**IRELAND V UNITED KINGDOM**

**AT STRASBOURG**

**20 September 2021**

*Article 3*

1. Ireland v United Kingdom, ECtHR, 18 January 1978 is one of the small number of decided inter-state cases at Strasbourg. It is now referred to as the ‘hooded men’ case.[[1]](#footnote-1) It arose with detention without trial in NI in August 1971, when the army used five interrogation techniques on 14 selected republicans.
2. Strasbourg found – by 16 votes to one (the UK) – that there had been a violation of article 3: crucially, it opted for ‘inhuman and degrading treatment’. By 13 votes to 4, the ECtHR held – disagreeing with a unanimous commission finding - that this had not amounted to ‘torture’.
3. The judgment as reported takes 88 of the 129 pages. Judge O’Donoghue (as one of four), for the applicant state, dissented at pp 93-99, as did Judge Fitzmaurice (the minority of one), for the respondent state, at pp 100-122; Sir Gerald, however, conceded facts at Palace barracks in autumn 1971 amounting to inhuman or degrading treatment.

*Lawfare*

1. The Pat Finucane centre unearthed papers in the national archives in Kew in 2013, essentially the UK’s case papers from 1971-77 (release had begun in April 2003). These included: a memo from Merlyn Rees of 31 March 1977 to James Callaghan, where he stated that Lord Carrington, as defence secretary, had decided to use torture methods (something Merlyn Rees later tried to qualify).[[2]](#footnote-2)
2. On 4 June 2014, RTE television ran *The Torture Files*. The Pat Finucane centre secured a bigger than normal, and southern, audience for its brand of lawfare. The Irish government could not ignore the national broadcaster, and was forced to act.

*Back to Strasbourg*

1. On 4 December 2014, the Irish government sought to reopen the 1978 case on the ground of documents not having been disclosed properly. It wanted the judgment changed, or revised. The word privileged (referring to legal professional privilege) – coming from the UK government - appears twice in the subsequent judgment (paras 57 & 59).
2. The principle of legal certainty militates against re-opening very old cases, not least when factual disputes continue: what did the UK decide in 1971 in London and/or Belfast?; and were ministers and officials entitled to discuss the case privately with legal advisors? All justice systems embody privilege provisions.
3. Strasbourg decided eventually (on 20 March 2018), by 6 votes to one, to dismiss the request for revision of the original judgment.[[3]](#footnote-3) The judgment runs to 47 of the 79 pages. The dissenting opinion of Judge O’Leary, from ‘Ireland’, is at pp 51 to 79.[[4]](#footnote-4) She concluded: **‘In 2018, a majority of the chamber has decided to ignore the bigger picture now available to it on the grounds that the principle of legal certainty must prevail. However, it is difficult to see in what way legal certainty was endangered in a case where a violation of Article 3 had in any event been found, where the respondent State did not contest the Commission finding of torture and where the revision request sought not to call into question the legal principles established but rather their application in the circumstances, now properly demonstrated, of the original case.’** (para 76) This meant: what was called inhuman or degrading treatment in 1978; could, in 2018, be called torture - on the basis of the way UK ministers, officials and lawyers had allegedly discussed the case in private decades ago.

*The NI Courts*

1. On 17 October 2014, the PSNI – having sent a researcher (Ian Clarke) to Kew – decided not to investigate further allegations of torture from August and October 1971.
2. Francis McGuigan, one of the hooded men, and the daughter of another (Sean McKenna) applied for judicial review. They wanted UK ministers prosecuted for torture (Lord Carrington lived until 9 July 2018). The case was dismissed by Maguire J in the high court on 27 October 2017 – that is five months before the Strasbourg decision - ; however, he quashed the decision not to continue trying to prosecute.
3. The applicants appealed to the court of appeal. On 20 September 2019, Morgan LCJ and Stephens LJ (with Sir Donnell Deeny dissenting powerfully) allowed the appeal. The court of appeal held: one, a fresh PSNI investigation would not be likely ‘to engender public confidence’; but two, ‘we recognise, however, that the passage of time may considerably hamper the progress of any such investigations.’
4. Many issues arise in this case. Here, I am concerned only about the effect of the Strasbourg decision on domestic UK jurisprudence. (I believe the court of appeal – which followed Lord Kerr in Finucane - is wrong on the Human Rights Act 1998 and deaths before 2 October 2000 (paras 73-97); one may only access convention rights in domestic law through that statute not direct from Strasbourg.)

*Strasbourg and the UK*

1. Strasbourg, as noted, had declined to revise the 1978 judgment in 2018. There was no attempted appeal by the Irish government, to the grand chamber. Judge O’Leary, however, was effusively treated by the court of appeal majority in NI (paras 57-61).
2. The court of appeal majority found effectively – on the basis that the convention was a living instrument (and the UK had incorporated the 1984 torture convention in 1988) – that the two applicants had been tortured in 1971 (paras 73-76 & 116(i)).
3. That was the view of the court of appeal majority on 20 September 2019. On 9 July 2021, the supreme court – in R (AB) v secretary of state for justice and equality [2021] UKSC 28 – decided that domestic law still remained separate from (albeit in a relationship with) Strasbourg jurisprudence: **‘that the intended aim of the Human Rights Act 1998, which was to enable the rights and remedies available in the European Court of Human Rights to be asserted and enforced by the domestic courts, was at risk of being undermined if domestic courts took the protection of Convention rights further than they could be fully confident that the European court would go…it was not the function of domestic courts to establish new principles of Convention law’ (**headnote).
4. The supreme court so spoke on 9 July 2021. However, the common law is inherently retrospective. Therefore, the court of appeal majority was wrong on 20 September 2019. It did what the supreme court later criticized.
5. The conclusion is clear: the PSNI is under no legal obligation to conduct an article 2 (or article 3) investigation of UK and/or NI ministers (none of whom is alive!) for the crime of torture in 1971: such a prosecution would be unlawful, in any event, under article 7.
6. If the two applicants were to seek to promote the hooded men case further, then any respondent could rely henceforth on R (AB) v secretary of state for justice and equality.

The Deeny dissent.

1. Sir Donnell disagreed profoundly with his two judicial colleagues in his separate judgment, taking a view on legacy of non justiciability: **‘It seems to me that the police have much more pressing duties of crime prevention and law enforcement than to conduct historical research into the matters of which the appellants complain.**’ (para 31)
2. On the facts, there was no secretary of state left in the firing line: **‘All other Ministers involved in this seem to have passed on and Lord Carrington has passed since since the hearing before Maguire J.’** (para 31)
3. On the law (the *ratio decidendi* of the appeal), he disputed that the chief constable – replying orally to Gerry Kelly MLA at the policing board on 3 July 2014 – had given a legitimate expectation to the applicants when he had answered robotically: ‘The PSNI will assess any allegation or emerging evidence of criminal behaviour, from whatever quarter, with a view to substantiating such an allegation and identifying sufficient evidence to justify a prosecution and bring people to court.’ (para 24)
4. That was the thin legal basis (not even pleaded nor found by Maguire J) upon which the court of appeal majority allowed the appeal, to little apparent practical effect.
5. On the lurking question – torture – he wrote: **‘I cannot agree with them that it is appropriate for this Court to make a finding that the treatment to which Mr McGuigan and the late Mr McKenna were subject is to be re-labelled at this time as torture forty eight years after the events.’** (para 5) This answers to a considerable extent any point that the majority did not alter a finding of inhuman or degrading treatment to one of torture.
6. Given, as Sir Donnell argued, Maguire J had not made that finding, then, applying the law on appeals (judicial review not remaking the decision), his decision should be left unchallenged: **DB v Chief Constable [2017] UKSC 7**.
7. Alluding to Judge O’Leary but not naming her, he wrote: **‘The principal basis relied upon by the applicants is the memorandum from Mr Merlyn Rees in 1977 saying that torture had been authorised by Lord Carrington. This is scarcely worthy of the name of evidence at all. Mr Rees was in opposition in 1971 at the time of internment. He became Secretary of State for Northern Ireland in 1974…. In 1977 he is therefore expressing an opinion about something done by his political opponent, Lord Carrington, in another government department, as the NIO did not then exist, six years previously…’.** (para 13)

*The Next Step*

1. Francis McGuigan appealed to the supreme court. The PSNI and the department of justice cross-appealed. Mary McKenna did not appeal, but the PSNI and department of justice cross-appealed.
2. The appeals were heard by the supreme court, on 14-16 June 2021 (along with secretary of state, PSNI and department of justice cross-appeals in another successful article 2 case brought by Margaret McQuillan).
3. Crown counsel revisited the jurisprudence on articles 2 and 3, but was inclined to caution. The judgment is awaited this autumn. It will then be seen whether the supreme court puts up an obstacle to NI lawfare or not.

Dr Austen Morgan,

33 Bedford Row,

London

WC1R 4JH

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1. Judicial communications office, 20 September 2019: ‘Court Delivers “Hooded Men” Judgment’. [↑](#footnote-ref-1)
2. The better historical view is: Lord Carrington and Reginald Maudling, in the prime minister’s absence, ‘acquiesced’ in army advice to the NI government, especially Brian Faulkner, regarding the five techniques. [↑](#footnote-ref-2)
3. The Court expresses doubts whether the documents submitted by the applicant Government in support of the first ground of revision contain sufficient prima facie evidence of the alleged new fact and considers that the documents submitted in support of the second ground did not demonstrate facts which were “unknown” to the Court when it delivered the original judgment.’ (para 136) [↑](#footnote-ref-3)
4. With no publicized experience as a practitioner, but rather as an academic and CJEU official. [↑](#footnote-ref-4)