EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 27229/95

Susan Keenan

against

the United Kingdom

REPORT OF THE COMMISSION

(adopted on 6 September 1999)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a British citizen born in 1935 and resident in Ilfracombe. She is represented before the Commission by Messrs Toller Beattie, solicitors practising at Braunton.

3. The application is directed against the United Kingdom. The respondent Government were represented by their Agent, Ms Sally Langrish of the Foreign and Commonwealth Office, London.

4. The case concerns the applicant's complaints concerning the circumstances of her son's detention in prison prior to his suicide and the alleged failure of the authorities to take the appropriate steps to safeguard his life. She complains that she has no effective remedy in national law in respect of her son's death in prison. The applicant invokes Articles 2, 3 and 13 of the Convention.

B. The proceedings

5. The application was introduced on 28 February 1995 and registered on 4 May 1995.

6. On 9 April 1996, the Commission decided, pursuant to Rule 48 § 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 9 August 1996. By letter dated 31 October 1996, the applicant indicated that she did not propose to submit any observations in reply.

8. On 8 September 1997, the Commission decided to invite the parties to attend an oral hearing on the admissibility and merits of the application.

9. On 6 May 1998, the applicant submitted written observations.

10. The hearing was held on 22 May 1998 in Strasbourg. The Government were represented by their Agent, Ms Sally Langrish, Mr Ian Burnett QC, Counsel and Mr Hugh Giles, Mr Laurence O'Dea, Mr Martin McHugh and Ms Mary Piper as Advisers. The applicant, who attended, was represented by Mr Tim Owen, Counsel, Mr Alain Feinson and Ms Jayne Perring, Solicitors.

11. On 22 May 1998, the Commission declared the application admissible.

12. The text of the Commission's decision on admissibility was sent to the parties on 28 May 1998. The parties were informed that the Commission had decided to adjourn further examination of the case pending the Court's judgment in the Osman case (Mulkiye and Ahmed Osman v. the United Kingdom, No. 23452/94, Comm. Rep. 1.7.97).

13. On 28 May 1998, the Government submitted two documents.

14. On 6 November 1998, the Commission invited the parties to make their final submissions in light of the Court's judgment in the Osman case (Eur. Court HR, Osman v. the United Kingdom judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3124).

15. The Government submitted their final observations on 18 December 1998. Following an extension in the time-limit fixed for the purpose, the applicant submitted her final observations on 28 January 1999.

16. After declaring the case admissible, the Commission, acting in accordance with former[1] Article 28 § 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

17. The present Report has been drawn up by the Commission in pursuance of former Article 31 of the Convention and after deliberations and votes, the following members being present:

MM	S. TRECHSEL, President
	E. BUSUTTIL
	G. JÖRUNDSSON
	A. WEITZEL
	H. DANELIUS
Mrs	G.H. THUNE
Mr	C.L. ROZAKIS
Mrs	J. LIDDY
MM	J.-C. GEUS
	I. CABRAL BARRETO
Sir	Nicolas BRATZA
MM	I. BÉKÉS
	A. PERENI④
	C. BÎRSAN
	K. HERNDL
	E. BIELI↓NAS
	E.A. ALKEMA
	M. VILA AMIGÓ
Mrs	M. HION
Mr	A. ARABADJIEV

18. The text of this Report was adopted on 6 September 1999 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with former Article 31 § 2 of the Convention.

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[1] The term "former" refers to the text of the Convention before the entry into force of Protocol No. 11 on 1 November 1998.

19. The purpose of the Report, pursuant to former Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

20. The Commission's decision on the admissibility of the application is annexed hereto.

21. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

22. The applicant is the mother of Mark Keenan who on 15 May 1993, at the age of 28, died from asphyxia caused by self-suspension whilst serving a sentence of 4 months' imprisonment at HM Prison, Exeter.

23. From the age of 21 Mark Keenan received intermittent treatment in the form of anti-psychotic medication for a condition which it appears was first diagnosed whilst he was serving a four year prison sentence for assault. It appears to have been reported by Mark Keenan that he was diagnosed as suffering from paranoid schizophrenia. Following his release from prison in 1988, Mark Keenan's general practitioner continued the prescription of anti-psychotic medication.

24. His medical history had included symptoms of paranoia, aggression, violence and deliberate self-harm, and his behaviour was sometimes unpredictable. In November/December 1992, shortly before he was admitted to prison, he had received treatment at North Devon District Hospital following two incidents in which he had injected himself with overdoses of insulin. Following the first incident, on 9 November 1992, it was noted that he was complaining of paranoia. Diagnoses of borderline personality disorder and paranoid schizophrenia were made and it was noted that he had a history of frequent episodes of deliberate self-harm. He was discharged after 10 days on a prescription of anti-psychotic medication. The second incident, on 16 December 1992, was associated with the breakdown in the relationship with his girlfriend. The admission notes recorded as diagnoses "Personality disorder. Paranoid psychosis. Suicide threats". He discharged himself on 18 December 1992.

25. On the same day he was admitted to HM Prison Exeter having been remanded in custody following an assault on his girlfriend. On admission he was received by the prison's health care centre for observation and assessment having given a history of suffering from paranoid schizophrenia.

26. On 21 December 1992, an attempt was made to transfer him from the health care centre to ordinary location. Later the same day he was re-admitted to the health care centre because he had been kicking at his cell door and appeared paranoid to prison staff. The explanation provided by Mark Keenan was that he had taken some cannabis which had tripped him out and made him paranoid, shaky and tense. Subsequently, on 23 December 1992, he was discharged to ordinary location having been assessed as fine, with no psychiatric symptoms, cheerful and coping. By the evening he was complaining that he was "cracking up". He was advised to "calm down and think positively about going to court tomorrow". In the event, on 24 December 1992, he was released on bail.

27. Mark Keenan was re-admitted to HM Prison, Exeter on 1 April 1993 having been convicted of the assault on his girlfriend. He was again received by the prison's health care centre for observation and assessment. On 5 April 1993, Dr Keith, the prison's senior medical officer, consulted Dr Roberts, the consultant psychiatrist who had been treating Mark Keenan before his admission to prison. Dr Roberts advised that Mark Keenan had a personality disorder with anti-social traits and that under stress he disclosed some fleeting

paranoid symptoms. He concurred with the medication which Dr Keith had prescribed, but advised that Mark Keenan should be treated symptomatically.

28. On 14 April 1993, Mark Keenan barricaded himself into the ward room of the health care centre in protest against his proposed transfer to ordinary location. On 16 April 1993, he was discharged to ordinary location but re-admitted to the health care centre the following evening after his cell-mate reported that Mark Keenan was uptight and had fashioned a noose from a bed sheet which he was keeping under his bed. On his return to the health care centre, Mark Keenan was placed in an unfurnished cell and put on a 15 minute watch. The entry in his medical notes for 17 April 1993 records:

> "Brought to Health Care Unit at 21.30 hours ... states he will hang himself. A noose has been made out of strips of sheets. In conversation with Keenan, <says> he is under pressure from kitchen workers who have stated they will contaminate his food etc. The look of relief on his face was great when I told him he will have to stay here."

29. A subsequent entry, on 18 April 1993, records "owes on wing hence can't cope <with ordinary location".

30. On 23 April 1993, it was decided that Mark Keenan should be assessed by the prison's visiting psychiatrist, Dr Rowe. On 26 April 1993, before he had been assessed, a further attempt was made to transfer him to ordinary location. He was re-admitted to the health care centre the following day. The entry in his medical notes for 27 April 1993 records:

> "Brought to treatment room shaking and hyperventilating. Declined any further medication. Unable to cope. Admitted to health care centre for observation and assessment. Seen at 17.45 hours. He says he felt panicky and paranoid in main prison. He felt he was going to be attacked. He felt he might have to defend himself. Located in single cell on lower landing."

31. On 29 April 1993, Mark Keenan was assessed by Dr Rowe. Dr Rowe, who did not express an opinion that it was currently necessary to transfer Mark Keenan to a hospital for psychiatric treatment, prescribed a change in his medication, and recorded in his medical notes:

> "He is an old patient of mine who suffers from a mild, chronic psychosis. He is not usually violent, although he is easily stressed and then can be unpredictable."

32. On 30 April 1993, the question of moving Mark Keenan to ordinary location was again raised with him. The entry in his medical notes for 30 April 1993 records:

> "He does not feel fit for <ordinary location> as he is afraid he might be injured, further mention of paranoia by him. To remain in a single cell."

33. In the course of the day his mental state was noted to deteriorate, with evidence of aggression and paranoia. Dr Searle considered that the change in medication might be responsible and therefore prescribed a return to his previous medication. At 6 p.m. Mark Keenan assaulted two hospital officers, one seriously. Following the assault he was placed in an unfurnished cell within the health care centre and put on a 15 minute watch.

34. On 1 May 1993, Dr Bickerton certified Mark Keenan fit for adjudication in respect of the assault and fit for placement in the segregation unit within the prison's punishment block. He recorded in Mark Keenan's medical notes for 1 May 1993:

> "Calm and rational. No sign of mental illness. Slept well, feels relaxed. Claims he was frustrated yesterday and this is why he attacked the officer. Fit for normal cellular confinement in punishment block."

35. The same day, Mr McCombe, the prison's deputy governor, ordered Mark Keenan to be placed in segregation in the punishment block under Prison Rule 43. Mr McCombe considered segregation appropriate as Mark Keenan's behaviour was unpredictable and he posed a threat to staff. No date appears to have been given for his release from segregation.

36. Whilst in segregation, Mark Keenan would have been locked up about 23 hours each day. Although the segregation unit was visited each day by a doctor, the prison chaplain and the prison governor, Mark Keenan would, in contrast to location within the health care centre or the main prison, have had minimal contact with staff, and none with fellow prisoners.

37. On 1 May 1993, following his transfer to the segregation unit, Mark Keenan requested a listener (a prisoner trained by the Samaritans in the counselling of inmates who may be suicidal). At 6.05 p.m. Mr Gill, one of the prison's hospital officers, was contacted after Mark Keenan had indicated to prison officers on the segregation unit that he was feeling suicidal. The medical notes record:

> "Went to see <Keenan>. 1997 raised (a form completed for the referral of an inmate, perceived to be a suicide risk, to the medical officer). Listener in cell with inmate. Reassurances given that he is not suicidal but tense, agitated <and> needs to talk it over. Will get <medical officer> to see when he attends later."

38. At 6.45 p.m., however, Mark Keenan was threatening to harm himself and was therefore transferred to an unfurnished cell in the hospital wing and put on a 15 minute watch.

39. At 7.45 p.m. Dr Bickerton attempted to speak to Mark Keenan through his cell door. Whilst noting that he appeared very agitated and distressed, and claimed to be hearing voices and thinking he was Jesus Christ, Dr Bickerton doubted that Mark Keenan was suffering from any psychotic illness. Mark Keenan's medical notes record that he spent the greater part of the night banging and kicking his cell door, shouting obscenities and making threats to prison staff. On 2 May 1993 Dr Simkin recorded in Mark Keenan's medical notes:

> "This morning denying he is suicidal. Verbally abusive to staff. Some bruises from hitting door. This man is a considerable hazard to staff and has become obnoxious to other hospital inmates due to his behaviour. He is unpredictable and has made threats to his life. He has been placed on Rule 43. I have explained to him that his remaining in the <unfurnished> cell is in order to assess his attitude in the next 24 hours. I will increase chlorpromazine to 400mg qds and resume Kemadrin and chloral nocte. He says he will not take medication."

40. The medical notes for 3 May 1993 record:

> "a.m. - very much better in attitude. Slept well. Requests to return to <the segregation unit in the punishment> block. Agreed."

41. Mark Keenan was duly returned to the segregation unit. A note in the segregation unit's occurrence book for 3 May 1993 records:

> "Keenan <was> brought in from the hospital. Seems slightly more lucid than before, however still needs watching. At tea time Keenan asked to <talk to a listener> as he stated he felt he was "going into one", which I took to mean kicking off ... staff beware."

42. The medical notes record that at 9 p.m.:

> "Troublesome in block. Given extra chlorpromazine. Seemed to calm down after a chat. If he is talking suicidally overnight then unfurnish his block cell and review 'mane' <query, in the morning>."

43. Save for a short note on 4 May 1993 that at "11.00 hours clopixol 500mg given", no further entry was made in Mark Keenan's medical notes from the 3 May 1993 until his suicide on 15 May 1993. Dr Bradley, who saw Mark Keenan in the course of routine morning visits to the segregation unit on 4 to 7 and 10 to 14 May 1993, recalls:

> " ... We had the cell door open on the majority of occasions. I recall there may have been one time when I spoke through his glass window ... but that was because they were short of staff. He had the opportunity to talk to me.
>
> We discussed his medication. He never mentioned any feelings of depression to me or not coping. On the whole Keenan appeared calm and with it with me. He appeared clear and not disturbed. I also checked with the staff as to his behaviour through the day, and they replied that there was nothing that concerned them."

44. The occurrence book for the segregation unit records, however, that on 4 May 1993:

> "Keenan abusive, aggressive and offering violence to staff. Relocated to <cell> A1-4 for a quietening down period. Keenan phone call to solicitor at 10.00 hours re assault on H/O Dent. On return <from phone call> to A1 <landing> states he will behave himself. Relocated to <cell> A1-5."

45. The entry for 6 May 1993 records:

> "Keenan refused cup of tea. Said there was something out in it. When told that there was nothing out in it he decided to drink it. He is starting to act very strange. Staff to be aware."

46. The entry for 7 May 1993 records:

> "Keenan seen by doctor. Refused medication. Staff to still offer medication. To be logged if taken or refused."

47. Following the entry on 7 May 1993 there is reference to the fact that on 8, 9 and 10 May 1993 he accepted his medication. Thereafter there is no reference to Mark Keenan in the occurrence book until his suicide on 15 May 1993.

48. In a letter to his mother, dated 13 May 1993, he complained that the state of his mind was not very good.

49. On 14 May 1993, Dr Bradley assessed Mark Keenan to be fit for adjudication in respect of his assault on the two prison officers on 30 April 1993. The record of the adjudication contains the certification by the doctor that he was fit for adjudication and for cellular confinement. The doctor added the observations:

> "At the time of the alleged offence Mr Keenan was receiving medication for a chronic psychiatric problem and he had had a recent change in medication."

50. At the adjudication on 14 May 1993 Mark Keenan was found guilty of assault and awarded 28 additional days in prison together with 7 days' loss of association and exclusion from work. At that point, Mark Keenan had only nine days before his expected release date. The sentence had the effect of delaying his release date from 23 May 1992 until 20 June 1993.

51. Shortly after the adjudication Mark Keenan was seen by the chaplain who recalled in his evidence to the Inquest that he was unhappy about the decision and stated "I was thinking of kicking off, but I don't think I will." The chaplain stated that at no stage did Mark Keenan indicate that he might take his own life.

52. At 9.45 the following morning, on 15 May 1993, Mark Keenan was seen by Dr Bickerton who recalls that he seemed calm, polite and relaxed. He was then seen by deputy governor McCombe, who later described him as having been in a highly agitated state, but relaxing when he was informed that his right to buy tobacco had not been suspended.

53. In the afternoon Mark Keenan was visited by a friend, M. T., whom he had known for about 5 years. M.T., who saw Mark Keenan for some 20 minutes, found him to be disappointed that he had an additional 28 days to serve in prison, but otherwise in good spirits and, when M.T. left, as looking forward to his next visit the following Saturday. Prison officer Haley, who returned Mark Keenan to his cell following the visit, recalls that Mark Keenan was very talkative and appeared in high spirits.

54. Prison officer Milne, who saw Mark Keenan at or about 5.15 p.m., recalls that he seemed alright and asked if he could use the telephone at 6 p.m.. Milne agreed, but in the event it does not appear that Mark Keenan was allowed out of his cell to make the call. According to the evidence given later at the inquest, Prison officer Milne who was on duty on landing A1 - the segregation block- was absent in the toilet for ten minutes from about 6.25-30 p.m. On his way from the toilet to assist on landing A3, he noticed that the cell call

indicator for landing A1 was depressed. The call buttons in each cell lit up indicators on each landing to ensure that if an officer was not present on one landing, the light could be seen by officers on other landings. There was no noise issuing from the indicator as it seemed that some-one, a prisoner or prison officer, had cancelled the buzzer, access being possible to the system from each landing. Milne called to another officer to accompany him and immediately went to Mark Keenan's cell and proceeded to open it. He estimated that it took a minute for him to open the cell from the time at which he saw the light on.

55. At 6.35 p.m., on 15 May 1993, Mark Keenan was discovered by the two prison officers hanging from the bars of his cell by a ligature fashioned out of a bed sheet. At 7.05 p.m. he was pronounced dead.

56. At some point before he committed suicide Mark Keenan depressed the call button in his cell. It would not have been possible for him to depress the call button whilst suspended. It was prison officer Milne's evidence at the Inquest that Mark Keenan must have pressed the call button during the 10 minutes when he was using the staff toilets since the light on the landing, which would have indicated that the call button had been depressed, was not on when he left.

57. In an undated letter, received by Dr Roberts after 15 May 1993, Mark Keenan wrote:

> "As you will well know I am in prison for assault on G. S., which I received 4 months. I cannot take much more. I have seen Dr Rowe in here he wrote me up for some new tablets fenzodine white tablets like white smarties. I just went mad on them, and ended up on assault on two staff. I am asking you if you can give me treatment when I get out and get me better. I was using drugs in Bmth as well, I feel very unstable but the doctor will not help me at all. I need help please could you send the Governor a report on me, I can't take much more."

58. On 25 August 1993, at the Inquest before a Coroner, the jury recorded a verdict of death by misadventure and that the cause of death was asphyxiation by hanging. Evidence had been given in public proceedings by fourteen witnesses, including the applicant, the prison officers on duty and who had discovered Mark Keenan's body, the police inspector who had investigated the death, the Deputy Governor of the prison, a number of prison hospital officers and the senior prison doctor, the prison chaplain and M.T. who had visited Mark Keenan on the day that he had died. There were statements submitted from these persons, as well as Dr Bickerton and Dr Bradley.

59. On 17 November 1993, the applicant obtained legal aid limited to obtaining further evidence and counsel's opinion on the merits and quantum of damages in a potential action against the Home Office in respect of the treatment of her son and the conditions of his detention.

60. In a report dated 17 August 1994, the consultant forensic psychiatrist instructed by the applicant's solicitors expressed his opinion that Mark Keenan, as a prisoner suffering from paranoid schizophrenia, was unfit to be placed in segregation in the punishment block and that the failure of the prison authorities to accommodate him in the hospital wing was an important contributory factor to his death.

61. In an advice dated 14 October 1994, counsel advised in light of the psychiatrist's report that notwithstanding the grave breach of duty by the Prison Service in keeping Mark Keenan, a mentally ill prisoner, in a punishment cell without any proper medical monitoring, an action in negligence under the Law Reform (Miscellaneous Provisions) Act 1934 would not succeed since there was no evidence that Mark Keenan had suffered any injury of a kind in respect of which a cause of action could be maintained. He was already mentally ill and there was no indication that he suffered any worsening in his condition, or developed any new condition as a result of his confinement. Mere distress was insufficient and the fact of his death was not such as in English law to constitute an injury in respect of which a cause of action lay. In respect of proceedings under the Fatal Accidents Act 1976, counsel advised that, since Mark Keenan was over 18 when he died, the applicant did not qualify for bereavement damages, there were no dependents who might be able to pursue a claim. To the extent the applicant might have incurred any funeral expenses, these were not sufficient to justify the support of legal aid. The effect of this advice was to prevent the applicant from pursuing any contemplated litigation since, in light of the advice, legal aid would be withdrawn.

62. By letter of 12 December 1994, the applicant was informed by the Legal Aid Board that they were considering whether to discharge her legal aid certificate in light of counsel's opinion that she had no reasonable prospect of success. By decision of 8 March 1995, the Legal Aid Board discharged her legal aid certificate since it was unreasonable in the circumstances that she continue to receive assistance.

63. In another report, dated 15 February 1995, a second consultant psychiatrist instructed by the applicant's solicitors expressed the opinion that Mark Keenan suffered from paranoid schizophrenia, that he was recognisably in one of the very highest suicide risk groups, that his confinement within the segregation unit was likely to have aroused in him feelings of terror, hopelessness, anguish and inferiority, that his ability and will to cope with his illness would, in the circumstances of his confinement, have been cumulatively undermined and resulted in the taking of his own life. The consultant psychiatrist concluded that Mark Keenan's treatment during the last eleven days of his life had fallen substantially below what could be regarded as an acceptable standard of care.

64. The applicant's legal aid was withdrawn by the Legal Aid Board on 8 March 1995 in light of counsel's advice.

65. In a report dated 2 August 1996, Dr Keith, the prison's senior medical officer, in response to the psychiatric reports obtained on behalf of the applicant, disputed that Mark Keenan suffered from paranoid schizophrenia, or that any specific symptoms of schizophrenia were observed whilst he was in detention. Dr Keith stated that Mark Keenan was treated consistently with Dr Roberts' diagnosis as a patient suffering from a personality disorder with anti-social traits who displayed some fleeting paranoid symptoms when under stress. When he was perceived to present a risk he was admitted to the health care centre for observation. In a further report dated 17 March 1996, a consultant psychiatrist, Dr Faulk, instructed on behalf of the Government, expressed the opinion that those treating Mark Keenan at the prison, who were not consultant psychiatrists, were entitled to rely upon the diagnosis given by Dr Roberts, that in light of that diagnosis their treatment of Mark Keenan was appropriate, and that there was no evidence that Mark Keenan found being on the punishment block particularly disturbing, or that whilst there he had become psychotic.

B. Relevant domestic law

1. Prison regulations

66. Section 7 of the Prison Act 1952 requires each prison to have a medical officer who, pursuant to Rule 17 of the Prison Rules 1964 promulgated by the Secretary of State, is responsible for "the care of the health, mental and physical, of the prisoners in that prison". Rule 18 provides:

> "(1) The medical officer shall report to the governor on the case of any prisoner whose health is likely to be injuriously affected by continued imprisonment or any conditions of imprisonment. ...
> (2) The medical officer shall pay special attention to any prisoner whose mental condition appears to require it, and make any special arrangements which appear necessary for his supervision and care.
> (3) The medical officer shall inform the governor if he suspects any prisoner of having suicidal intentions, and the prisoner shall be placed under special observation."

67. Health Care within prisons is also governed by Standing Order 13 which defines the responsibilities and duties of the members of a prison health care team. Paragraph 31 provides:

> "The initial medical assessment of all prisoners to the health care centre on or shortly after reception into prison, or as a result of concern about their mental state, should include consideration of special arrangements needed for their supervision to prevent attempts to harm themselves or commit suicide. Where it is considered that special supervision is medically indicated the medical officer will order supervision in one of the following forms:
> (a) continuous supervision, in which the prisoner is observed by a designated officer who remains constantly in his or her presence; or
> (b) intermittent supervision in which the prisoner is observed by a designated officer at intervals of not more than 15 minutes."

68. The Prison Service has also issued its own guidelines in the form of Circular Instruction 20/89 providing guidance, *inter alia*, relating to staff responsibilities, action on reception, referral and assessment during custody and preventative measures in respect of prison suicides. Circular Instruction 20/89 defined the task of the prison service as being:

> "to take all reasonable steps to identify prisoners who are developing suicidal feelings; to treat and manage them in ways that are humane and most likely to prevent suicide; and to promote recovery from suicidal crisis."

69. Pursuant to sections 47 and 48 of the Mental Health Act 1983, any prisoner suffering from a serious mental illness may be transferred to a hospital for detention and treatment.

70. Rule 43 of the Prison Rules 1964, pursuant to which Mark Keenan was placed in segregation, requires the prison governor to remove a prisoner from segregation in the event that a medical officer so advises on medical grounds. Rule 53(2) provides that no punishment in cellular confinement is to be imposed unless a medical officer has certified that the prisoner is in a sufficiently fit state of health.

2. Proceedings for injury and death caused by negligence

71. A person who suffers injury, physical or psychiatric, in consequence of the negligence of another may bring an action for damages for that injury. An exacerbation of an existing condition constitutes such injury. Upset and injury to feelings resulting from negligence in the absence of physical or psychiatric damage or exacerbation, do not entitle a plaintiff to damages. Any personal injury action maintainable by a living person survives for the benefit of his estate and may be pursued after his death.

72. Claims arising from the death of an individual caused by negligence are brought under the Fatal Accidents Act 1976 or the Law Reform (Miscellaneous Provisions) Act 1934. The former enables those who were financially dependent upon the deceased to recover damages for the loss of dependency. The scheme of the 1976 Act is compensatory and save for the sum of £7,500 for bereavement to the spouse of a deceased or parent of a deceased child under 18 at the time of death, damages are awarded to reflect the loss of support. The latter enables damages to be recovered on behalf of the deceased's estate and may include any right of action vested in the deceased at the time of his death together with funeral expenses.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

73. The Commission declared admissible the applicant's complaints:

- that the prison authorities failed to protect the applicant's son, Mark Keenan, from committing suicide while in segregation;

- that her son suffered inhuman and degrading treatment in respect of the conditions of his detention prior to his death;

- that she had no effective remedy in respect of her complaints.

B. Points at issue

74. The points at issue in the present case are as follows:

- whether there has been a violation of Article 2 of the Convention;

- whether there has been a violation of Article 3 of the Convention;

- whether there has been a violation of Article 13 of the Convention.

C. As regards Article 2 of the Convention

75. Article 2 para. 1 of the Convention provides in its first sentence:

"1. Everyone's right to life shall be protected by law. ..."

76. The applicant submits under Article 2 of the Convention that the respondent Government were under a positive obligation to take adequate and appropriate measures to secure effective protection of her son's life while he was detained as a prisoner known to be suffering from a mental illness. This included reasonable steps being taken to protect him from his own self-destructive or self-harming acts. She submits that the prison authorities failed to comply with this obligation to safeguard her son's life. She argues that the prison authorities were fully aware that her son had a history of mental illness, was receiving psychotropic medication and that his behaviour was showing violent, self-destructive tendencies, such that there was at all times a real and immediate risk that he might kill or severely injure himself intentionally or unintentionally. It was drawn to the Governor's attention by the prison doctor and Mark Keenan that he was suffering from a chronic psychiatric problem, with a recent change in medication yet the Governor proceeded to impose a punishment of 28 days' additional imprisonment including seven days in punitive segregation in the punishment block. The prison authorities should have sought appropriate advice from a psychiatrist as to her son's mental condition before proceeding to impose disciplinary or segregation measures and there should have been specific monitoring of his psychiatric condition by qualified persons while he was subject to segregation. Further, there were no effective procedural safeguards available in respect of the measures taken against her son.

77. The Government submit that there is no positive obligation cast on Contracting States by Article 2 in respect of individuals who are competent to make rational decisions and thus exercise their own right of self-determination. The Government submit that Mark Keenan, whilst mentally ill, was capable of making rational decisions in the exercise of his right of self-determination in the last days of his life and thus no positive obligation was owed under Article 2. In the alternative, the Government submit that if any positive obligation was owed then this was discharged. The extent of that obligation should also be assessed in light of the fact that the risk posed to Mark Keenan was not from a third party but from himself. The Government submit that there was in place at the prison a comprehensive system of safeguards and procedures concerning suicide prevention. The Government assert that these safeguards and procedures were followed in Mark Keenan's case, and that the assessment and response of those in charge of his treatment and care to the risk which he presented was, in all the circumstances, when viewed objectively and without hindsight, reasonable and appropriate. On the basis of the objective evidence available to the prison authorities in the period leading up to Mark Keenan's death, there was no real and immediate risk to his life and the prison authorities did not fail to take any measures which might have been expected to avoid any risk. The Government points out that the fact that Mark Keenan pressed the call button in his cell before suspending himself indicates that he did not intend to take his life. However, the duty officer had briefly left his desk for the lavatory and but for that unfortunate coincidence of events Mark Keenan would probably still be alive.

78. The recent case-law of the Convention organs establishes that Article 2 is not exclusively concerned with intentional killing resulting from the use of force by agents of the State but also imposes a positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction (see eg. Eur. Court HR, Osman v. the United Kingdom judgment of 28 October 1998, *Reports* 1998-VIII, para. 115). The scope of the obligation will depend on the circumstances of the case, bearing in mind, amongst other relevant considerations, the operational choices that have to be made in terms of priorities and resources and the necessity of interpreting such an obligation in a way which does not impose an impossible or disproportionate burden on the authorities. For example, in the Osman case (Eur. Court HR, op. cit, para. 116), the Court held that Article 2 imposed a positive obligation on the authorities to take preventive measures to protect an individual whose life was at risk from the criminal acts of another individual. This obligation would not be met where it was established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

79. The Commission considers, first of all, that the prison authorities have an obligation under Article 2 to take appropriate steps to safeguard the lives of the prisoners under their control. The authorities are indeed under an obligation to account for injuries and deaths which may occur to detainees held under their responsibility (see, *mutatis mutandis*, No. 21986/93, Salman v. Turkey, Comm. Rep. 1.3.99, para. 315, pending before the Court, concerning the death of a detainee in police custody). The existence of this obligation is not affected by fact that the death or injury occurs as a result of the prisoner's attempts, successful or otherwise, to commit suicide. It would agree with the Government's submission that the scope of the obligation may be affected by this factor. When depriving an individual of his liberty, the authorities thereby assume a responsibility for his welfare, the individual's autonomy to undertake that responsibility for himself having been largely removed. However, it would run counter to other fundamental rights guaranteed under the Convention -

the right to respect for private life and potentially the prohibition against torture and inhuman and degrading treatment - to impose a regime with the rigorous controls necessary to render any self-injurious attempts impossible.

80. The Commission sees no reason why it should not apply the test set out by the Court in the Osman case (Eur. Court HR, Osman judgment, *loc. cit*.). It has therefore considered the two limbs - the extent of the knowledge of the prison authorities and the reasonableness of the steps taken.

81. As regards the first limb, the Commission finds that it is not in dispute that Mark Keenan had a history of mental problems. It is not necessary, nor appropriate for it to adjudicate between the varying classifications of his condition proffered by the doctors concerned in the case. This condition was a significant factor affecting his mental health, as shown by the fact that he was on medication and by his problematic behaviour prior to his death. The Commission also finds that the authorities were aware that he posed a risk to himself. On 16 April 1993, he was placed in the health care centre on a 15 minute watch after his cell mate reported that he had made a noose from a bedsheet. His state deteriorated shortly afterwards and on 30 April he was again placed in the health care centre on a 15 minute watch, after he had shown signs of paranoia and aggression. On 1 May 1993, after being transferred to the punishment block, Mark Keenan requested a listener, a counsellor trained to talk to persons feeling suicidal. The medical notes of that day referred to him posing a suicide risk, and following threats to harm himself he was again transferred to the hospital wing. He made threats again on 2 May 1993 and, though deemed well enough to return to the punishment block on 3 May 1993, he again requested a listener. The Commission further notes that Mark Keenan's behaviour at the time prior to his death varied considerably, periods of instability or aggression alternating with periods of relative calm. Indeed, there is no medical entry between 3 May and 15 May, when he committed suicide. The risk posed by Mark Keenan may be regarded as being a real one but its immediacy varied with his fluctuating mental state.

82. The Commission has therefore considered whether in light of these elements the authorities did all that could reasonably have been expected of them in dealing with Mark Keenan. It recalls that the applicant has criticised heavily the decision to impose a disciplinary punishment on him, which had the result of lengthening the duration of his imprisonment and of placing him in the harsh conditions of the segregation block, where he committed suicide. The Commission observes that the punishment was imposed on him in respect of an assault committed by him on two prison officers. It is not disputed that this occurred though the applicant alleges that her son may have been affected by the change of medication. This matter was brought to the attention of the Governor, who was nonetheless satisfied, after hearing Mark Keenan's version of events, that the charge was proved. Significantly, one of the prison doctors assessed Mark Keenan as fit both for adjudication and for punishment. In these circumstances, the Commission cannot regard the measure taken by the Governor as unreasonable. Nor is it persuaded that there was any element which should have alerted the authorities to the necessity to seek the opinion of a psychiatrist as to Mark Keenan's fitness at this point. The Commission recalls that the prison doctor had consulted Mark Keenan's consultant on his admission to hospital and had arranged for him to be seen by the visiting psychiatrist on 29 April following difficulties. It considers that, without the benefit of hindsight, the prison authorities might reasonably have considered that Mark Keenan's mental illness was being appropriately treated and monitored and that the prison

doctors, who had been treating Mark Keenan over the previous month, were in a position to assess his condition.

83. As regards the circumstances immediately surrounding Mark Keenan's death, the Commission observes that while in the segregation block, he received a daily visit from a doctor and that nothing untoward was noted in the records. He also received a daily visit from the prison chaplain and the governor as well as being in contact with the prison officers on duty. While this regime was punitive, the Commission does not consider that it imposed a level of social deprivation or hardship which could foreseeably have caused a suicide attempt. That there was no factor which would have alerted the prison authorities to the fact that an attempt would be made is indicated by the evidence given at the inquest by the persons who saw him on 15 May prior to his death - a friend and a prison officer recalling that he seemed to be in good spirits.

84. The Commission has also given consideration to the unfortunate absence of the prison officer from his post at the time that Mark Keenan pressed the call button. It also appeared that the buzzer which would have given audible warning had been switched off shortly before in circumstances which were not clarified at the later inquest. These two factors arguably contributed to the delay in a response being made to Mark Keenan's call, and thereby to his death. However, the Commission is not satisfied that in the circumstances this discloses a neglect or defect for which the prison authorities can be held liable under Article 2 of the Convention. The system provided for a call button in each cell which could be monitored visually by the prison officers on duty on the landings but was not intended to, nor could reasonably have been expected to, guarantee that every call was instantly attended to where there were a number of prisoners and competing claims on a prison officer's attention. It further observes that closer monitoring of a prisoner could be provided for by way of a fifteen minute watch, where that prisoner was assessed as an immediate risk. Since, however, Mark Keenan's condition had been relatively stable since 30 April 1993 - over a period of two weeks - the Commission does not find that it was unreasonable of the authorities not to have been operating a suicide watch over him on 15 May 1993.

85. The Commission concludes that in the circumstances of this case the prison authorities have not been shown to have acted unreasonably in the way in which they treated Mark Keenan in the period of detention prior to his tragic death or to have omitted measures which could reasonably have been expected to have been applied to avoid a risk to his life.

CONCLUSION

86. The Commission concludes, by 15 votes to 5, that in the present case there has been no violation of Article 2 of the Convention.

D. As regards Article 3 of the Convention

87. Article 3 provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

88. The applicant submits under Article 3 that the measures taken against her son in the final days of his life constituted inhuman and degrading treatment and punishment having regard to his mental condition. She refers in particular to the decision to hold him in segregation in the punishment block, which involved incarceration for 23 hours each day. She relies, *inter alia,* on the report by a consultant of 15 February 1995 which gives the opinion that his confinement would have been likely to have aroused in him feelings of terror, hopelessness, anguish and inferiority.

89. The Government point to the Commission's case-law that the segregation of persons in detention for reasons of security or discipline is not *per se* a breach of Article 3. The Government also point to the fact that the deceased was assessed as fit for detention in the segregation unit by one of the prison's medical officers, that whilst in the segregation unit he was seen each day by one the prison's medical officers, that during the period he was in segregation there is no evidence of any deterioration in his condition, and that even if, which is not supported by the evidence, the circumstances of his detention aroused in him feelings of hopelessness, fear, anguish or inferiority, they were not such as to attain the minimum level of severity necessary to engage Article 3.

90. The Commission recalls that ill-treatment must be of a certain minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects, and where relevant, the sex, age and state of health of the victim (see eg. Eur. Court HR, the Costello-Roberts v. the United Kingdom judgment of 25 March 1993, Series A no. 247-C, p. 59, para. 30).

91. The Commission finds that there is no contemporaneous evidence that Mark Keenan was suffering a significant level of anguish or distress prior to his death which can be attributed to his conditions of detention. There is an undated letter written by Mark Keenan which was received by his doctor after his death which refers to his feelings of instability and that he had gone “mad” on the new medication, with the comment that he could not take much more. However, these remarks are in the context of his request for treatment when he left prison. It is not possible to distinguish the undoubted suffering resulting from his mental illness from any additional strain which might have been imposed on him due to the segregation. The Commission notes that the visitors which he had prior to his death considered that he was in a cheerful mood and that there were no visible signs of any internal distress apart from the Deputy Governor’s recollection that he had shown signs of agitation which had calmed after he had been re-assured about his right to buy tobacco. The medical report relied on by the applicant was issued by a doctor who had not treated Mark Keenan and whose opinion was based on hindsight and a degree of speculation. It does not form a sufficient basis for drawing conclusions, to the requisite standard of proof beyond reasonable doubt, that the segregation of Mark Keenan constituted treatment of the severity prohibited by Article 3 of the Convention.

CONCLUSION

92. The Commission concludes, by 11 votes to 9, that in the present case there has been no violation of Article 3 of the Convention.

E. As regards Article 13 of the Convention

93. Article 13 provides:

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

94. The applicant also invokes Article 13, submitting that she did not have available any remedy which would effectively allow her to obtain redress in respect of the death of her son and the treatment which he suffered prior to his death. As established in counsel's opinion of 14 October 1994, she was unable to pursue any action in the courts, either under the Law Reform (Miscellaneous Provisions) Act 1934 or the Fatal Accidents Act 1976. She also alleges that there were no effective means available to Mark Keenan to complain about his treatment and punishment in the prison. She points out that prisoners' complaints procedures took at least six weeks in 1993 and that legal aid to bring judicial review would have been unlikely to have been granted, any such proceedings also not offering any likelihood of prompt intervention.

95. In respect of the applicant's complaint under Article 13, the Government point to the fact that Mark Keenan could have raised issues relating to the circumstances of his detention under the prisons' Request and Complaints procedure, or through the mechanism of Judicial Review. The Government also point to the availability of actions in the tort of negligence, assault and misfeasance in the exercise of a public office, and that any action vested in the deceased at the time of death survives for the benefit of his estate under the Law Reform (Miscellaneous Provisions) Act 1934. The Government further point to the remedies available to the dependants of a deceased under the Fatal Accidents Act 1976. The Government submit, therefore, that English law provides effective remedies for the complaints made by the applicant in connection with her son's detention and death.

96. The Commission recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. The nature of the right which the authorities are alleged to have violated also has implications for the nature of the remedies which must be guaranteed. In cases dealing with allegations of unlawful deaths, torture and disappearances in custody, the Court has held that the notion of effective remedy entails the payment of compensation where appropriate and a thorough and effective investigation into the allegations, which includes effective access of relatives to the investigatory procedure (see, amongst other authorities, Eur. Court HR, Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, para. 95, Ergi v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, p. 1781, para. 96).

97. Insofar as the applicant complains of the inability of her son to obtain prompt intervention prior to his death, this would appear to invoke the right to an effective remedy in the context of preventing inhuman treatment by way of segregation and of preventing the risk

of suicide as a result of the stresses of the segregation. The Commission observes that it would have been open to Mark Keenan to apply for judicial review of the disciplinary proceedings which imposed the punishment on him, and to apply for legal aid to bring such proceedings. Whether or not this would have proved successful is perhaps arguable. However the courts would have been able to quash the proceedings. In the event, Mark Keenan committed suicide a day after the adjudication occurred. The Commission finds that this in itself rendered any attempt at redress impossible and is not persuaded that the Contracting State can be held liable for failing to provide a remedy which would have taken effect in the short time preceding his death. It has therefore examined the applicant's complaints under Article 13 with regard to the alleged failure to provide an effective remedy subsequent to the death of her son.

98. The Commission finds that the inquest which took place on 25 August 1993 provided an independent and public enquiry which allowed the circumstances surrounding the death of Mark Keenan to be examined. It recalls that the evidence was taken from the police officer who investigated the death, the prison officers who were on duty that day and found the body, and other personnel from the prison, including the senior prison doctor, hospital staff and the Deputy Governor. This provided an effective investigative mechanism. It did not however furnish the applicant with the possibility of establishing the responsibility of the prison authorities for failure to protect her son or obtaining damages.

99. In this respect, the Commission observes that it is not disputed that two claims could have been presented to the courts. Firstly, if the applicant had been able to prove that her son had suffered injury or aggravation to his mental illness due to the conditions of his detention, an action would have lain for negligence by the prison authorities under the Law Reform (Miscellaneous Provisions) Act 1934, which would have afforded the possibility of obtaining damages. It appears however that this would not have covered any claims that her son had suffered inhuman or degrading treatment insofar as this related to mental distress resulting from the conditions of his detention or that these conditions caused his death by suicide. Secondly, a claim could have been made under the Fatal Accidents Act 1976 in respect of Mark Keenan's death. However, this cause of action serves generally to provide damages for the dependants of a person who has died and to compensate the pecuniary loss flowing from that death. The applicant was not however dependent on her son. Since the applicant's son was over 18 years of age, she also could not claim bereavement damages. As there was a financial loss to the estate from funeral expenses, a potential claim could have been made as regarded this aspect. This would not however have provided relief in respect of the applicant's concerns.

100. Consequently, the Commission considers that these proceedings, which would not have recognised any non-pecuniary damage suffered by the applicant or her son, short of physical or psychiatric injury, as founding an appropriate award of damages, did not afford effective redress in respect of her complaints. The Commission accordingly finds that the applicant did not have available to her a remedy which would have effectively examined the liability of the authorities for the suffering caused to her son prior to his death or for failing to prevent him from committing suicide and which would have afforded the possibility of compensation in respect of those matters.

CONCLUSION

101. The Commission concludes, unanimously, that in the present case there has been a violation of Article 13 of the Convention.

F. Recapitulation

102. The Commission concludes, by 15 votes to 5, that in the present case there has been no violation of Article 2 of the Convention (para. 86).

103. The Commission concludes, by 11 votes to 9, that in the present case there has been no violation of Article 3 of the Convention (para. 92).

104. The Commission concludes, unanimously, that in the present case there has been a violation of Article 13 of the Convention (para. 101).

M.-T. SCHOEPFER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

DISSENTING OPINION OF MRS G. H. THUNE

I have voted with the majority in finding no violation of Article 2. I do, however, to a large extent, share the views expressed by the minority, and did not without strong hesitation reach this conclusion.

It is not contested that the prison authorities were already aware from the time Mr. Keenan was committed to prison that he was seriously depressed with a history of frequent episodes of self-harm. It therefore must have been clear to them that a certain risk of him committing suicide existed already at that time.

As regards the application of the second limb of the test applied by the Court in the Osman case, namely, the reasonableness of the way Mr. Keenan was treated by the prison authorities having regard to his particular situation, I consider that a number of serious objections can be raised. The reactions of the prison authorities in the various situations outlined in the facts part of this report do in my opinion raise doubts as to whether Mr. Keenan's particularly vulnerable situation, as well as the risk of self-harm, was taken sufficiently seriously by the prison authorities. On the other hand, it is obvious that the risk existed already at the time he was committed to prison, and it must be recognised that the task of prison authorities under such circumstances is very difficult. On balance, I therefore have concluded with the majority of the Commission that there is no violation of Article 2 of the Convention.

As to the complaint under Article 3, however, I am not able to follow the majority and have voted in favour of finding a violation.

According to the case-law of the Court, inhuman treatment must be of a certain minimum of severity to fall within the scope of Article 3. The assessment should in each case be a relative one, depending on various factors, among them the state of health of the victim as well as the physical and mental effects of the treatment to which the alleged victim has been subjected. I refer in particular to the cases of Herczegfalvy, Costello-Roberts and Nasri (Eur. Court HR Herczegfalvy v. Austria judgment of 24 September 1992, Series A No.144, Costello-Roberts v. the United Kingdom judgment of 25 March 1993, Series A No.247-B and Nasri v. France judgment of 13 July 1995, Series A No. 320-B). In all these cases, substantial weight was placed on the particular vulnerability of the individual applicants who claimed that they had been subjected to inhuman and/or degrading treatment. The Court has also accepted in principle that treatment which, under ordinary circumstances, would not be considered inhuman within the meaning of Article 3, can amount to a violation of this provision when the situation of the individual subjected to such treatment renders him particularly vulnerable. This approach by the Court implies in my view that the Contracting States have an obligation under the Convention to show particular diligence in handling vulnerable individuals who are under the care and control of the authorities.

These considerations must apply also to the present case where the prison authorities were faced with a person who previously had shown signs of serious mental distress and tendencies to commit suicide. When committed to prison Mr. Keenan had a diagnosis of

borderline personality disorder and paranoid schizophrenia. He was mentally unstable and also under medication. This was known to the prison authorities at the time he was detained as shown by his immediate and appropriate placement in the health care centre for observation and assessment.

When considering the subsequent events, there is nothing to indicate that Mr. Keenan's mental status improved or that he in any way recovered from his illness. On several occasions, attempts were made to transfer him from the health care centre to ordinary location. These attempts were unsuccessful as he very quickly had to be taken back to the health care centre.

On the whole the authorities, in my view, treated Mr. Keenan in a manner which showed substantial negligence of his particularly vulnerable situation, in particular with regard to his mental problems and his seriously depressive tendencies. In this respect, I share the views expressed by the minority in the dissenting opinion of Mr. Rozakis who refer to the severe response made by the authorities to behaviour which must be seen as flowing from his mental state. It is particularly striking the way Mr. Keenan was subjected to punishment in the segregation unit. I also consider the medical service provided for him as inadequate in his particular situation, and refer to the fact that during the last period before his death there were no medical records.

The behaviour of the authorities must in my opinion have caused Mr. Keenan additional distress, and I find it difficult to accept the assessment by the majority of the Commission when it "finds that there is no contemporaneous evidence that Mark Keenan was suffering a significant level of anguish or distress prior to his death which can be attributed to his conditions of detention" (paragraph 95). I also find it unjustified to rely on observations by visitors who had stated that shortly before his death he was in a cheerful mood and saw no particular signs of any internal distress, as an accurate indication of his mental state.

Contrary to the majority, I accordingly find that the treatment during Mr. Keenan's detention in prison, including the placement in the segregation unit with lack of adequate medical attention, amounted to inhuman treatment contrary to Article 3 of the Convention.

(Or. English)

**DISSENTING OPINION OF MR C.L. ROZAKIS
JOINED BY MRS J. LIDDY AND MR J.-C. GEUS**

I regret that I am unable to follow the majority of the Commission in its finding that there has been no violation of Articles 2 and 3 of the Convention in the present case. The reasons which have led me to a different conclusion are the following :

1. With regard to Article 2 of the Convention, my point of departure is the judgment of the Court in the Osman case, which has already been cited by the Commission in its opinion. In this judgment the Court, after having accepted that States parties to the Convention have, under certain circumstances, a positive obligation to protect life, proceeds to the formulation of a test, which seems to me to be the basic test to apply in all circumstances where a State must have an obligation to protect life from possible harm. In para. 116 of the Osman judgment, the Court says :

> « ... where there is an allegation that the authorities have violated their positive obligation to protect the right to life..., it must be established to [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk... For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. »

The test applied by the Court in Osman contains a number of constitutive elements which must concurrently exist for the Strasbourg organs to conclude that a violation of Article 2 has occurred : first, the knowledge on the part of the authorities of a risk to life; secondly, the knowledge that they have or ought to have at the time of the existence of the risk (knowledge contemporaneous to the events producing risk) ; thirdly, that the risk is real and immediate ; fourthly, that the person who runs the risk is identifiable - which means that he/she does not simply belong to a general category of persons whose life may be threatened, but that he/she is a person for whom the authorities have or ought to have specific information concerning the threat to his/her life ; fifthly, that the authorities have failed to take measures within the scope of their power which judged reasonably, might have been expected to avoid the risk.

In applying these elements of the test in the Osman case the Court found that there has been no violation of Article 2 of the Convention, and rightly so. In the Osman case the police were not in a position to detect at the time of the occurrence of the incidents (which eventually culminated in the taking of life), that they were life-threatening. Indeed if one looks at the particular circumstances of the Osman case one realises that, without the wisdom of hindsight, it was impossible for a reasonable person to conclude that the isolated incidents,

which were annoying to their recipients, but of a rather petty criminal nature, could have led to a major criminal activity, namely to the taking of life. Accordingly, the police, although they had all the requisite information in their hands, and even knew about the increasing rhythm of the activities of the culprit, they were unable to reasonably assess that information in a way which could have led them to conclude that human life was at risk. While, therefore, one could easily criticise the police for negligent behaviour with regard to specific aspects of their reaction to the criminal activity of the person responsible for the ensuing massacre, it is difficult for one to consider them responsible for a conduct amounting to a violation of Article 2 of the Convention.

The situation is totally different in the present case. The applicant's son, Mark Keenan, had a clear medical history, which included symptoms of paranoia, aggression, violence and deliberate self-harm. His situation was known to the authorities at the time that they decided to incarcerate him and to put him in segregation. Furthermore, as the Commission recognises, his situation while imprisoned also manifested his mental instability, his aggressivity and his suicidal tendencies which alternated with periods of relative calm. What seems to me crucial in the circumstances of this case is not the simple fact that Mark Keenan was mentally unstable. What is crucial, to my mind, in the correct assessment of the risk is that both before his incarceration and during the period of imprisonment he had repeatedly given signals of his tendency to commit suicide.

Yet, against that background, the authorities behaved in a manner which manifests real negligence to the particular needs of that ailing person. They behaved towards him as if he were a regular prisoner. Although they knew about his condition and his suicidal fits, they imposed on him a further disciplinary punishment, which had the result of lengthening the duration of his imprisonment and of placing him in the harsh conditions of the segregation block where he committed suicide. One could have reasonably expected that the authorities, taking into account the particularities of Mark Keenan, would have followed a totally different course of action, focusing on the improvement of his mental condition or at least excluding, as far as possible, the aggravation of his mental situation, which led to his suicide. Confinement to a hospital and the application of a treatment more suitable to his needs could have been considered a more logical reaction of the authorities, when deciding on the fate of the applicant's son. Moreover, responsibility may also be attributed to the authorities by the fact that having chosen a severe treatment of Mark Keenan, which was, as I said, totally unsuitable to his individual needs, they did not take the necessary steps to protect him effectively, through a more efficient monitoring of his behaviour and deeds. This failure eventually led to his suicide at the time when he was left unattended.

In conclusion, the authorities, while they knew about the suicidal tendencies of Mark Keenan, and they had in their hands reasonable means to avert the fatal incident, opted for a policy towards him which contributed to rather than avoided his taking of his life. Under such circumstances, I find that Article 2 has been violated.

2. With regard to Article 3, I also consider that there has been a violation of its substantive contents, from the moment that the authorities, in total disregard of the particular needs of Mark Keenan, applied measures against him, which were unfit for his health conditions and contributed to his suffering and to his anxiety. I consider such a behaviour as inhuman treatment.

(Or. English)

DISSENTING OPINION OF MM I. BÉKÉS AND A. ARABADJIEV

We join the dissenting opinion of Mr C. L. Rozakis on point 2 as regards Article 3 of the Convention.

(Or. French)

DISSENTING OPINION OF MR I. CABRAL BARRETO

Je partage l'opinion de M. C.L. Rozakis qu'il y a eu violation de l'article 2 de la Convention due au fait que les autorités ont failli à leur obligation positive de protéger le droit à la vie de Mark Keenan.

Eu égard à cette conclusion, je n'estime pas nécessaire d'examiner le grief concernant la violation de l'article 3 de la Convention, se fondant sur les mêmes faits que ceux à la base du précédant grief.