable under domestic law, i.e. on and after 2 October 2000.**

92. [rejection of Respondent's arguments]

93. **As for Mr Treacy's alternative contention that, irrespective of whether a right to an Article 2 compliant investigation now arises under section 6 of the 1998 Act, a duty to hold such an investigation in any event arises at common law, and indeed has remained unfulfilled ever since Mr McKerr's death, this in my opinion fails both on authority and principle.** By the same token that this House in R v Lyons [2003] 1 AC 976, declined, by reference to a subsequent ECtHR ruling, to hold a pre-1998 Act trial, conducted in accordance with the domestic laws and standards then applicable, unsafe, so too here it would be wrong for your Lordships to condemn as contrary to the common law a series of procedures long since properly concluded in accordance with well-established domestic laws and never challenged save by reference to a substantially later ECHR decision. Nor would it be right to impute to the common law a requirement for the same form of investigation of fatalities as the ECtHR has now found implicit in Article 2. Such a fiction would be unwarranted however profound one's desire to interpret domestic law down the years consistently with our international obligations.

94. I return, as promised, to indicate why for my part I would question Mr Treacy's assertion that the ECtHR's judgment should be understood as a finding that the United Kingdom remains under an international law obligation to hold a further investigation into Mr McKerr's death. Immaterial though, for reasons already explained, the correctness of this assertion is to the determination of the appeal, it would be unfortunate if the impression were gained that it was necessarily accepted by your Lordships. The following points should be made. First, that the ECtHR, by reference to a number of identified shortcomings in the various investigative processes long since concluded in this case, found "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." (para 161). **There is nothing in the judgment to suggest that this violation is to be regarded as a continuing one.**

95. **Secondly, it is plain that, 20 years on from Mr McKerr's death, no fresh inquiry could possibly comply fully with the now established requirements of an Article 2 investigation.** Perhaps most obviously, the

opportunity for a prompt independent investigation has been irretrievably lost; this element of a compliant inquiry would necessarily be missing.

96. Thirdly, it has now been left by the Court to the Committee of Ministers to supervise the execution of its judgment pursuant to Article 46 (2) of the Convention. That Committee may or may not sanction the United Kingdom's present proposal, which is to hold no further inquiry into Mr McKerr's death. But even if it does not, such further inquiry as may be stipulated could only be by way of partial redress or remedy for past failures. **Merely because the Committee of Ministers may judge some further inquiry "effective" does not mean that it would be compliant.**

97. In short, the most that is achievable now on the international plane is further redress for past non-compliance. It accordingly follows that, even were the domestic court, despite the non-retrospectivity of the 1998 Act, able to entertain Article 2 complaints in respect of pre-October 2000 deaths, the respondent would in any event be unable to establish that an Article 2 procedural obligation in respect of Mr McKerr's death arose after October 2000. **The complaint would not be of a proposed post-October 2000 unlawful act (the refusal to comply with the implied procedural obligation to investigate) but rather of a pre-October 2000 breach and manifestly the respondent could have no right in domestic law to complain about that.**

98. **This conclusion, however, as I have already acknowledged, is not essential to the disposal of the present appeal. It is for the reasons earlier given, which accord with those given in the speech of my noble and learned friend Lord Hoffmann, that I too would allow the appeal and dismiss the respondent's application for judicial review.**