A House of Lords

Regina (Amin) *v* Secretary of State for the Home Department

[2003] UKHL 51

2003 July 14, 15, 16; Oct 16

B Lord Bingham of Cornhill, Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead and Lord Hutton

Human rights — Right to life — State's duty to investigate death — Prisoner murdered by cellmate with history of violence — Secretary of State refusing to hold independent public investigation into death — Nature and scope of procedural duty — Whether public scrutiny and family participation required — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 2

C

The deceased, while serving a custodial sentence in a young offender institution, was murdered by his cellmate who had a history of violent and racist behaviour. The Director General of the Prison Service immediately wrote to the deceased's family accepting responsibility for the death. A number of investigations into the death were commenced. An inquest was opened but adjourned when the cellmate was charged with murder and not resumed after he was convicted. An internal prison service investigation recommended changes to the regime but that no individual D member of staff could be disciplined. A police investigation advised that no prosecution should be brought against the Prison Service. The Commission for Racial Equality conducted an investigation into racial discrimination in the Prison Service, with the circumstances of the deceased's death as one of the terms of reference, but declined, save to a minimal extent, to hold the inquiry's hearings in public or to permit the family to participate. The Secretary of State refused the E family's request for a public inquiry into the death on the grounds that such an inquiry would add nothing of substance and would not be in the public interest. The claimant, the deceased's uncle, challenged the Secretary of State's decision in judicial review proceedings. The judge granted a declaration that an independent public investigation with the deceased's family legally represented, provided with the relevant material and able to cross-examine the principal witnesses should be held in order to satisfy the state's procedural duty, under article 2 of the Convention for the F Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998[1], to investigate the deceased's death. On the Secretary of State's appeal the Court of Appeal, concluding that the series of inquiries already held satisfied overall the state's investigative duty under article 2, set aside the judge's order and dismissed the claim for judicial review.

On the claimant's appeal—

Held, allowing the appeal, that the state's duty to secure the right to life G guaranteed by article 2 required it, in particular, to take steps to protect the lives of those involuntarily in its custody from the criminal acts of others, and, where death occurred, the state's procedural obligation to carry out an effective investigation of the circumstances required, whatever mode of inquiry was adopted, as a minimum standard of review, sufficient public scrutiny to secure accountability and an appropriate level of participation by the next-of-kin to safeguard their legitimate interests; that, having regard to the absence of an inquest and since none of the H investigations which were undertaken satisfied the minimum threshold, the state's procedural duty under article 2 had not been discharged; and, that, accordingly, the judge's order would be restored (post, paras 22, 30–40, 43, 45–47, 49, 51, 53–54, 60, 65–66).

[1] Human Rights Act 1998, Sch 1, Pt I, art 2: see post, para 18.

Jordan v United Kingdom (2001) 37 EHRR 52 and *Edwards v United Kingdom* (2002) 35 EHRR 487 applied.

Decision of the Court of Appeal [2002] EWCA Civ 390; [2003] QB 581; [2002] 3 WLR 505; [2002] 4 All ER 336 reversed.

The following cases are referred to in the opinions of their Lordships:

Edwards v United Kingdom (2002) 35 EHRR 487
Finucane v United Kingdom (2003) 37 EHRR 656
John v Rees [1970] Ch 345; [1969] 2 WLR 1294; [1969] 2 All ER 274
Jordan v United Kingdom (2001) 37 EHRR 52
McCann v United Kingdom (1995) 21 EHRR 97
Menson v United Kingdom (Application No 47916/99) (unreported) 6 May 2003, ECtHR
Nilabati Behera v State of Orissa (1993) 2 SCC 746
Osman v United Kingdom (1998) 29 EHRR 245
R (Wright) v Secretary of State for the Home Department [2001] EWHC Admin 520; [2001] UKHRR 1399
Reeves v Comr of Police of the Metropolis [2000] 1 AC 360; [1999] 3 WLR 363; [1999] 3 All ER 897, HL(E)
Salman v Turkey (2000) 34 EHRR 425
Yasa v Turkey (1998) 28 EHRR 408

The following additional cases were cited in argument:

A (Children) (Conjoined Twins: Surgical Separation), In re [2001] Fam 147; [2000] 2 WLR 480; [2000] 4 All ER 961, CA
Airedale NHS Trust v Bland [1993] AC 789; [1993] 2 WLR 316; [1993] 1 All ER 821, CA and HL(E)
Basu v State of West Bengal [1997] 2 LRC 1
Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Guerra v Itlay (1998) 26 EHRR 357
Kelly v United Kingdom (Application No 30054/96) (unreported) 4 May 2001, ECtHR
Kurt v Turkey (1998) 27 EHRR 373
McKerr v United Kingdom (2001) 34 EHRR 553
McShane v United Kingdom (2002) 35 EHRR 593
Murray v United Kingdom (1996) 22 EHRR 29
Plattform "Ärtze für das Leben" v Austria (1988) 13 EHRR 204
R v Broadcasting Standards Commission, Ex p British Broadcasting Corpn [2001] QB 885; [2000] 3 WLR 1327; [2000] 3 All ER 989, CA
R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson [1995] QB 1; [1994] 3 WLR 82; [1994] 3 All ER 972, CA
R v Director of Public Prosecutions, Ex p Manning [2001] QB 330; [2000] 3 WLR 463, DC
R v Graham (1905) 93 LT 371, DC
R v Lyons [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028, HL(E)
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Anderson) v Secretary of State for the Home Department [2001] EWCA Civ 1698; [2003] 1 AC 837; [2002] 2 WLR 1143, CA; [2002] UKHL 46; [2003] 1 AC 837; [2002] 3 WLR 1800; [2002] 4 All ER 1089, HL(E)
R (Howard) v Secretary of State for Health (Note) [2002] EWHC 396 (Admin); [2003] QB 830; [2002] 3 WLR 738
R (Persey) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 371 (Admin); [2003] QB 794; [2002] 3 WLR 704, DC

A *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, DC
Rapier, decd, In re [1988] QB 26; [1986] 3 WLR 830; [1986] 3 All ER 726, DC
Sacker v West Yorkshire Coroner [2003] EWCA Civ 217; [2003] 2 All ER 278, CA
Shanaghan v United Kingdom (Application No 37715/97) (unreported) 4 May 2001, ECtHR
State v Makwanyane [1995] 1 LRC 269
Streletz v Germany (2001) 33 EHRR 751
B *Timurtas v Turkey* (2000) 33 EHRR 121
Wright, In re [2003] NIQB 17; (unreported) 6 January 2003, Kerr J
X (Minors) v Bedfordshire County Council [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)
Z v United Kingdom (2001) 34 EHRR 97

APPEAL from the Court of Appeal

C The claimant, Imtiaz Amin, appealed with leave of the House of Lords (Lord Steyn, Lord Scott of Foscote and Lord Rodger of Earlsferry) granted on 14 November 2002 from the decision of the Court of Appeal (Lord Woolf CJ, Laws and Dyson LJJ) dated 27 March 2002 allowing an appeal by the Secretary of State for the Home Department from Hooper J who, on 5 October 2001 had granted the claimant's application for judicial review of the refusal by the Secretary of State for the Home Department to hold a D public inquiry into the death of the claimant's nephew, Zahid Mubarek, and made a declaration that on the facts known to the Secretary of State, including the fact that the inquest into Mr Mubarek's death in custody would not be resumed, an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses had to be held to satisfy the obligations E imposed by article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On 24 June 2003 the House of Lords (Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead and Lord Hutton) granted leave to the Northern Ireland Human Rights Commission to intervene in the appeal.

The facts are stated in the opinion of Lord Bingham of Cornhill.

F *Patrick O'Connor QC* and *Martin Soorjoo* for the claimant. The right to life under article 2(1) is the first substantive personal right addressed in the European Convention on Human Rights. Its priority indicates the primary importance the Convention attaches to it: see *McCann v United Kingdom* (1995) 21 EHRR 97; *State v Makwanyane* [1995] 1 LRC 269; *Basu v State of West Bengal* [1997] 2 LRC 1; *Streletz v Germany* (2001) 33 EHRR 751; G *Guerra v Italy* (1998) 26 EHRR 357; *Plattform "Artze für das Leben" v Austria* (1988) 13 EHRR 204; *Airedale NHS Trust v Bland* [1993] AC 789, 808; *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330; *In re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 and *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360; and compare article 3 of the Universal Declaration of Human Rights 1948; article 6 of the International Covenant on Civil and Political Rights 1966; article 1 of the H American Declaration on the Rights and Duties of Man 1948 and article 4 of the African Charter on Human and Peoples' Rights 1981.

The state's duty under article 2 requires it not only to refrain from the unlawful taking of life by state agents (see *McCann v United Kingdom* 21 EHRR 97; *Jordan v United Kingdom* (2001) 37 EHRR 52; *Edwards v*

United Kingdom (2002) 35 EHRR 487; *Salman v Turkey* (2000) 34 EHRR 425 and *Finucane v v United Kingdom* (2003 37 EHRR 656) but also to establish appropriate measures to protect life and to take active steps to preserve a citizen's life where it is in danger from a third party and the authorities know or ought to have known of the risk, and in particular there is a special duty to protect the lives of those in the state's custody: see *Osman v United Kingdom* (1998) 29 EHRR 245; *Edwards v United Kingdom* 35 EHRR 487; *Salman v Turkey* 34 EHRR 425; *Menson v United Kingdom* (Application No 47916/99), 6 May 2003; *Sacker v West Yorkshire Coroner* [2003] 2 All ER 278 and *In re Rapier, dec'd* [1988] QB 26.

The state is under a duty to carry out an effective investigation, not only where there has been a killing by state agents, but also where there has, arguably, been a failure to protect life in breach of article 2(1). The duty to investigate is not "adjectival", i e, subordinate or secondary to the duty to protect life, but is implicit in it. The Strasbourg jurisprudence gives member states a margin of appreciation as to how its investigative duty should be fulfilled: see *Z v United Kingdom* (2001) 34 EHRR 97 and *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. The domestic court is, however, obliged to act consistently with principles declared in the Strasbourg jurisprudence which set minimum standards: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837; *R v Broadcasting Standards Commission, Ex p British Broadcasting Corpn* [2001] QB 885 and *R v Lyons* [2003] 1 AC 976. To be effective the investigation must be independent of hierarchical or institutional connection, be reasonably prompt, and have a sufficient element of public scrutiny to ensure practical accountability and an appropriate level of involvement of the next of kin: see *Jordan's* case 37 EHRR 52; *Edwards'* case 35 EHRR 487; *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399; *McShane v United Kingdom* (2002) 35 EHRR 593; *Shanagan v United Kingdom* (Application No 377151/97) (unreported) 4 May 2001; *Kelly v United Kingdom* (Application No 30054/96) (unreported) 4 May 2001 and *McKerr v United Kingdom* (2001) 34 EHRR 553. Public scrutiny and family involvement are separate requirements which provide an irreducible minimum standard of review.

The next of kin are properly complainants and fall within the term "victim" in article 34 of the Convention and section 7(1) of the Human Rights Act 1998: see *Yasa v Turkey* (1988) 28 EHRR 408; *Jordan's* case 37 EHRR 52; *Edwards'* case 35 EHRR 487 and the "Report of the Committee on Death Certification and Coroners" (1971)(Cmnd 4810). In any event, the state has a distinct obligation to involve them, given the rights to respect for family life under article 8 and to receive information under article 10 of the Convention. The state's indifference to those rights can amount to inhuman and degrading treatment: see *Kurt v Turkey* (1998) 27 EHRR 373 and *Timurtas v Turkey* (2000) 33 EHRR 121.

The need for public scrutiny relates to the state's obligation to secure to everyone within its jurisdiction the rights and freedoms protected by the Convention and to ensure the existence of an effective political democracy and the rule of law: see the preamble to and article 1 of the Convention. Absent contrary factors, public scrutiny enhances the protection of life: see

Edwards's case 35 EHRR 487 and *Jordan's* case 37 EHRR 52. The transparency it brings is a safeguard against abuses of power.

At common law there is no free-standing right to an investigation outside an inquest. However, refusal to hold an investigation may be successfully challenged on the ground of irrationality: see *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292; and contrast *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2003] QB 794 and *R (Howard) v Secretary of State for Health (Note)* [2003] QB 830.

A coroner's inquest, developed from a long standing jurisdiction of public investigation into deaths, must be held where there has been a death in custody (see section 8 of the Coroners Act 1988); it provides for the involvement of the next of kin and is open to public scrutiny. This form of inquiry is the appropriate framework for an investigation under article 2 and meets the criteria set by the Strasbourg jurisprudence: see *Hale, History of the Pleas of the Crown* (1736), vol II, Chap VIII; Coroners Act 1887; Prisons Act 1865; *R v Graham* (1905) 93 LT 371; Coroners Act 1988; *In re Rapier, decd* [1988] QB 26; *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1; *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360 and *Sacker v West Yorkshire Coroner* [2003] 2 All ER 278.

John Larkin QC and *Peter Coll* for the intervener, adopted the submissions of the claimant. Independent investigations satisfying the Strasbourg criteria can be established within existing models, appropriately adjusted: see *In re Wright* [2003] NIQB 17; (unreported) 6 January 2003; section 7 of the Prison (Northern Ireland) Act 1953; article 54 of and Schedule 8 to the Health & Personal Social Services (Northern Ireland) Order 1972; sections 51 and 55 of the Police (Northern Ireland) Act 1998 and "Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003" (Cm 5831) (2003).

Jonathan Crow and *Martin Chamberlain* for the Secretary of State. The Court of Appeal's decision is correct for the reasons they gave.

Article 2 imposes a substantive obligation on the state (a) to establish a legal regime for the protection of the right to life, (b) not intentionally to take life, and (c) to take reasonable positive steps within the scope of its powers to protect life in cases where its servants are or ought reasonably to be aware that an individual in its care is at risk of death or serious injury: see *Osman v United Kingdom* 29 EHRR 245. In the present case, however, the Prison Service had a common law duty to protect the deceased and failed to do so.

Article 2 requires by implication that there should be effective official investigation where a person has been killed as a result of the use of force, inter alia, by agents of the state: see *McCann v United Kingdom* 21 EHRR 97. The obligation is procedural and does not appear on the face of the article; it is therefore unlikely to be absolute: see *Brown v Stott* [2003] 1 AC 681 and *Murray v United Kingdom* (1996) 22 EHRR 29. The essential purpose of the investigation is to secure effective implementation of the domestic laws protecting the right to life, to ensure accountability of state agents or bodies for deaths occurring under their responsibility and to safeguard the legitimate interests of the next of kin to enable them to bring civil proceedings; but the Strasbourg court does not prescribe particular

procedures for securing these objects, that is for the domestic court so long as the state itself initiates investigative measures which, when viewed as a whole, comply with general principles: see *Edwards v United Kingdom* 35 EHRR 487; *Jordan v United Kingdom* 37 EHRR 52; *Salmon v Turkey* 34 EHRR 425; *Menson v United Kingdom* (unreported) 6 May 2003; *Dworkin, Taking Rights Seriously* (1977) pp 25–26; *McKerr v United Kingdom* 34 EHRR 553 and *McShane v United Kingdom* 35 EHRR 593.

Those general principles will normally require the investigation to be conducted by those with hierarchical, institutional and practical independence from those implicated in the events; however the degree of independence will be fact dependent and a less exacting standard will suffice where the authorities accept responsibility for the death in question.

The need for public scrutiny and involvement of the next of kin are not separate requirements. Public scrutiny will secure practical as well as theoretical accountability: but the degree of scrutiny will vary and can be satisfied by different procedural forms. The next of kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests. Where, as here, the authorities have admitted responsibility for the death, the family can initiate civil proceedings to safeguard their legitimate interests. Where the family decline opportunities offered to them to participate in the investigative process the state cannot be held in breach of its duty towards them: see *Finucane v United Kingdom* 37 EHRR 656.

The issue on appeal is therefore essentially one of fact: the range of investigative procedures employed satisfied the criteria and the state accordingly complied with its procedural duty under article 2.

O'Connor QC replied.

Their Lordships took time for consideration.

16 October. **LORD BINGHAM OF CORNHILL**

1 My Lords, in March 2000 Zahid Mubarek, a 19-year-old prisoner serving a sentence in Feltham Young Offender Institution, was wantonly murdered by Robert Stewart, with whom he shared a cell. The issue in this appeal is whether the United Kingdom has complied with its duty under article 2 of the European Convention on Human Rights to investigate the circumstances in which this crime came to be committed.

The facts

2 Zahid Mubarek ("the deceased") was born on 23 October 1980. He lived in East London. His criminal record was a short one. On 16 January 1997, for an offence of possessing an imitation firearm with intent to cause fear of violence, he was the subject of an attendance centre order. It appears the offence may have been committed in response to provocation and racist abuse. In March 1999 he was cautioned for handling stolen goods. On 17 January 2000 he was sentenced to a total of 90 days' detention in a young offender institution for offences of theft, going equipped for theft and interfering with a motor vehicle. These were offences which he committed, as it seems, to fund a growing heroin addiction. But it seems he had not complied with bail conditions imposed to address his drug problem. He was sent to Feltham, spent his first night there in the induction wing, and on

22 January 2000 was transferred to Swallow Unit where he was accommodated in cell 38, a double cell which he occupied on his own until the arrival of Stewart on 8 February. The evidence suggests that the deceased was a model prisoner who caused no trouble and appeared to have no enemies.

3 Robert Stewart was born on 4 August 1980 and lived at Hyde in Greater Manchester. Beginning with a conviction of arson when aged 13, he was convicted of 21 further offences before being sentenced for the first time to detention in a young offender institution in August 1995. Further such sentences followed in January 1996, February 1997 (after the making of community service and supervision orders), November 1997, October 1998 and January 2000. Only two of Stewart's convictions were of offences of personal violence (assault occasioning actual bodily harm and common assault). At the end of 1999 he faced charges under the Protection from Harassment Act 1997 which were due to be heard in London. It appears that these offences, or some of them, may have been thought to be racially motivated. His personal security file suggested that while in custody he had been implicated in violence, damage to prison property, escape attempts, hostage holding, the stabbing of other inmates (one of whom had lost his eye), suspected (but unproved) involvement in the murder of another prisoner, arson, the threatening of other inmates with a metal bar and a wooden table or chair leg and threats of violence against prison staff whose addresses he had ascertained. An intercepted letter suggested that he was in possession of a gun and knew the address of a prison governor. It appears that from about January 1999 his behaviour in custody improved, although he was later diagnosed to be suffering from "a long-standing deep-seated personality disorder" and "an untreatable mental condition".

4 Stewart's first visit to Feltham was on 10 January 2000 for purposes of a court hearing in London. It was judged that he needed to be watched and he was put in a single cell. An intercepted letter written by him was found to contain a reference to "Niggers". An officer who read Stewart's security file at this time formed the opinion that Stewart was "very dangerous and a threat to both staff and other inmates". He made a note in Stewart's wing file: "Staff are advised to see the security file on this inmate (held in security). Very dangerous individual. Be careful." Having made his court appearance, Stewart returned to Hindley Young Offender Institution (from which he had come) on 12 January.

5 Stewart returned to Feltham on 24 January for a further court appearance. He was accommodated on a different wing, where staff were warned that he was dangerous. He left again on 26 January.

6 Stewart was transferred to Feltham on a longer-term basis on 7 February 2000. He spent his first night on a wing where he had not been before. On the following day, 8 February 2000, he was placed in cell 38 on Swallow Wing, with the deceased. It is said that the wing had a maximum capacity of 60 prisoners, that there were already 59 before the arrival of Stewart and that the vacant place in cell 38 was the only place available. The allocation decision was made by an officer who had, according to one source, been warned to "watch [Stewart] as he was dangerous". The officer himself does not, it appears, recollect such a warning, and did not consult Stewart's security file, or his wing file which did not reach Feltham until later.

7 Stewart shared cell 38 with the deceased from 8 February to 21 March 2000. During that time he wrote and sent a letter, not intercepted, couched in violent and racist terms. On 19 March Stewart's sentence expired and he was thereafter held on remand pending trial of the outstanding charges, but he was not moved. There is no evidence of hostility or discord between the deceased and Stewart during the time they were sharing cell 38, although the deceased may have expressed a wish to share with someone else. There is evidence that other prisoners regarded Stewart as "strange" and "weird" and "aggressive", partly because of his manner and behaviour, partly because of a cross, with the letters RIP, tattooed on his forehead.

8 On 21 March 2000 at about 3.35 am Stewart battered the deceased into a coma with a wooden table leg. The deceased was due to be released that day. He never recovered, dying in hospital of brain damage a week later. After the attack Stewart pressed the cell alarm button and, when an officer responded, said that his cellmate had had an accident. When moved to a nearby cell he drew a large swastika on the wall with the heel of his rubber shoe; above it he wrote "Just killed me padmate" and below it "RIP". The Director General of HM Prison Service met the parents of the deceased at the hospital on the day of the attack and, on learning of the death, wrote a letter apologising unreservedly for the failure of the Prison Service to look after the deceased and accepting responsibility for his death. He told them of an internal inquiry he had set up under the leadership of Mr Ted Butt, a serving governor and senior investigating officer of the Prison Service.

9 Stewart was charged with murder, and his trial started on 24 October 2000. He admitted the killing. The issue was whether he was guilty of murder or of manslaughter by reason of diminished responsibility. He was convicted of murder. Although the court heard evidence of the circumstances immediately surrounding the killing, including the actions of prison officers at that time, there was no exploration at the trial of cell allocation procedures or other events before the murder.

10 An inquest into the death of the deceased was formally opened on 31 March 2000 and then adjourned pending trial of the murder charge against Stewart. Following the conviction HM Coroner for West London declined to resume the inquest, a decision to which she adhered despite representations inviting her to reconsider it. In an affidavit she has given detailed reasons why the constraints to which coroners and inquests are subject make an inquest an unsuitable vehicle for investigating publicly the issues raised by this case.

11 The police investigated whether the Prison Service or any of its employees should be prosecuted for manslaughter by gross negligence or under section 3 of the Health and Safety at Work etc Act 1974. The advice of counsel was that there was insufficient evidence to provide a realistic prospect of securing any conviction relating to the death of the deceased. His family were so informed in August 2001.

12 The terms of reference of the Butt inquiry were to investigate the circumstances surrounding the murder and in particular to consider the issue of shared accommodation both generally and with particular reference to Stewart, in the light of what was known about his criminal history and institutional behaviour. The family of the deceased were consulted about these terms of reference but were not present at any stage of the investigation

A and although invited to meet Mr Butt did not avail themselves of this opportunity. Mr Butt's report was in two parts, completed at the end of October and November 2000 respectively. Copies of both parts were made available to the family, save for certain confidential annexes relating to individual prisoners, and no restriction was placed on their use of the report, save for the transcripts of interviews with members of the Prison Service
B annexed to the first part of the report. The report was made available to the police and the Commission for Racial Equality ("the CRE") but was not published. It identified a number of shortcomings at Feltham and made 26 recommendations for change.

13 On 17 November 2000 the CRE announced that it would be conducting a formal investigation into racial discrimination in the Prison Service. Its terms of reference were wide-ranging and general across the
C Prison Service but made specific reference to the circumstances leading to the murder of the deceased and any contributing act or omission on the part of the Prison Service. The family were involved in the preparation of the terms of reference and expressed views on the procedures proposed. The family wrote to the CRE asking that they be allowed to participate in its inquiry and for its hearings to be in public, but the CRE refused this request. It stated
D that the inquiry had to be seen to be impartial and that, although there was to be a "public component" in its proceedings, it could not conduct the whole inquiry in public. In the event, a public hearing was held on 18 September 2001 when certain high-level policy witnesses made statements and were questioned by counsel for the CRE. Before this hearing the family were offered a meeting with counsel at which they could raise topics which they would like to be covered in the cross-examination.
E They did not take up this offer and did not attend the public hearing. They had no opportunity to question witnesses. The CRE published its report relating to the deceased in July 2003, very shortly before the hearing in the House. It made a finding of race discrimination against the Prison Service and identified 20 respects in which the administration of Feltham had failed.

F 14 Very shortly after the death of the deceased, on 3 April 2000, solicitors for his family wrote to the responsible minister of state, asking for an independent public inquiry into the death. On 7 and 12 April the minister replied that it was too early to make a decision about a public inquiry pending the police investigation and the Butt inquiry. At a meeting on 2 November 2000 the minister did not agree to establish a public inquiry.
G On 31 July 2001 he was asked to reconsider this decision, but he replied that he saw no reason to reverse his earlier decision not to hold such an inquiry.

15 The appellant, an uncle of the deceased, sought judicial review of (a) the decision of the CRE not to allow the family to participate in the proceedings in any meaningful manner or to hold any significant part of its investigation in public, (b) the decision of the coroner not to resume the inquest and (c) the decision of the Home Secretary not to hold an inquiry in
H public. Hooper J, before whom these applications came, adjourned the applications against the CRE and the coroner but granted permission to pursue the claim against the Home Secretary. This claim he upheld, ruling that the refusal to hold a public inquiry was a breach of article 2 of the Convention: [2001] EWHC Admin 719. He declared that

"an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by article 2 of the European Convention on Human Rights."

The Home Secretary appealed against this decision. In a judgment of the court (Lord Woolf CJ, Laws and Dyson LJJ) the appeal was allowed and the judge's order set aside: [2003] QB 581. The appellant challenges the ruling of the Court of Appeal and seeks to restore the judge's order.

Domestic law

16 For many centuries the law of England has required a coroner to investigate the death of one who dies in prison. *Sewell on Coroners* (1843), referring to the Statute de Officio Coronatoris 1276 (4 Edw 1, c 2), put it thus, at p 32:

"It is observable that this statute being wholly directory, and in affirmance of the common law, the coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty, not mentioned in it, which was incident to his office before; and therefore, though the statute mentions only inquiries of the deaths of persons slain, drowned, or suddenly dead, yet the coroner ought also to inquire of the death of those who die in prison; to the end that the public may be satisfied whether such persons came to their end by the common cause of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined."

This duty was recognised by *Hale, History of the Pleas of the Crown* (1736), vol II, p 57 and *Blackstone, Commentaries on the Laws of England, Book IV, Of Public Wrongs*, 1st ed (1769), p 271. It found expression in section 11 of the Gaols etc (England) Act 1823 (4 Geo 4, c 64), section 48 of the Prisons Act 1865 (28 & 29 Vict c 126), section 56 of the General Prisons (Ireland) Act 1877 (40 & 41 Vict c 49), section 53 of the Prisons (Scotland) Act 1877 (40 & 41 Vict c 53), section 3 of the Coroners Act 1887 (50 & 51 Vict c 71), section 13(2)(b) of the Coroners (Amendment) Act 1926 and section 8 of the Administration of Justice (Emergency Provisions) (Northern Ireland) Act 1939. These statutes are not to identical effect. But in all of them deaths in prison are singled out as cases calling for inquiry. All of them require the inquiry to be conducted by an independent judicial officer (in England, Wales, Ireland and Northern Ireland, a coroner, in Scotland, a sheriff or sheriff substitute). Most of them expressly require the inquiry to be before a jury, and some (the 1823 and 1865 Acts and the Irish 1877 Act) provide that no inmate or officer of the prison where the death occurred shall be a juror. In some it is provided that, if practicable, "sufficient time shall be allowed before the holding of the inquest to allow the attendance of the nearest relative of the deceased" (the Irish 1877 Act) or that "sufficient time shall intervene between the day of the death and the day of the holding the inquiry, to allow the attendance of the next of kin of the deceased" (the Scottish 1877 Act).

17 Section 8(1)(c) of the Coroners Act 1988, applicable in England and Wales, requires a coroner to hold an inquest on being informed that a person has died in prison. Such an inquest must, by section 8(3)(a), be conducted

with a jury. By section 8(6), neither a prisoner in the prison where the deceased died nor any person engaged in any sort of trade or dealing with the prison may serve as a juror at the inquest. The inquest must be held in public: Coroners Rules 1984 (SI 1984/552), rule 17. The family may attend and be legally represented: Coroners Rules 1984, rule 20. They or their representative may question witnesses at the hearing. The coroner is however ordinarily required by section 16(1)(a)(i) to adjourn the inquest on being informed that a person has been charged with the murder or manslaughter of the deceased and on the conclusion of the criminal proceedings has a discretionary power (conferred by section 16(3)) to resume the adjourned inquest "if in his opinion there is sufficient cause to do so". Section 17A(1)(a) provides for the adjournment of an inquest if the coroner is informed by the Lord Chancellor that a public inquiry conducted or chaired by a judge is being or is to be held into the events surrounding the death.

The Convention

18 By article 1 of the Convention member states bound themselves to secure to everyone within their respective jurisdictions the rights and freedoms defined in Section 1 of the Convention. The first of those rights, expressed in article 2(1), is the right to life: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." The provisions of article 2(2), relating to the use of necessary force in defence against unlawful violence, to effect an arrest or prevent an escape from lawful detention or to quell a riot or insurrection, have no bearing on this appeal. Article 2(1) has been repeatedly described as "one of the most fundamental provisions in the Convention": *McCann v United Kingdom* (1995) 21 EHRR 97, para 147; *Salman v Turkey* (2000) 34 EHRR 425, para 97; *Jordan v United Kingdom* (2001) 37 EHRR 52, para 102. The European Court has made plain that its approach to the interpretation of article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective: *McCann*, para 146; *Salman*, para 97; *Jordan*, para 102.

19 The primary purposes of article 2 were well described by the European Court in paragraph 115 of its judgment in *Osman v United Kingdom* (1998) 29 EHRR 245 when it said (I omit the footnote):

> "115. The Court notes that the first sentence of article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive

operational measures to protect an individual whose life is at risk from the criminal acts of another individual."

But the scope of article 2(1) goes beyond the primary purposes thus defined, as the Commission explained in para 193 of its opinion in the report of *McCann*, p 140:

"193. Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the State that everyone's right to life shall be 'protected by law' may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. The nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts surrounding a deprivation of life are clear and undisputed and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under article 2 of the Convention."

20 Most of the recent European cases to which reference was made in argument before the House concerned killings deliberately carried out, or allegedly carried out, by agents of the state. Naturally, therefore, such deliberate killings by state agents were the primary, although not the exclusive, subject of the Court's attention. The cases clearly establish a number of important propositions.

(1) It is established by *McCann*, para 161, *Yasa v Turkey* (1998) 28 EHRR 408, para 98, *Salman,* para 104 and *Jordan*, para 105 that (as it was put in *McCann*):

"The obligation to protect the right to life under [article 2(1)], read in conjunction with the State's general duty under article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State."

(2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight: para 192 of the opinion of the Commission in *McCann,* set out at pp 139–140.

(3) As it was put in *Salman*, para 99:

"Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it

A is incumbent on the State to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies."

Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and B convincing explanation of how the death or injury occurred: *Salman*, para 100; *Jordan*, para 103.

(4) The obligation to ensure that there is some form of effective official investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state: *Salman,* para 105.

C (5) The essential purpose of the investigation was defined by the Court in *Jordan*, para 105:

> "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes D may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."

(6) The investigation must be effective in the sense that (*Jordan,* para 107)

E > "it is 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 . . . This is not an obligation of result, but of means."

(7) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary (*Jordan*, para 106)

F > "for the persons responsible for and carrying out the investigation to be independent from those implicated in the events . . . This means not only a lack of hierarchical or institutional connection but also a practical independence."

(8) While public scrutiny of police investigations cannot be regarded as an G automatic requirement under article 2 (*Jordan*, para 121), there must (*Jordan*, para 109) "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case."

(9) "In all cases", as the Court stipulated in *Jordan*, para 109: "the next-of-kin of the victim must be involved in the procedure to the extent necessary H to safeguard his or her legitimate interests."

(10) The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: *Jordan,* para 143. But it is "indispensable" (*Jordan*, para 144) that there be proper procedures for

ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.

21 As pointed out above, the propositions I have sought to summarise were, in the main, laid down in cases involving deliberate killing or alleged killing by agents of the state. *Edwards v United Kingdom* (2002) 35 EHRR 487 is of central importance in this appeal because it was not such a case. Factually it bore strong similarities to the present case. Christopher Edwards, who had shown marked signs of mental illness, was remanded in custody and placed in a prison cell with another man, Richard Linford, who was suffering from acute mental illness. During their first night in the shared cell Richard Linford kicked and stamped Christopher Edwards to death. There were factual differences between that case and this. The period for which the two men shared a cell was much shorter. Richard Linford's plea of guilty to manslaughter on grounds of diminished responsibility was accepted by the prosecution, and a hospital order was made, so there was no contested trial. There was no acceptance of responsibility by the Prison Service. There was in that case a long and thorough inquiry conducted by independent Queen's Counsel. But the case is important because, although addressing a case in which there had been no killing or alleged killing by state agents and the responsibility of the state (if any) could only rest on its negligent failure to protect the life of Christopher Edwards, a prisoner in its custody, the European Court applied essentially the same principles as in the cases already considered. In my respectful opinion, the Court was fully justified in doing so, for while any deliberate killing by state agents is bound to arouse very grave disquiet, such an event is likely to be rare and the state's main task is to establish the facts and prosecute the culprits; a systemic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more intractable problems.

22 In its judgment in *Edwards* the court repeated (in para 54) the passage in para 115 of *Osman* quoted in para 19 above, and it found a breach of the obligation there defined (para 64). It then turned to consider the procedural obligation to carry out effective investigations. Having summarised the parties' competing submissions the Court made its assessment which (omitting footnotes) it is necessary to quote:

> "69. The obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State's general duty under article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a

formal complaint or to take responsibility for the conduct of any investigative procedures.

"70. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

"71. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

"72. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

"73. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

23 No light is shed on the present problem by two cases decided since *Edwards v United Kingdom* 35 EHRR 487. *Menson v United Kingdom* (Application No 47916/99) (unreported) 6 May 2003, concerned a racist attack on a victim who was set on fire and killed in the street by assailants who were not agents of the state and who were duly prosecuted, convicted and sentenced. No blame attached to state authorities for the killing and no breach of the state's investigative duty was found. While certain familiar principles were rehearsed, the complaint was held to be manifestly ill-founded. *Finucane v United Kingdom* (2003) 37 EHRR 656, was a much more difficult and complex case, but it laid down no principles which had not been laid down before.

The judge's decision

24 In approaching the present case Hooper J had the benefit of a recent judgment of Jackson J in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399. That case concerned a serving prisoner who suffered a severe asthmatic attack in his cell and died. An inquest was held at which the family of the deceased were present, but unrepresented for

want of legal aid. There was no inquiry into the quality of the medical treatment the deceased had received in prison. It later emerged that the responsible medical officer had been suspended from duty and had previously been found guilty of serious professional misconduct. In a civil action against the Home Secretary liability was admitted, thus precluding forensic investigation of the case. The family sought judicial review on the grounds, among others, of a failure to protect the life of the deceased and a failure of the procedural obligation arising under article 2 of the Convention to investigate the circumstances of the death.

25 In a succinct and accurate judgment Jackson J reviewed the domestic and Strasbourg case law, deriving from *Jordan v United Kingdom* 37 EHRR 52 the requirement that an investigation, to satisfy article 2, must have certain features (para 41). (1) The investigation must be independent. (2) The investigation must be effective. (3) The investigation must be reasonably prompt. (4) There must be a sufficient element of public scrutiny. (5) The next-of-kin must be involved to an appropriate extent. From the recent case law Jackson J derived five propositions of which the fourth was: "Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom*, at paras 106–109." The judge concluded on the facts that there had not been an effective official investigation into the death of the deceased and held that there should be an independent investigation, to be held in public, at which the family should be represented.

26 Hooper J examined the facts of the present case, so far as they are known, in some detail, reviewed the relevant case law, adopted Jackson J's summary of the features identified in *Jordan* as necessary if an investigation were to comply with article 2 and accepted the fourth proposition put forward by Jackson J and quoted above. He concluded that the inquiries and investigations which had been conducted did not, singly or cumulatively, satisfy the investigative duty of the United Kingdom under article 2. In para 91 of his judgment he said:

> "91. Zahid Mubarek was murdered in Feltham by a racist cell mate with 'an alarming and violent criminal record, both in and out of custody'. It is accepted that Zahid Mubarek was put in the same cell as his killer because of 'systemic failures'. Established procedures were not followed and there is an appalling history at Feltham of failure to comply with earlier recommendations. It seems likely (and it is certainly arguable) that there were serious human failings both at the wing level and at higher levels which have not been publicly identified. On the facts of this case the obligation to hold an effective and thorough investigation can, in my judgment, only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses. Against the background of the material which I have set out at some length, the family and the public are entitled to such an investigation."

He accordingly made the declaration quoted in para 15 above. Neither Jackson J nor Hooper J had the benefit of the Court's judgment in *Edwards v United Kingdom* 35 EHRR 487.

The Court of Appeal decision

27 In para 32 of its judgment [2003] QB 581, 597, the Court of Appeal outlined its general approach to the investigative duty arising under article 2:

> "32. Against this framework of obligations created by article 2, it is useful—and here is our third preliminary—to make some general observations about the nature of the procedural duty to investigate. Plainly there is *no* duty on the face of the Convention to investigate a death. It is clear that such a duty has been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by article 2 would or might in some cases be rendered nugatory or ineffective. Thus the duty to investigate is adjectival to the duty to protect the right to life, and to the prohibition of the taking of life. It follows that by its nature it cannot be a duty defined by reference to fixed rules. It only has life case by case, contingent upon what is required in any individual instance for the substantive right's protection. Across the spectrum of possible article 2 violations, there are classes of case which can readily be distinguished. One class is that of allegations of deliberate killing—murder—by servants of the state. A second is that of allegations of killing by gross negligence—manslaughter—by servants of the state. A third is that of plain negligence by servants of the state, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the state has concealed or is concealing its responsibility for the death. That possibility gives rise to the paradigm case of the duty to investigate. The duty is in every instance fashioned to support and made good the substantive article 2 rights. We shall see, as we go through the movements of the argument, that this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic."

After addressing other matters not now relevant, the court considered the scope of the duty to investigate and said, in para 45:

> "45. In the terms in which it was articulated by Mr Crow [for the Home Secretary] at the hearing, the focus of this part of the case appeared to be relatively narrow. Building on Jackson J's judgment in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399, 1409–1410, para 41, which we need not set out, Hooper J held [2001] EWHC Admin 719 at [81]—[86], that for an investigation to satisfy the procedural requirements of article 2 a number of conditions must be met, including these two: (a) there must be a sufficient element of public scrutiny, and (b) the next-of-kin must be involved to the appropriate extent. Mr Crow submitted that that is a wrong approach. There are not discrete and cumulative requirements of publicity and family participation. Depending on the particular facts, participation by the next-of-kin may itself satisfy applicable standards of openness without any additional requirement of public hearings. Now, while these two elements are plainly of great potential importance, it seems to us that this part of the case raises a deeper, or at any rate a more general question. How far may the nature and quality of any investigation embarked upon in satisfaction of the article 2 adjectival duty vary according to the context and subject matter of the case? Are such requirements as

publicity and family participation, and other virtuous procedures, *constant?* It was broadly the claimant's position that they are: the duty is essentially a uniform one, whether the death is due to unlawful violence by state servants, or to recklessness or to negligence. In so submitting Mr O'Connor built especially on *Jordan v United Kingdom* 11 BHRC I, and now also on *Edwards v United Kingdom* The Times, 1 April 2002."

The court then considered the relevant cases, citing passages from the decisions in *Jordan, Wright* and *Edwards* and expressed clear conclusions in paras 60–63:

"60. In our view *Edwards's* case represents no fresh departure in the Strasbourg jurisprudence, which in this area, as it is generally, is essentially pragmatic. The *Jordan* requirements are by no means set in stone. Particular considerations—the absent witnesses, the relative exclusion of the family—coloured the court's decision in *Edwards's* case, just as they might colour the decision of a common law court.

"61. In light of the arguments on *Edwards's* case it is right to draw special attention to two matters in particular. The first is that the procedural duty to investigate does not appear on the Convention's face: it is no more nor less than an adjectival duty, imposed as a corollary of the substantive right guaranteed by article 2. Secondly, the task of our courts is to develop a domestic jurisprudence of fundamental rights, drawing on the Strasbourg cases of which by section 2 of the Human Rights Act 1998 we are enjoined to take account, but by which we are not bound. In this present context, these two features march together. The reason is that the nature and scope of an adjectival duty, which by definition is not expressly provided for in the Convention, must especially be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive Convention rights.

"62. Accordingly, this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. Just as, in our view, on question (2) Mr Crow originally adopted too rigid an approach to the Human Rights court's jurisprudence in submitting that the duty to investigate was only triggered in cases of the use of unlawful force by state agents, so also on question (3) Mr O'Connor makes the same error in submitting that there are fixed requirements of publicity and family participation, uniformly applicable to every investigation. What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state had laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards's* case are perfectly consistent with this. And it is an approach which embraces what we will say in the

Middleton appeal about the coroner's jurisdiction and inquest verdicts of neglect.

"63. In all these circumstances we agree with Mr Crow that publicity and family participation are not necessarily discrete compulsory requirements which must be distinctly and separately fulfilled in every case where the procedural duty to investigate is engaged. Further, and somewhat more broadly, we consider that Jackson J's fourth proposition in para 43 of his judgment in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399, 1410 cannot be accepted at face value. For convenience we set it out again: '4. Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom* at paras 106–109.' This might seem to suggest something of a universal formula for all investigations undertaken in fulfilment of article 2, and to that extent we disagree with it. In fairness the judge had just indicated, in proposition (3), that 'there is no universal set of rules for the form which an effective official investigation must take', and in our judgment that is entirely correct."

The Court of Appeal accepted the submission, made on behalf of the Home Secretary, that the judge should have held, on the facts of the case, that the procedural obligation of the United Kingdom had been discharged.

28 In argument before the House Mr O'Connor, for the appellant, sought to restore the order of the judge for very much the reasons the judge had given and contended that the Court of Appeal, in departing from the judge's reasoning, had erred. He accepted that it was for member states to decide how the investigative duty arising under article 2 should be discharged and accepted that some cases would call for more intense scrutiny than others. But he argued that *Jordan* and *Edwards* specified an irreducible, minimum, standard of review, however achieved and whether by a single means of investigation or several. That irreducible minimum could be met only by an appropriate level of publicity and an appropriate level of participation by the next of kin. In this case there had been neither. The appellant's legal argument was broadly supported by the Northern Ireland Human Rights Commission, which was granted leave to intervene.

29 Mr Crow, for the Secretary of State, supported the reasoning and the decision of the Court of Appeal. The Strasbourg jurisprudence had laid down principles but not rules which could never be departed from. A member state's duty to investigate was shaped by the facts and circumstances of the particular case. There was no single model of investigation which must be applied in all cases. It was for the state to decide what form of investigation would be appropriate in a given case. Public scrutiny and family participation were not separate requirements. Here, the Prison Service had accepted responsibility for the death. A civil action could be begun with an assured prospect of success. The criminal culpability of Stewart and prison staff had been investigated by the police. There had been a contested criminal trial. There had been a detailed investigation by Mr Butt, leading to a full report, severe criticism of the régime at Feltham and many recommendations. There had been a full report by the CRE, which had been published. The family of the deceased had not taken advantage of the opportunities offered to them to participate. There was no

reason to think that any further inquiry would uncover any facts not already known or lead to any improvements not already in train.

Conclusions

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. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746, 767: "There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life." Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v Comr of Police of the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.

31 The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom* (Application No 47916/99) (unreported) 6 May 2003, p 13. It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

32 Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the Court, particularly in *Jordan v United Kingdom* 37 EHRR 52 and *Edwards v United Kingdom* 35 EHRR 487, has laid down minimum standards which must be met, whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and Convention standards.

33 There was in this case no inquest. The coroner's decision not to resume the inquest is not the subject of review, and may well have been justified for the reasons she has given. But it is very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation, as established by *McCann v United Kingdom* 21 EHRR 97. It would overcome the problems exposed by this appeal if effect were given to the recommendations made in Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a

Fundamental Review 2003 (Cm 5831) (June 2003), and no doubt that report is receiving urgent official attention.

34 The police investigations into the criminal culpability of Stewart and the Prison Service were, very properly, conducted in private and without participation by the family. The Advice Report on which counsel based his advice not to prosecute the Prison Service or any of its members was produced in evidence during these proceedings but not before. It is written in an objective and independent spirit, but it raises many unanswered questions and cannot discharge the state's investigative duty.

35 The trial of Stewart for murder was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. It involved little exploration, such as would occur in some murder trials, of wider issues concerning the death.

36 There is no reason to doubt that Mr Butt set about his task in a conscientious and professional way. He explored the facts, exposed weaknesses in the Feltham regime and recommended changes which, it is understood, have been and are being implemented. It is however plain that as a serving official in the Prison Service he did not enjoy institutional or hierarchical independence. His investigation was conducted in private. His report was not published. The family were not able to play any effective part in his investigation and would not have been able to do so even if they had accepted the limited offer made to them.

37 The CRE report, which was not before the judge or the Court of Appeal, brings additional facts to light (although some of these, such as the discovery of a handmade wooden dagger under Stewart's pillow after the murder, raise many further questions). The report has been published. But the CRE inquiry, conducted under the Race Relations Act 1976, was necessarily confined to race-related issues and this case raises other issues also (as did *Edwards*, where there was no race issue). Save for a single day devoted to policy issues, the inquiry was conducted in private. The family were not able to play any effective part in it and would not have been able to do so even if they had taken advantage of the limited opportunity they were offered. Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in *Edwards's* case, but even that was held inadequate to satisfy article 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence.

38 I consider that the judge was right to reach the conclusion and make the order which he did. For the foregoing reasons, and those given by my noble and learned friends, Lord Slynn of Hadley, Lord Steyn and Lord Hope of Craighead, I would accordingly allow the appeal and restore his order.

39 I cannot accept the submission of Mr Crow that any further inquiry is unlikely to unearth new and significant facts. The papers before the House raise questions which any legal representative of the family would properly wish to pursue and the discovery of further new facts of significance may well be probable. But it is true that there are factual areas—for example, the killing itself, and the cause of death—which have already been fully explored and of which little or no further examination is required. Many of the factual findings made by Mr Butt and the CRE can no doubt be taken as read. It will be very important for the investigator to take a firm grip on the

inquiry so as to concentrate the evidence and focus the cross-examination on issues justifying further exploration. Reliance should be placed on written statements and submissions so far as may properly be done at a hearing required to be held in public. All those professionally engaged, for any party, should bear in mind their professional duty to ensure that the investigation of this tragic and unnecessary death is conducted in a focused and disciplined way.

LORD SLYNN OF HADLEY

40 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Bingham of Cornhill. He has set out in detail the facts and the relevant passages of the opinions of the Commission and the judgments of the Court of Human Rights in Strasbourg. These judgments clearly recognise that article 2 of the Convention is to be read as including not only a duty not to take life, but in some circumstances to take steps to prevent life being taken and as part of that duty an obligation to investigate the circumstances surrounding the death.

41 The duty to investigate is partly one owed to the next of kin of the deceased as representing the deceased: it is partly to others who may in similar circumstances be vulnerable and whose lives may need to be protected. The significance of this duty to those detained in prison, not least where prisons are crowded and prisoners often dangerous, is obvious. It does not seem to me to be possible to say that there is a clear dividing line between those cases where an agent of the state kills and those cases where an agent of the state or the system is such that a killing may take place. The result of "an incident waiting to happen" may just as much as an actual killing require detailed and profound investigation, though in some cases the procedure to be adopted may be justifiably different.

42 The European Court of Human Rights and the Commission have clearly recognised that "The nature and degree of scrutiny which satisfies [the] minimum threshold [of a public and independent scrutiny] must, in the Commission's view, depend on the circumstances of the particular case": *McCann v United Kingdom* 21 EHRR 97, para 193. "What form of investigation will achieve those purposes may vary in different circumstances": *Jordan v United Kingdom* 37 EHRR 52, para 105. See also *Edwards v United Kingdom* 35 EHRR 487.

43 Such investigation must however be by an independent person, and be "effective" to satisfy the relevant duty: *Edwards* at paras 69–73. There must be a sufficient element of public scrutiny and the next of kin or the family must be involved to an appropriate extent: *Jordan v United Kingdom* 37 EHRR 52.

44 Even though there may be room for flexibility in the procedures adopted by different member states, the European Court of Human Rights has insisted on a minimum threshold. In my opinion, even if the United Kingdom courts are only to take account of the Strasbourg Court decisions and are not strictly bound by them (section 2 of the Human Rights Act 1998), where the Court has laid down principles and, as here a minimum threshold requirement, United Kingdom courts should follow what the Court has said. If they do not do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.

A **45** It seems to me that in the present case the judge did, but the Court of Appeal did not, give sufficient effect to the judgments of the Strasbourg Court.

46 There were here a number of inquiries of different kinds which went some way to fulfil the minimum threshold duty but for the reasons given by Lord Bingham there were features of each stage of the inquiry which did not achieve the minimum threshold.

B **47** I do not for my part criticise those who held the inquiries, such as Mr Butt, since they were carrying out specific tasks no doubt in the way they were intended to do. Nor is it necessarily wrong to show that, if not in one compendious inquiry, through different inquiries, the overall test has been satisfied. But here in my opinion, even looking at all the inquiries, the test overall has not been satisfied either as to the degree of public scrutiny or as to C the participation of the next of kin and the relatives.

48 One is left with a profound sense of unease that this investigation did not adequately investigate the matter in an acceptable way. For example, although it may be accepted that on 8 February Stewart was placed in cell 38 with the deceased because there was no other place available, there is no real explanation as to why it was necessary to keep him there from 8 February to 21 March 2000 in view of all the circumstances.

D **49** I would therefore allow the appeal for the reasons given by Lord Bingham as briefly supplemented in this speech.

LORD STEYN

50 My Lords, in my view the Court of Appeal approached the Strasbourg jurisprudence, and in particular the decision in *Edwards v* E *United Kingdom* 35 EHRR 487 in the wrong way. The Court of Appeal observed [2003] QB 581, 607–608, para 62:

> "this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts . . . What is required will vary with the circumstances. A credible accusation of murder or manslaughter by state agents will call for an investigation of F the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the state has laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of G rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including *Edwards's* case are perfectly consistent with this."

The Court of Appeal plainly thought that in the case of acts by state agents causing death in custody there is a more exacting and rigorous duty to investigate than in cases of negligent omissions leading to death in custody. H That cases in the former category may be a greater affront to the public conscience than cases in the latter category can readily be accepted. But the investigation of cases of negligence resulting in the death of prisoners may often be more complex and may require more elaborate investigation. Systemic failures also affect more prisoners. The European Court of Human

Rights has interpreted article 2 of the European Convention on Human Rights as imposing minimum standards which must be met in all cases. And in the decision in *Edwards* the European Court of Human Rights applied the same minimum standards to a case of omissions as it had previously applied in *Jordan v United Kingdom* 37 EHRR 52 to acts by state agents. The distinction drawn by the Court of Appeal infected its analysis of the Strasbourg decisions. Relying on this distinction the Court of Appeal in effect departed from the requirements as explained in *Edwards*. Given the crucial public importance of investigating all deaths in custody properly, I consider that full effect must be given to the Strasbourg jurisprudence. I prefer the decisions of Jackson J *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399 and Hooper J in the instant case to the judgment of the Court of Appeal.

51 If the Court of Appeal had applied the Strasbourg jurisprudence correctly, I consider it unlikely that the Court of Appeal would have concluded (contrary to the view of the trial judge) that the procedural obligation to investigate was in any event discharged in this case. The Butt inquiry does not have the quality of institutional or hierarchical independence. The CRE inquiry, the report of which has now become available, was largely conducted in private and the focus was on race-related issues. That leaves only the police investigation and the criminal trial. On that basis it is obvious, and conceded, that there was no adequate inquiry.

52 The Court of Appeal posed the question: What would be the benefit of a further inquiry? The investigations conducted so far do not, either singly or together, meet the minimum standards required to satisfy article 2. But, in any event, it is vital that procedure and the merits should be kept strictly apart otherwise the merits may be judged unfairly: *Wade & Forsyth, Administrative Law,* 8th ed (2000), pp 501–503. In *John v Rees* [1970] Ch 345, 402, Megarry J observed about the argument that "it will make no difference":

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

This observation is apposite to the assumption that, although there has not been an adequate inquiry, it may be refused because nothing useful is likely to turn up. That judgment cannot fairly be made until there has been an inquiry.

53 For the reasons given by Lord Bingham of Cornhill, as well as my brief reasons, I would also allow the appeal and restore the order of Hooper J.

LORD HOPE OF CRAIGHEAD

54 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn. I agree with them, and for the reasons which they have given I too would allow the appeal and restore the order of Hooper J. I should like however to

A add a few words by way of a supplement to Lord Bingham's review of the domestic law on the investigation of deaths in prison.

55 There is no coroner in Scotland. The system in Scotland for the investigation of sudden deaths depends instead on the sheriff and the public prosecutor. To a large extent the question whether an investigation is needed is left to the discretion of the procurator fiscal of the area where the death occurred. In the performance of that function he is answerable to the B Lord Advocate. But in some cases the holding of a public inquiry is mandatory, and it has for a long time been recognised in Scotland that it is in the public interest for a public inquiry to be held into the death of a person who at the time of the death was being held in legal custody. Section 53 of the Prisons (Scotland) Act 1877 (40 & 41 Vict c 53), to which Lord Bingham has referred, was replaced by section 25 of the Prisons (Scotland) Act 1952. C In the event of the death of a prisoner it was the duty of the governor under that section to give immediate notice to the procurator fiscal in whose area the prison was situated and, where practicable, to the prisoner's nearest relative. It was the duty of the procurator fiscal then to hold a public inquiry into the death before the sheriff and, where practicable, to allow sufficient time for the prisoner's next of kin to attend the inquiry.

D 56 The legislation on this subject was consolidated and amended by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. It comprised the Fatal Accidents Inquiry (Scotland) Act 1895 (58 & 59 Vict c 36), which provided for a compulsory inquiry into any death resulting from an accident sustained during industrial employment or occupation, the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1906, which gave the Lord Advocate discretion to order an inquiry into any sudden or E suspicious death where he considered this to be expedient in the public interest, and section 25 of the Prisons (Scotland) Act 1952. The system which was introduced by the 1895 Act was for an investigation to be held in public by a sheriff and jury, whose verdict set forth when and where the accident and the death took place and the cause of death: section 4(7). Section 2 of the 1906 Act required the jury's verdict to deal also with the cause of the accident, the person if any who was responsible for it, the F precautions if any by which it might have been avoided and any other facts disclosed by the evidence which in the opinion of the jury were relevant to the inquiry. In practice, the verdict of the jury was usually dictated by the sheriff and in many cases the jury simply returned a formal verdict.

57 As the law in Scotland now stands, following the amendments introduced by the 1976 Act, juries are no longer used for these inquiries. G The system instead is for the procurator fiscal to investigate the circumstances of the death, and for the inquiry (known as a fatal accident inquiry or, more colloquially, an FAI) to be held in public by the sheriff. It is held at a time and place which has been intimated to the nearest known relative and of which public notice has also been given. It is the duty of the procurator fiscal to adduce evidence at the inquiry as to the circumstances, and it is the sheriff's task to make a determination setting out the H circumstances so far as they have been established to his satisfaction by the evidence.

58 The statute provides that the circumstances which are to be set out in the sheriff's determination must include (a) where and when the death and any accident resulting in the death took place, (b) the cause or causes of the

death and any such accident, (c) the reasonable precautions, if any, whereby the death and any accident resulting in the death might have been avoided, (d) the defects, if any, in any system of working which contributed to the death or any accident resulting in the death and (e) any other facts which are relevant to the circumstances of the death. The holding of an FAI in the case of the death of a person who, at the time of his death, was in legal custody is mandatory: 1976 Act, section 1(1)(a)(ii). For the purposes of that provision he is in legal custody if he is detained in a prison, remand centre or young offenders institution, in a police station, police cell or other similar place or is being taken to or from any such place: section 1(4). The procurator has power to compel witnesses to give him information which is within his knowledge regarding any matter relevant to the investigation: section 2(2). The inquiry is open to the public: section 4(4). The rules of evidence, the procedure and the powers of the sheriff to deal with contempt of court and to enforce the attendance of witnesses at the inquiry are as nearly as possible the same as those which he has when he is sitting in an ordinary civil cause: section 4(7).

59 An example of the flexibility of this system and its ability to deal with complex and difficult issues is provided by the fatal accident inquiry which was held in 1996 by Sheriff Sir Stephen Young in Paisley Sheriff Court into the crash of the RAF Chinook helicopter into the Mull of Kintyre on 2 June 1994 which killed all those who were on board the aircraft. The evidence for the Crown was presented by counsel. The families of the two pilots were separately represented, as were the families of all the deceased other than the pilots and the manufacturer of the helicopter. The inquiry involved the hearing of evidence and submissions over some 16 days, and the sheriff's determination which extended to 123 pages contained a detailed and careful analysis of the evidence: see Report from the Select Committee on Chinook ZD 576 (HL Paper 25 (iii), Session 2001–2002) (31 January 2002), paras 19–21.

60 I mention these details because there is no doubt that the procedure which would have had to have been followed under the 1976 Act if at the time of his death the deceased had been in legal custody in Scotland satisfies the procedural obligation to carry out an effective investigation which is imposed on the United Kingdom by article 2 of the Convention. In *Edwards v United Kingdom* (2002) 35 EHRR 487, 515, para 83 the European Court said:

> "The Government argued that the publication of the report secured the requisite degree of public scrutiny. The court has indicated that publicity of proceedings or the results may satisfy the requirements of article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as theory of the state agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible . . ."

The circumstances which have resulted in the death of a prisoner while he is in custody are capable of being given the widest exposure by this system,

which is conducted in the public interest by the public prosecutor. The fact that it involves a public hearing in which the prisoner's next of kin are entitled to participate provides an ample opportunity for the circumstances to be subjected to public scrutiny, and the sheriff's determination is an effective vehicle for ensuring that those whom the evidence shows are responsible for deaths occurring under their responsibility are made accountable.

61 The Court of Appeal [2003] QB 581, 607, para 61, described the procedural duty to investigate as no more or less than an adjectival duty. They observed that, as this duty was by definition not expressly provided for in the Convention, it must be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive Convention rights. At pp 607–608, para 62 they added that this issue could not be satisfactorily resolved by a process of reasoning which stuck like glue to the Strasbourg texts. What was needed was a flexible approach, responsive to the dictates of the facts case by case. I would not quarrel with these propositions. But I disagree with the conclusion which the Court drew from them. This was that an allegation of negligence leading to death in custody bears a different quality from a case where it is said that the prisoner's death resulted from the laying of lethal hands on him by the state.

62 In my opinion failures by the prison service which lead to a prisoner's death at the hands of another prisoner are no less demanding of investigation, and of "the widest exposure possible", than lethal acts which state agents have deliberately perpetrated. Indeed there is a strong case for saying that an even more rigorous investigation is needed if those who are responsible for such failures are to be identified and made accountable and the right to life is to be protected by subjecting the system itself to effective public scrutiny. Some form of effective investigation is, of course, needed when prisoners have been killed as a result of force by, inter alios, agents of the state: *McCann v United Kingdom* 21 EHRR 97, 163, para 161. But, as the words "inter alios" indicate, the obligation to safeguard the lives of prisoners is not confined to those who are at risk of the acts of state agents. It extends with equal force to all those whose lives are at risk from the criminal acts of another individual: *Osman v United Kingdom* 29 EHRR 245, 305, para 115.

63 The Court has made it clear that a fatal accident inquiry according to the Scottish model is not the only option. The choice of method is essentially a matter for decision by each contracting state within its own domestic legal order. The court also accepts that the form of investigation which will achieve the purposes of the Convention may vary in different circumstances: *Edwards v United Kingdom* 35 EHRR 487, 511, para 69. Mr O'Connor said that in principle a coroner's inquest would satisfy the requirements of article 2. But he submitted that there must at best be a considerable doubt as to whether it would do so in this case in the light of its unusual facts and circumstances.

64 For reasons which she has explained in her affidavit the Coroner for West London, in the exercise of her discretion, declined to reconvene the inquest into Zahid Mubarek's death which was formally opened and then adjourned to await the prosecution of Robert Stewart for murder. As she pointed out, a number of practical problems are posed by the workload and availability of the coroner which would have made it very difficult for her to

commit the time and resources that would have been needed to conduct the investigation that is required in this case. She accepts that the conditions of the office would be no answer if it was plain that the holding of an inquest was the appropriate remedy. But there are other, more fundamental, reasons for not taking this course. These are to found in the legal restraints which are provided by the Coroners Act 1988 and the Coroners Rules 1984. The coroner is restricted to a simple short verdict. She cannot make recommendations, and many of the issues which still need to be investigated in public as indicated in Hooper J's judgment would be beyond the scope of her inquest.

65 I agree that the various investigatory processes into Mr Mubarek's killing which have been conducted so far fall well short of providing the effective public scrutiny that is needed in a case of this kind. Substantial changes in the existing system for the investigation of deaths by coroners have been proposed: Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review (Cm 5831) (June 2003). But they will require legislation, and it must be assumed that these changes will not be applied retrospectively to deaths which have already occurred. The only alternative in these circumstances is for the Secretary of State to order the holding of an independent public inquiry into the circumstances which led to Mr Mubarek's death. Subject to the observations at the end of Lord Bingham's speech with which I am in full agreement and to the fact that the person who conducts it will lack the powers which could only be given by statute, I suggest that the conduct and scope of this inquiry should be as close to the Scottish model as possible.

LORD HUTTON

66 My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend, Lord Bingham of Cornhill. I agree with it, and for the reasons which he gives I too would allow this appeal.

Appeal allowed with costs.

Solicitors: Imran Khan & Partners; J G O'Hare, Belfast; Treasury Solicitor.

DECP