Three years of the HRA in the North

The Hon. Mr. Justice Brian Kerr, The High Court, Northern Ireland

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Blackhall Place, Dublin

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18 October 2003

1. *Human Rights Act Monitoring: October 2000 to June 2003.* 330 cases monitored: - CA - 4.5%; QB (non JR) – 4.5%; Ch.D and Bankruptcy – 2.5%; QB (JR) – 50%; Bails – 2%; Crown Court – 9%; Family Proceedings Court – 3%; Magistrates' Court (Criminal) – 6%; Office of Social Security and Child Support Commissioners – 18.5%.

2. *The distribution of the cases among the various articles of the Convention.* Article 2 – 8%; Article 3 – 3%; Article 5 – 7%; Article 6 – 45%; Article 7 – 2%; Article 8 – 20%; Article 9 – 2%; Article 10 – 2%; Article 14 – 4%; Article 1 of First Protocol – 5%; Articles 2 & 3 of First Protocol – 2%

3. Article 2: -

   The adjectival rights under article 2

   Jordan v UK [2001] ECHR 24746

   In November 1992, the applicant's son was shot and killed by officers of the RUC while unarmed. In November 1993, the DPP directed no prosecution on the basis of insufficient evidence. In December 1994, the Coroner held a preliminary hearing at which he decided to: (i) protect certain categories of information from disclosure on the grounds of national security; (ii) protect the identity of three military witnesses by withholding their names and screening them from all except the Coroner, the jury and the legal representatives of the interested parties; and (iii) protect the identity of certain RUC officers, including the officer who fired the shots which killed Mr Jordan by withholding their names.

   The applicant asserted that there had been a failure to comply with the procedural requirement under art 2 to provide an effective investigation into the circumstances of his son's death. He submitted in particular that the inquest proceedings were flawed due to the limited

scope of the enquiry, the lack of legal aid for relatives, the lack of advance disclosure to the family of inquest statements and the lack of compellability as a witness of the police officer who fired the shots.

Held: (1) Article 2, which safeguarded the right to life and set out the circumstances when deprivation of life may have been justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation was permitted under art 15.

(2) The obligation to protect the right to life under art 2 of the Convention, read in conjunction with the state's general duty under art 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', required, by implication, that there was to be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation was 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. The form of such an investigation could vary. However, whatever mode was employed, the authorities were to act of their own motion, once the matter has come to their attention. For an investigation into alleged unlawful killing by state agents to have been effective, it was generally regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. The investigation was also to be effective in the sense that it was capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.

Re Jordan [2002] NI 151

The applicant sought judicial review of the alleged failure of the Lord Chancellor to introduce the necessary legislation to ensure that the inquest system in Northern Ireland complied with art 2 of the convention, arguing (i) that the Lord Chancellor had been guilty of inordinate delay in introducing an amendment to r 9(2) and (ii) that in order to comply with art 2 of the convention, the inquest system in Northern Ireland required that the jury have the opportunity to examine the lawfulness of the force that had caused the death of the deceased, and that unless the jury was permitted to consider a verdict of unlawful killing, such an assessment could not take place.

Held: - (1) The abolition of the immunity from compellability of witnesses such as Sergeant A was imminent and should be in place

before the inquest was held, and in those circumstances it would be inappropriate to make a declaration.

(2) If no other form of investigation was proposed, an inquest would normally be required to inquire into the facts that were relevant to the lawfulness of the force that caused the death.

(3) The deficiencies identified by the ECtHR related to the effect of the investigation rather than to the nature of the inquiry itself. What was vital was that the inquest should be able to play its part in the identification of criminal offences and to contribute to the prosecution of the offenders by bringing the offences to the attention of those responsible for directing prosecutions. There was currently lacking in Northern Ireland any direct nexus between the investigation carried out by a properly conducted inquest, meaning one that would investigate the facts that were relevant to the lawfulness of the force that caused the death of the deceased, and the decision to be taken by the DPP in relation to the prosecution of criminal offences identified in the course of the inquest.

Re Jordan [2003] NIQB 1

The applicant sought judicial review of the decision of the DPP refusing to give reasons for his decision not to prosecute the police officer who caused the death his son. On 10 September 2001 the applicant's solicitors had again written to the DPP and referred to the decision of ECtHR in *Jordan v UK* and asked to be provided with information relating to the decisions not to prosecute the police officer who killed Pearse Jordan.

It was submitted for the respondent that the court should not follow the decision in *Jordan v UK* because it had failed to give sufficient weight to the need to keep confidential the contents of police reports on which such decisions were based and because of its failure to have regard to relevant domestic authorities.

It was held that but for the question of retrospectivity there was no reason not to follow the decision of the European Court. In particular, the fact that the inquest had not been completed was not a reason that the DPP should be absolved of the need to give reasons. The possibility that the inquest may, at some unspecified future time, supply an answer to the unresolved questions surrounding the death of Pearse Jordan cannot relieve the DPP of his duty to explain the reasons for deciding not to prosecute if that will "reassure a concerned public that the rule of law had been respected".

But the decision of the DPP not to give reasons was taken before the coming into force of HRA and since there was binding authority that the Act was prospective and not retrospective in effect the application for judicial review must be dismissed.

4. Article 3

Effect on a witness of being required to give evidence

R v Stobie [2002] NI 20

M applied to the court to set aside or declare ineffective a witness summons served upon him by the Director of Public Prosecutions (the DPP) to give evidence at the trial of the defendant on charges of aiding and abetting murder and possession of firearms. His application was made on the ground of the risk of serious illness which could result from the stress of his having to give evidence.

It was held that M could not be said to have been subjected to 'inhuman' treatment if the DPP obtained a summons from the court and his counsel called him as a witness. For the DPP to call M to give evidence was not to subject him to 'treatment', even assuming that the result could be classified as 'inhuman'. Furthermore, the type and degree of the consequences to M, taking into account the object of calling him to give evidence and the nature of the DPP's act in seeking to call him to give evidence, would not constitute subjection to inhuman treatment and would therefore not be a breach of art 3 of the convention.

The potential of solitary confinement to constitute 'inhuman and degrading treatment'

Re Conlon [2002] NIJB 35

The applicant had been kept in effective solitary confinement for 18 months. He claimed that this constituted a breach of article 3.

It was held that "the prison authorities did not intend to humiliate or debase the appellant, any more than they did in *Application 33394/96 Price v United Kingdom* [2001] ECHR 33394/96, 11 BHRC 401, ECtHR. This, as the Court observed at para 24 of its judgment in that case, is one of the factors which it will take into account, although the absence of any such purpose cannot conclusively rule out a finding of violation of art 3: cf *Application 28524/95 Peers v* Greece [2001] ECHR 28524/95, 10 BHRC 364."

ECtHR had "not adopted any comprehensive definition of inhuman or degrading treatment. The assessment of the level of severity of treatment required to come within the term is relative, and depends on factors which include the duration of the treatment, its physical or mental effects and the age, vulnerability and state of health of the victim: *Ireland v United Kingdom* (1978) 2 EHRR 25, para 162. The conditions in which a person is held may violate art 3. It has been stated that although solitary confinement does not in itself constitute inhuman or degrading treatment, it is capable in some circumstances of violating art 3, depending on its stringency and duration and the effect on the prisoner: see the decision of the Commission in *Ensslin, Baader and Raspe v Federal Republic of Germany* (1978) 14 DR 64

5. Article 5

The requirement to bring a detained person before a court promptly

Re McKay [2002] NI 307

The applicant was arrested for robbery, a scheduled offence. He was brought before a magistrate's court and applied for bail but the magistrate refused this on the ground that he did not have power to grant bail under the emergency legislation then in force. The applicant sought a declaration that the relevant bail provision was incompatible with article 5 (3) (right to be brought promptly before a judge or other officer authorised by law to exercise judicial power and to have a trial within a reasonable time or to be released pending trial). Alternatively it was argued that the magistrate should be treated as the judge of the court of trial. Section 67 (2) of the Terrorism Act 2000 provides that a person charged with a scheduled offence may only be admitted to bail by a judge of the High Court or Court of Appeal or by the judge of the court of trial on adjourning the trial of a person charged with a scheduled offence.

It was held (1) there is nothing in the text of art 5 nor in the jurisprudence of ECtHR which requires that the court before which an arrested person must be brought should be the same court that has power to grant him bail. He must be brought promptly before a court or an officer authorised to exercise judicial power. He must also have the opportunity to apply for bail. It is not necessarily the case, however, that these two separate and distinct rights require to be vindicated at the same time or in the same forum. Provided that the arrested person is brought promptly before a court that has power to review the lawfulness of his detention and that he has the opportunity to apply without undue delay for release pending his trial, the requirements of art 5 (3) are met.

(2) The magistrate is plainly not the judge of the court of trial. Nor is he, while remanding the defendant, adjourning the trial of a person charged with a scheduled offence. At a remand hearing before a preliminary inquiry the question of whether a trial will ensue has not been decided. The magistrate cannot therefore be said to be adjourning the trial when he remands the applicant.

The restriction on the power of the High Court to grant bail

Re Shaw [2003] unreported

In this case a challenge to the compatibility of section 67 (3) of the Terrorism Act with article 5 was made. Section 67 (3) provides: -

> "(3) A judge may, in his discretion, admit a person to whom this section applies to bail unless satisfied that there are substantial grounds for believing that the person, if released on bail (whether subject to conditions or not), would-
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> (a) fail to surrender to custody,
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> (b) commit an offence while on bail,
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> (c) interfere with a witness,
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> (d) otherwise obstruct or attempt to obstruct the course of justice, whether in relation to himself or another person, or
>
> (e) fail to comply with conditions of release (if any)"

It was argued that the restriction on the judge's power to grant bail constituted a violation of article 5 (3) and (4). It was held, however, that the circumstances in which bail must be refused under section 67 (3) broadly mirror those which ECtHR has recognised as justifying the refusal of bail. While the Strasbourg court has been careful to stipulate that there must be a proper evaluation of those circumstances, such an evaluation must also occur for the purposes of section 67 (3).

6. Article 6

Entitlement to counsel of choice

Re Doherty [2002] NI 11

The applicant applied for judicial review of the decision of a resident magistrate to refuse an application for the adjournment of the hearing of two summonses in which he had been charged with breach of enforcement orders served on him by the Department of the Environment for Northern Ireland. The applicant had made a pre-emptive application for an adjournment as his preferred counsel, M, was on holiday on the date fixed for the hearing. Although the Department did not oppose the application, the magistrate refused the application on the grounds that M's absence did not constitute a valid reason for the adjournment and that the applicant's solicitor had had ample time in which to instruct other counsel. The solicitor was instructed to renew the application at the hearing but it was again refused. The applicant and the solicitor left the court and the applicant was convicted in his absence. On the application, the applicant accepted that the magistrate's decision could not have been challenged by way of judicial review before the incorporation of the European Convention on Human Rights into domestic law by the Human Rights Act 1998, but contended that since the incorporation of the convention, the right to counsel of one's choice was either an absolute one enshrined in art 6 of the convention (right to a fair trial) or a convention right which should be denied only after careful inquiry. He submitted that the magistrate had failed to conduct such an inquiry.

Held – (1) The right to choose one's own counsel should be respected by the courts unless there were substantial reasons for concluding that the interests of justice required otherwise. That right was expressly recognised in the convention authorities and particular regard was to be had to and reliance placed on the express terms of the convention, which defined the rights and freedoms which the contracting parties had undertaken to secure. The right of the defendant to be represented by counsel of his or her choosing was expressly provided by art 6(3)(c) of the convention, and the wish of a defendant to be represented by a particular counsel had therefore to be carefully considered by a court which was asked to adjourn a case in order to allow that wish to be fulfilled.

(2) In order to decide whether the right to be represented by counsel of own choice should be respected or whether that right should yield to greater interests of justice, it was essential to be aware of and to evaluate the reasons why the applicant wished to have M as his counsel. The magistrate had not made any such inquiry; rather, she had concluded that M's being on holiday when the case was originally listed was not a sufficient reason to adjourn the hearing. That was the wrong approach, since some assessment of the reasons for the choice of

M was an indispensable prerequisite to a valid decision that the applicant should be denied his right to counsel of his own choosing. It was unquestionably the case that a defendant might not insist upon counsel of his choice if that involved an unacceptable delay to his trial. Moreover, the availability of suitable alternative counsel when the person chosen could not be present was undoubtedly a factor to be taken into account when deciding whether to accede to an application for an adjournment. The magistrate was correct, therefore, to have had regard to the lack of information about any attempt to engage alternative counsel. Where she fell into error, however, was in her failure to conduct any inquiry into the reasons why the applicant wished to have M represent him. If she had conducted such an inquiry, it was entirely possible that she would properly have concluded that the case should not be adjourned. She might well have decided that there had to have been other counsel available who could have conducted the case adequately and without disadvantage to the applicant. Such a decision, if taken on proper grounds and after a sufficient consideration of the reasons that the applicant wished to have M represent him, would have been beyond challenge. The failure of the magistrate to conduct any inquiry into the reasons that the applicant wished to be represented by M had inevitably deprived her of the opportunity to properly consider whether his right to have counsel of his choosing should be respected.

Re Taggart [2003] NI 108

The applicant was a member of Northern Ireland Police Service. A complaint had been made about his conduct and that of colleagues at the scene of an incident on 29 June 2001. The Police Ombudsman investigated the complaint and her officers wished to interview the applicant and his colleagues simultaneously in order to avoid possible collusion. The applicant's solicitor represented another of the officers and could not be present at both interviews. The applicant challenged the proposal to proceed with the interviews.

It was held that the protection afforded by art 6(3)(c) is part of the complement of safeguards designed to achieve a fair trial. Whether there has been a violation of an art 6 right is not to be determined in satellite litigation challenging the propriety of extra-judicial inquiries but at the criminal trial itself. The right to have a solicitor of one's choice is not an absolute one. The tactic of interviewing all four officers at the same time was a legitimate and reasonable one. If the applicant's art 6(3)(c) rights were engaged, the decision to proceed in the manner proposed was proportionate.

Applying section 3 (the read down provision) of HRA

R v Greenaway [2003] NI 5

The accused was charged with an offence of possession of a firearm in suspicious circumstances contrary to art 23 of the Firearms (Northern Ireland) Order 1981, which provided that a person who had in his possession any firearm or ammunition under such circumstances as gave rise to a reasonable suspicion that he did not have it for a lawful object would, unless he could show that he had it in his possession for a lawful object, be guilty of an offence. He applied for an order staying the case against him on the ground that it would be an abuse of process to require him to answer a charge which imposed a 'persuasive' burden of proof on him. The accused contended that art 23 imposed such a burden of proof on him and submitted that such a burden was contrary to art 6(2) of the European Convention on Human Rights, which provided that everyone charged with a criminal offence should be presumed innocent until proved guilty according to law.

Held - On any traditional method of statutory construction, the reverse onus imposed by art 23 of the 1981 Order had to be regarded as casting a persuasive burden of proof on the accused since it required him to prove, on the balance of probabilities, a fact which was essential to the determination of his guilt or innocence, namely that he had the weapons and ammunition for a lawful object. On the further application of such methods, the burden imposed on the accused amounted to a mandatory presumption of guilt as to an essential element of the offence, since once it was shown that the accused had the items in his possession in circumstances which gave rise to a reasonable suspicion that he did not have them for a lawful object, that presumption could be displaced only by the accused showing that he had the items for a lawful object. Moreover, in the instant case, no reason relating to the general interest of the community had been advanced by the prosecution to justify the modification of the accused's right under art 6(2) of the convention. It followed that, if conventionally construed, art 23 imposed a persuasive burden on a person charged that was disproportionate to the fulfilment of the objective of the statute. On its ordinary meaning, therefore, art 23 was inconsistent with art 6(2) of the convention. However, applying s 3 of the Human Rights Act 1998, it was possible to interpret art 23 of the 1981 order in a way which was compatible with convention rights by holding that it imposed an evidential burden, rather than a persuasive burden, on a defendant. That construction would therefore be adopted. On that construction, art 23 did not conflict with the accused's rights under art 6(2) of the convention and accordingly the application would be dismissed.

7. Article 7
No punishment without law

Re Cummins [2002] NIJB 260

The applicant held a firearm certificate for a shotgun since 1961. On 13 November 2000 he pleaded guilty to 24 charges of indecent assault. These convictions related to incidents that had occurred between 20 and 40 years previously. The applicant was sentenced to concurrent terms of two years' imprisonment suspended for a period of two years in each case. On 8 December 2000 his firearm certificate was revoked under art 22 of the Firearms (Northern Ireland) Order 1981, SI 1981/155. Article 22 (2) of the Order provides: -

> '(2) Subject to paragraph (6), a person who has been sentenced to borstal training, to detention in a young offenders centre, to corrective training for less than three years or to imprisonment for a term of three months or more but less than three years, shall not at any time before the expiration of the period of eight years from the date of his conviction, purchase, acquire or have in his possession a firearm or ammunition.'

It was contended that the effect of the prohibition and the Minister's failure to remove it was to punish the applicant retrospectively and to impose a penalty beyond that imposed by the Crown Court and therefore a violation of article 7 which provides: -

> '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

Held - the revocation of the certificate cannot be characterised as punitive. The purpose—and effect—of the revocation provisions is not

to punish the applicant but to regulate those who may have access to lethal weapons. The fact that those who are subject to revocation suffer a disbenefit does not transform the statutory regime of weapons control into a system of punishment.

8. Article 8

Requiring to sign the register of sex offenders

Re Gallagher [2003] NIQB 26

The applicant was convicted of three offences of indecent assault at Londonderry Crown Court on 23 November 2000. He was sentenced to two years imprisonment on the first count, to nine months on the second count and to another term of nine months on the third count. The sentence on the second count was ordered to be consecutive on the sentence imposed on the first count and the sentence on the third count was ordered to be concurrent with the sentences on the first two counts. The effective total sentence was thirty-three months, therefore.

The Sex Offenders Act 1997 provides that a person convicted of a sexual offence who has been sentenced to a period of thirty months or more shall become subject to the notification provisions contained in the Act for an indefinite period. In effect this means that the applicant is required to notify police within 14 days of his conviction of his name and address and date of birth. If he changes his name or address he must notify police of the change within 14 days of its taking place. As a consequence of recent changes in the law he will also have to notify police of certain travel arrangements that he might undertake.

The applicant sought a declaration that section 1 of the 1997 Act (which is the provision that imposes the notification requirements) was incompatible with the European Convention on Human Rights.

For the applicant it was submitted that the provisions of the Act which required the applicant to comply with the notification requirements were in breach of article 8 of the European Convention on Human Rights. The requirements were automatic and that the trial judge had no discretion to disapply them or to alter the applicable period. The applicant was prevented from arguing that the particular circumstances of his offence were such that the Act ought not to apply to him. The trial judge was likewise prevented from disapplying the notification provisions even where it was clear to him that these were unnecessary or inappropriate. It was suggested that the imposition of a lifetime notification requirement without any possibility of a review at any time could not be regarded as Convention compliant.

The task of deciding whether the measures are proportionate must be approached circumspectly, recognising that Parliament has determined what is required for the protection of the public from sex offenders and what is necessary to deter such offenders by having in place a system whereby their movements are monitored. In approaching this task the enactments of legislatures in other jurisdictions, while interesting as examples of alternative methods, cannot automatically provide the answer. It is trite to say that legislation should reflect the perceived needs of the particular society it is designed to serve and the experience in other jurisdictions may not be mirrored here.

The gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes. It is important, of course, that one should not allow revulsion to colour one's attitude to the measures necessary to curtail such criminal behaviour. A scheme that interferes with an individual's right to respect for his private and family life must be capable of justification in the sense that it can be shown that such interference will achieve the aim that it aspires to and will not simply act as a penalty on the offender.

Re McR

The applicant was charged with attempted buggery contrary to section 62 of the Offences against the Person Act 1861.

In *Dudgeon v United Kingdom* [1981] ECHR 7525/76 the applicant, a homosexual, complained *inter alia* that the criminal law of Northern Ireland (which then forbade acts of a homosexual nature including buggery between consenting male adults) constituted an interference with his right to respect for his private life, in breach of Article 8 of the European Convention of Human Rights. It was held that the maintenance in force of the impugned legislation constituted a continuing interference with the applicant's right to respect for his private life (which included his sexual life) within the meaning of Article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affected his private life.

In *A. D. T. v. United Kingdom* [2000] ECHR 35765 the applicant was a practising homosexual. Following a police search of his home, videotapes were seized. These tapes contained footage of the applicant and up to four other adult men engaging in sexual acts. The applicant was charged with gross indecency between men as a result of the commission of the acts depicted in the videotapes. It was held that the

mere existence of legislation prohibiting homosexual conduct in private continuously and directly affected a person's private life. The applicant in that case had been affected by the legislation, as he was aware that his conduct had been in breach of the criminal law. Therefore, the applicant had been a victim of an interference with his right to respect for his private life because of the existence of legislation prohibiting consensual acts between more than two men in private.

Both cases make clear that Article 8 protects consensual sexual behaviour between individuals. In neither case was it considered that there was a pressing social need for the criminalisation of homosexual acts between consenting adult males performed in private. No such need was canvassed in the present case. A declaration of incompatibility was therefore made.

9. Article 9

Freedom of religion

Re Parsons [2003] NICA 20

The Independent Commission on Policing in Northern Ireland, set up as part of the Belfast Agreement of 10 April 1998, recommended that in order to correct the imbalance between Catholics and Protestants in the Northern Ireland police force new intakes of police officers should comprise 50% Catholics and 50% Protestants. The commission therefore suggested that candidates meeting a minimum standard should enter a pool from which the required number of recruits could be drawn on the basis of 50% Catholics and 50% Protestants or undetermined religion. That suggestion was accepted in principle by the Secretary of State for Northern Ireland. By s 46(1) of the Police (Northern Ireland) Act 2000, in making such appointments, the chief constable of the Police Service of Northern Ireland was placed under a duty to appoint from a pool of qualified candidates an even number of persons of whom one-half were to be persons treated as Catholic and one-half of were to be persons not so treated. Section 47(2) of the 2000 Act provided for those provisions to expire on the third anniversary of the commencement date, which reflected a statement made by the Secretary of State that the procedures would be reviewed on a triennial basis. The Equality Commission for Northern Ireland publicly supported the Act's recruitment measures. The applicant, a Protestant, sat various tests and examinations designed to assess his suitability for inclusion in the pool of qualified candidates for appointment to the Police Service of Northern Ireland. 553 candidates, including the applicant, were successful in entering that pool. The pool of qualified candidates were then divided into two categories, namely those who were treated as Catholic candidates and those who were not so treated. 154 of the 553 candidates in the pool were treated as Catholic and 399 as other than

Catholic. Offers of appointment were made to the 154 treated as Catholics and to the first 154 in the non-Catholic category. The applicant was number 514 in descending order of merit in terms of the pool as a whole and number 370 in the non-Catholic category. Of the 39 candidates below the applicant in the pool as a whole, 10 were in the Catholic category. The applicant sought a declaration that s 46(1)(a) of the 2000 Act was incompatible with the European Convention on Human Rights (as set out in Sch 1 to the Human Rights Act 1998) and also sought judicial review of the decision not to offer him appointment as a police officer. He submitted that s 46(1)(a) of the 2000 Act was incompatible with art 9 (1) of the convention, which guaranteed the right to freedom of thought, conscience and religion, in the alternative that the discrimination against him involved by the application of s 46(1)(a) constituted a breach of art 14, which provided that the rights and freedoms set out in the convention were to be secured without any discrimination on grounds such as, inter alia, sex or religion. The applicant accepted that s 46(1)(a) pursued a legitimate aim, namely redressing the religious imbalance in the police force, but suggested that since sex discrimination was so repugnant in a democratic society that it could not be tolerated whatever the circumstances, so discrimination on grounds of religion had to be disproportionate, however laudable the aim of the measure.

Held - (a) It cannot be said that any act by which a complainant is disadvantaged because of his adherence to a particular religion constitutes an invasion of freedom to hold that religion for the purposes of art 9(1).

(b) There is a breach of art 9(1) only when a certain level of disadvantage is reached. That may occur when belonging to his religion is made so difficult for a complainant that in consequence of the acts complained of he is in effect being coerced to change his religion, eg if adherents of a certain religion were barred from all or substantial areas of work (as in *Thlimmenos v Greece*). This would comprehend the second and fourth of the suggestions advanced by Ms Tahzib which we have cited, but restrictions on the lines of the first and third would constitute a breach of art 9(1) only if the invasion of freedom were sufficiently substantial.

(c) That point is not generally reached when the complainant has a choice, which it is reasonable for him to exercise, whereby he is enabled to avoid the adverse consequences of the act or circumstances complained of and still maintain his own religion, eg by taking up other employment open to him.

Brian Kerr
18 October 2003