



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF BUBBINS v. THE UNITED KINGDOM

(Application no. 50196/99)

JUDGMENT

STRASBOURG

17 March 2005

FINAL

17/06/2005

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bubbins v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr B.M. ZUPANČIČ, *President*,

Mr J. HEDIGAN,

Sir Nicolas BRATZA,

Mr L. CAFLISCH,

Mrs M. TSATSA-NIKOLOVSKA,

Mr V. ZAGREBELSKY,

Mrs A. GYULUMYAN, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 27 November 2003 and on 24 February 2005,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 50196/99) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an United Kingdom national, Mrs Theresa Bubbins ("the applicant"), on 25 May 1999.

2. The applicant was represented by Christian Fisher Solicitors, a firm of lawyers practising in London. The United Kingdom Government ("the Government") were represented by their Agents, Ms R. Mandal and (subsequently) by Ms E. Willmott, Foreign and Commonwealth Office.

3. The applicant alleged under Article 2 of the Convention that the facts of the case disclosed a violation of the right to life of her brother, Michael Fitzgerald.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 27 November 2003, the Court declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). The parties replied in writing to each other's observations and additional observations. On 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

7. On 24 February 2005 the Chamber decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The application is brought on behalf of Michael Fitzgerald, a deceased British national, by his sister, Theresa Bubbins, who lives in Bedford, England.

9. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The background to the incident

10. On 26 February 1998, the applicant's brother, Michael Fitzgerald, was shot dead by an armed police officer at his flat in Clarendon Street, Bedford, following a siege.

11. At about 6.25 p.m. on 26 February 1998 Melanie Joy, Michael Fitzgerald's girlfriend, drove to Michael Fitzgerald's flat. As she entered the rear car park she saw a pair of legs disappearing through the ground floor kitchen window of the premises. Melanie Joy did not recognise the person entering the flat and assumed that the person, who was male, was an unauthorised intruder.

12. Melanie Joy was concerned for the safety of Michael Fitzgerald and, although she did not know whether or not he was in the flat, she shouted his name through the letterbox on the front door of the premises. She obtained no response.

13. At about 6.28 p.m. Melanie Joy used her mobile telephone to report to the police a burglary in progress. The police gave this report an 'immediate response' within the criteria fixed by the Bedfordshire Police.

14. The first police officers to arrive at the scene were Acting Sergeant Phillips and Acting Sergeant Morris. They arrived at 6.33 p.m.

15. Acting Sergeant Phillips went to the kitchen window at the rear of the premises. The window was open. Acting Sergeant Phillips was able to move the venetian blinds and identified himself as a police officer. He was confronted by a man from within the shadows of the room. Acting Sergeant Phillips thought the man to be a few inches shorter than his own height of 6' 1". The man, who was in fact Michael Fitzgerald, adopted a double-handed extended arm stance, and pointed what appeared to be a handgun at the officer.

16. Acting Sergeant Phillips, fearful for his safety, shouted to his colleague, Acting Sergeant Morris: “He's just pointed a gun at me, get back.”

17. The two police officers and Melanie Joy then withdrew to what they believed to be a safe distance from the premises and Acting Sergeant Phillips summoned assistance, including Armed Response Vehicles (“ARV”). This request was timed at 6.34 p.m.

18. During the course of the incident which followed, radio traffic was monitored within the Bedfordshire Police Force Incident Room (“FIR”).

19. The FIR log indicates that at 6.38 p.m., Acting Sergeant Morris transmitted the following message:

“Michael Fitzgerald according to his ex that lives at this location knows him to have a replica firearm. She's not aware of him having a firearm itself but he does have a drink problem.”

20. Within a short time, other police officers arrived at the premises. Police Constables Evans and Newton, both unarmed, positioned themselves behind the rear wall of the rear garden. They both reported seeing a man in the kitchen pointing a gun at them.

21. At 6.40 p.m. Inspector Linda Kelly arrived and took front line charge of the situation.

22. Radio communication between Police Constable Evans and Acting Sergeant Phillips on 'talk-through' mode, so that the FIR would hear, conveyed the wrong impression that the premises in question were confined to the ground floor. There was in fact an upper floor. This erroneous impression prevailed until it was corrected as a result of information provided by Melanie Joy at 7.09 p.m.

23. In 1998, Bedfordshire Police Force had two nominated ARVs on duty at all times. In order to provide maximum cover, they were deployed to the north and south of the county. Their primary role was to contain spontaneous firearm situations until the arrival of tactical firearms personnel.

2. ARV vehicles

24. At about 6.42 p.m. the North ARV, containing Officer C and Officer B, arrived at the scene. They were briefed on the incident by Inspector Kelly and Acting Sergeant Phillips. By the time the North ARV arrived, an unarmed outer containment of the premises had been put in place. Officer B asked Inspector Kelly to close the road to vehicular and pedestrian traffic. The South ARV was still on its way to the scene.

25. As the two ARV officers were discussing the incident at the front of the premises, the front door opened and the occupant appeared in the doorway.

26. In accordance with his training, Officer B shouted: “Armed Police. Drop the gun and go back into the house.”

27. The occupant raised his hand which appeared to contain a handgun and, almost immediately, went back into the flat. Seconds later he again appeared at the doorway and raised the gun. Officer B issued the same instruction. The occupant appeared to take no notice of the command to drop the handgun and returned to the inside of the flat.

3. Deployment of the North ARV officers

28. At about 6.51 p.m. the armed officers decided that the only way to contain the building, and also to provide armed support to their unarmed colleagues, was to deploy one of them at the front of the premises and the other at the rear. Officer B positioned himself behind the high brick wall at the rear car park and erected a makeshift platform on which to stand and observe the rear of the premises. This platform was later replaced by a police car. Officer B was about 25 yards from the premises.

29. Officer C positioned himself at the front of the building. Both officers were armed with Steyn AUG .223 calibre carbines. Officer B saw the occupant enter the kitchen, raise his gun and point it towards him. Officer B shouted: “You're surrounded by armed police, leave the gun inside and come out slowly.” The occupant left the kitchen and Officer C, at the front of the premises, issued a similar command. These commands, which were repeated at intervals throughout the incident, had no apparent effect.

4. The arrival of the South ARV officers

30. At about 7.01 p.m. the South ARV arrived at the scene. It contained Officers D and A. Officer D joined Officer B at the rear of the premises. Officer A joined Officer C at the front of the premises.

31. Following the arrival of Officer D, Officer B reviewed his position and decided that he was not ideally placed to deal with the occupant should he decide to leave the premises. Officer B decided that it would be better to take up a position behind two cars parked in the courtyard car park on the other side (the premises/courtyard side) of the rear wall. According to the applicant, Officers B and D did not consult the senior officers present on their decision to forsake their protected position behind the wall and move to the courtyard side.

32. Both Officers B and D moved to a position behind the two vehicles, situated within a few feet of the rear wall. This was at about 7.05 p.m.

33. They were joined by Police Constable Cattnach, a police dog handler, to add the further tactical option of using a police dog should the occupant attempt to escape. Police Constable Cattnach arrived at about 7.17 p.m.

34. The police traffic department provided flood lighting on an extended mast powered by a generator. This lighting considerably enhanced the vision of the police officers in the rear car park.

35. At intervals, the occupant pointed his gun out of the rear kitchen window at the officers at the rear of the premises. Officers B and D repeatedly issued instructions for him to put down his gun and come out from the premises.

5. Attempts to trace Michael Fitzgerald

36. With the siege of the premises continuing, attempts were made to trace Michael Fitzgerald. Acting on information provided by Melanie Joy, two detective officers, Detective Constable Ellson and Detective Constable Route, visited local public houses.

37. A photograph of Michael Fitzgerald was obtained from the file relating to a previous court appearance following his arrest in September 1997 for a drink-driving offence. This photograph was provided to the officers who visited the local public houses.

38. Investigations into Michael Fitzgerald's whereabouts led to the police officers at the scene being told, erroneously, that Michael Fitzgerald was 5'8" tall. He was in fact 5'11". This information was derived from the details in the case file concerning his arrest in September 1997.

6. Other events between 7 p.m. and 8 p.m.

39. With the safety of the public in mind, officers maintained a cordon around the premises and arranged for the evacuation of children, whose parents were arriving to meet them, from a nearby school swimming pool. Occupants of other houses were instructed to remain within their homes.

40. Shortly after the arrival of Police Constables Evans and Newton, Melanie Joy was approached by Kate Bellamy, a neighbour of Michael Fitzgerald, who was in the company of another neighbour, Amanda Parkin. Melanie Joy went with the two women to Amanda Parkin's flat a safe distance away. The three women, for reasons of safety, were later taken by police transport to Greyfriars Police Station in Bedford. They arrived there at about 8 p.m.

41. At 7.02 p.m. Inspector Kelly requested a negotiator to attend the premises.

42. At about 7.09 p.m. the officers at the rear of the premises queried whether the flat premises in fact extended to the first floor. Acting Police Sergeant Morris obtained information from Melanie Joy that the flat did extend over two floors: the ground floor and the first floor.

43. At about 7.30 p.m., Officer A, at the front of the premises, was in communication with the FIR operator and said:

“Can you put on the incident scene log that he's still coming to the front door and he is brandishing a handgun. He is not opening the door but he is making sure that it's pointed towards us through the glass ...”

44. Within minutes a similar report was made by Acting Police Sergeant Phillips, who was positioned at the rear of the premises:

“... he's peering round the door we think heads into the kitchen and he's just pointed the gun out towards the officers now – over.”

45. At about 7.45 p.m. Superintendent Battle, the Deputy Divisional Commander at Greyfriars Police Station, Bedford, arrived on the scene. He was a member of the cadre of police officers in Bedfordshire trained to deal with firearms incidents. He was briefed by Inspector Kelly and assumed the role of Incident Commander. According to the applicant, Inspector Kelly informed Superintendent Battle that there was a suggestion that the man in the premises might be Michael Fitzgerald who owned imitation firearms, although this could not be confirmed.

46. At about 8.01 p.m. Police Constable Wright arrived at the scene. He was the Tactical Firearms Adviser (a functionary required on all police firearms operations). Both Superintendent Battle and Police Constable Wright reviewed the plan adopted by the ARV teams, and their deployments, and were satisfied with the decisions taken.

7. Use of the telephone

47. Following his arrival Superintendent Battle telephoned the flat on his mobile telephone to establish that the telephone inside was working and that the number obtained did indeed relate to the premises: he thought such information would be of benefit to negotiators when they arrived at the scene. This took place at about 8.15 p.m.

48. At first Superintendent Battle obtained the answer machine. The second time the occupant answered. Superintendent Battle (who, according to the Government, had considerable knowledge of the principles of negotiations) said: “I'm Steve. I'm a police officer.” He told the occupant that the house was surrounded by armed officers and requested that he should not go to the window or doors with a weapon, but that he should put the weapon down.

49. During the course of this telephone call Superintendent Battle asked the man his name and received the answer “Mick”. Superintendent Battle formed the impression that the man was drunk. Despite efforts to engage him in further conversation, the man put the telephone receiver down and the call was concluded.

50. The Government informed the Court in a letter of 9 September 2002 that when the occupant identified himself to Superintendent Battle as “Mick”, this information was relayed over the police radio and the officers at the scene used this name in their various challenges to the deceased. The

applicant's legal representative, on receipt of this information, noted in the applicant's observations that this "fresh information" had not been disclosed to them at the time of the inquest.

51. During the incident (but unknown to the police) two other telephone calls were made to the premises. The first was made by John Fitzgerald, Michael Fitzgerald's brother. The second, at about 7.35 p.m., was made by Sean Murray, a friend of Michael Fitzgerald.

52. Neither John Fitzgerald nor Sean Murray reported their telephone conversations with Michael Fitzgerald to the police, even though it was clear from the conversations that Michael Fitzgerald realised that he was surrounded by police. According to Sean Murray, Michael Fitzgerald sounded tired and said: "I think they are going to storm the house." The telephone then went dead.

8. Events after 8 p.m.

53. Inspector Kelly was of the opinion that the incident was likely to become protracted and shortly after 8 p.m. she gave instructions over the radio for night duty personnel to be called out and requested a log to be brought to the scene.

54. At about 8.15 p.m. a message was received by FIR from Detective Constable Ellson, who had obtained information to the effect that at about 6.40 p.m. Michael Fitzgerald had been in the Blarney Stone public house. It was reported that he had been very drunk, wearing blue jeans, a grey shirt and no coat. This information was passed on to Inspector Kelly by the Information Room Staff, but in doing so they transmitted the time of the sighting as 6.30 p.m. This information reinforced the belief that the person within the premises was not Michael Fitzgerald since Melanie Joy had called the police at about 6.28 p.m.

55. At about 8.19 p.m. the occupant of the flat moved from the ground floor to the rear first floor bedroom. He opened the casement window and pointed his gun from just over the windowsill in the direction of Officer D, who was at the rear of the premises behind a vehicle. Both Officers D and B became very concerned by this development. The occupant pushed his handgun through the open window and then withdrew it after shouts from the officers.

56. Within seconds of this first incident the occupant reappeared at the window, but this time stood up in full view of the officers. He was naked from the waist up.

57. The occupant adopted a two-handed stance through the open window with his arms outstretched. He was holding what appeared to be a gun. He aimed the gun at the officers at the rear of the premises. Police Constable Cattnach thought that he was going to be shot and dived to the ground. In his statement made after the event, he stated:

“...the man held his arms and pistol in front of him and as he deliberately brought the gun up to his eyes (...) I looked and could see that I was looking down the bore of the barrel his eyes were on the sights and he appeared to be pointing the weapon directly at me. I instinctively ducked as I was convinced the man was aiming directly at me and I was convinced I was going to be shot.”

58. Officer B observed through his gun sight that the barrel of the handgun appeared to be pointing directly at him. He was afraid for his own safety and shouted: “Armed police. Drop the gun or you will be shot.”

59. The occupant remained in his threatening stance. Officer B then squeezed the trigger of his carbine and fired one shot which hit the occupant in the chest.

60. Officer B was interviewed on 3 March 1998 at Bedfordshire Police Headquarters. He said:

“And he aims the gun, looking through the scope, I see the barrel of the gun and he's, the best way I can describe it, just like a police target, the same we are taught to shoot, he's got a solid base, he's got both hands on the gun, it's in front of his eyes, I can see the barrel of the gun, through my scope, and I can see the barrel lined up with him and it was aimed straight down my gun sight. Erm, and I say to be honest it frightened me to death (...) I shouted 'ARMED POLICE DROP THE GUN OR YOU WILL BE SHOT' I shouted that very loudly and clearly at him. Erm he just continued staying in the same position, rock steady, erm, and then I took the decision to squeeze the trigger and shoot and I shot him. (...)”

I thought if that gun goes off I'm gonna be seriously injured or killed 'cos you could see the size of the barrel, it was a large calibre weapon, hand gun, that was all I could see. Erm and I thought was gonna be shot, if I didn't do something.”

61. The applicant draws attention to the fact that Officer B's statement was never disclosed and was never subjected to forensic scrutiny or comment in any public forum.

62. One civilian witness, David Hanlon, a local resident, heard the police command: “Drop your gun or we will shoot”, followed by a single shot. The shot was fired at about 8.21 p.m.

63. Officer D, who was with Officer B, was on the verge of shooting at the time the shot was fired. In a statement made after the event he stated:

“I then saw that the gun was still in his hand and he was holding it with both hands with arms straight out, this conveyed to me that he was going to take aim to fire the weapon at [Officer B]. I took the safety off my weapon and took sight on him and put pressure on the trigger and was going to fire when I heard a bang.”

9. The aftermath

64. The officers, together with paramedics already at the scene, entered the building at 8.29 p.m. They found Michael Fitzgerald lying face down on the bed in the rear bedroom. They rendered first aid, but at 8.47 p.m. Michael Fitzgerald was pronounced dead.

65. The scene was preserved as a major crime scene.

66. The armed officers went to the Police Headquarters firearms range where they separately compiled their pocket book notes and gave their firearms for forensic examination. The examination revealed that a bullet had been discharged from the weapon belonging to Officer B. No other weapons had been fired.

67. The Home Office pathologist confirmed that the cause of death was a single gun shot wound to the chest and that the pattern of injuries was consistent with having been shot in the manner described by Officer B. A sample of Michael Fitzgerald's blood revealed 352 mgs of alcohol per 100 ml of blood. This would have made an individual of moderate drinking habits either extremely drunk or comatose.

68. Michael Fitzgerald's handgun was a replica Colt .45 calibre self-loading pistol. It had the appearance of an authentic weapon and only very close examination reveals it to be a replica.

69. Following the shooting it was discovered that Michael Fitzgerald had spent the afternoon drinking. He had left his jacket with the keys to his home in a public house. He was seen walking in the direction of his home by a taxi driver, at about 5.45 p.m., who described him as very drunk.

10. The investigation

70. On being informed of the fatal shooting of Michael Fitzgerald, the Deputy Chief Constable of Bedfordshire Police, David Stevens, voluntarily referred the matter to the Police Complaints Authority in order that it might supervise the investigation into the killing.

71. Mr Robert Davies, Assistant Chief Constable of Thames Valley Police, was appointed as the Investigating Officer. The essential purpose of the investigation was to inquire into the facts of the incident and to establish whether or not there had been a breach of the criminal law or police discipline. At the outset of the investigation the Thames Valley Police appointed a family liaison officer to assist Michael Fitzgerald's next-of-kin. During the investigation, a senior member of the investigation team visited the family on several occasions to keep them up-to-date on the progress in the investigation.

72. Officers B and Wright as well as Superintendent Battle were interviewed in the course of the investigation. The other officers who attended the scene or had a part to play in the incident made witness statements outlining their roles and responsibilities. The civilian employees of Bedfordshire Police also made witness statements, as did members of the public including the family of Michael Fitzgerald. Radio traffic within the FIR, which is tape-recorded, was transcribed, as was the control room tape. A crime analyst from Thames Valley Police was employed to scrutinise all the witness statements, the interviews taken under caution and the tape recording transcriptions.

73. The report prepared by Mr Davies was submitted to the Police Complaints Authority on 15 May 1998. A copy of the report and evidence was sent to the Deputy Chief Constable of Bedfordshire Police and to the Director of Public Prosecutions. The latter later concluded that there was no evidence to justify any criminal proceedings against any police officer.

74. On 23 June 1998 the Police Complaints Authority sent a copy of an Interim Statement on the investigation to Michael Fitzgerald's brother. This Interim Statement had been issued shortly after the submission of the report by Mr Davies. The Interim Statement recorded that Mr Davies' final report had been received on 15 May and was supported by 160 statements, 49 documents and 11 appendices including photographic evidence and plans of the scene of the incident. The Interim Statement concluded that "the investigation into the death of Mr Fitzgerald [had] been undertaken to the satisfaction of the Police Complaints Authority". Also in June 1998, the Police Complaints Authority notified Mr Fitzgerald's brother that a review of the case would be carried out by one of its members at the conclusion of the inquest.

75. In his report, Mr Davies concluded that Officer B had not committed a criminal offence and stated:

"I have examined the circumstances of this incident in detail and made two visits to the scene. I have read all the accounts of the officers present and other relevant witness statements including the forensic analysis. I have examined the transcription of the Information Room tape recording and other relevant documents. I am satisfied that [Officer B] genuinely believed he was facing an intruder armed with a firearm and that his life was in imminent danger. He did not know that the weapon was incapable of being discharged and he gave the man the chance to withdraw in a pressurised situation."

76. Mr Davies investigated the reason why a negotiator had not been present at the scene and stated:

"Difficulty was experienced during the early stages in obtaining a trained negotiator. The Bedfordshire Police have a cadre of six 'Tier One' negotiators trained to a national standard ... and six 'Tier Two' negotiators, who have been selected as being suitable to attend the National Negotiator's Course but who are, as yet, untrained. The Force policy is that one 'Tier One' and one 'Tier Two' negotiator will be available at all times including 'call out' times. Unfortunately on the 26th February 1998 there was a Negotiator's Conference being held at Brighton. Five of the six 'Tier One' negotiators were at the Conference. The remaining Tier One negotiator D.I. McCart was, according to the log, uncontactable. The Information Room log indicates that he was playing five-a-side football ... The frustration of the situation is all too evident when the log is scrutinised. At 1944 hours the log reads: 'No tier one negotiator available they all are at a conference according to info. from other. There is no tier one call out at all.' At 1954 hours the log reads: 'Unable to raise the negotiator other than by going through list one by one until finding someone willing to attend – call out totally useless or most recent update inaccurate. No response from any of the pager messages sent.' Timed at 1956 hours the log reads: 'Insp. Nethersole and Insp. Seamarks, both tier two negotiators, on route to GPS.' The Information Room Inspector states that an attempt was made to contact D.I. McCart both on his home number and on his pager."

D.I. McCart states that he had both his mobile phone and his pager with him, that they were both switched on, and that he did not receive a call on either of them. I have been unable to resolve this issue ... The difficulty experienced in contacting a 'Tier One' negotiator is a serious example of how poor co-ordination and planning can lead to real operational difficulty. The difference in skill levels between a Tier One and Tier Two negotiator should, in normal circumstances, be significant. The early arrival of a 'Tier One' negotiator might have made a difference."

77. Mr Davies concluded his report by stating:

"This was a tragic incident. Michael Fitzgerald had been suffering from a number of personal pressures including unemployment, rising debt and the grief of his mother's death. He turned increasingly to drink and was an alcoholic. It is very sad that on the night of the 26th February a series of unusual events came together and led to his death. First, Michael left his jacket and keys behind in a pub; second, unusually, he attempted to gain entry to his flat by the window; third, his girlfriend happened to arrive just as he was disappearing into the kitchen; fourth, his girlfriend mistook him for a burglar; fifth, neither Michael's brother, John, nor friend Sean Murray reported their telephone conversations with Michael to the police; sixth, no clear information emerged about Michael's identity prior to his death; and seventh, Michael, for whatever reason, we will never know, decided to aim a replica firearm to challenge armed police."

78. During the investigation witness statements were taken from approximately 138 witnesses.

79. The applicant stresses that the radio logs/transcripts and transmissions referred to were never disclosed, despite requests for them during the subsequent inquest. Furthermore, Mr Davies' report and conclusions were never disclosed to the applicant or to the deceased's family or made available for public scrutiny at the inquest. In addition, she and the deceased's family were at all times unaware that 138 witnesses had been heard. The Coroner disclosed only 29 witness statements to the family, and the family was therefore unable to consider whether other potential witnesses should have been called.

80. By a letter dated 17 September 1998, the Police Complaints Authority confirmed the findings of the police investigation that there was no wrongdoing on the part of the Bedfordshire police officers involved in the incident. The Police Complaints Authority was satisfied with the thoroughness of the investigation.

11. The Coroner's inquest

81. The death was reported to Mr David Morris, the Bedfordshire and Luton Coroner, by the police.

82. The inquest was opened on 27 February 1998 and then adjourned *sine die* to allow the Police Complaints Authority to complete its investigation into the circumstances surrounding the death.

83. On 28 July 1998, at a preliminary hearing to which all the interested parties including the press were invited, the Coroner ruled that the four armed officers should remain anonymous and should not be identified by

the media. They were to be known as A, B, C and D, of whom B had fired the fatal shot.

84. Counsel representing Michael Fitzgerald's family firmly objected to the grant of anonymity to these officers, arguing that the inquest was meant to be a forum subject to public scrutiny and that justice should be seen to be done in an open manner, particularly where citizens die at the hands of agents of the State.

85. In deciding to direct that the armed officers should be known as A, B, C and D, the Coroner accepted that there was a genuine concern on the part of each of the officers, and particularly Officer B, that he and his family could be exposed to verbal and physical abuse if his name were to be disclosed, having regard to the fact that he lived near the scene of the incident. The Coroner (according to the Government, without objection from any party) also used his knowledge of previous threats and abuse directed against Officer B and his family following another incident, not involving a shooting, where he had been acting in accordance with his police duties. The applicant points out that it was never raised as a ground at the hearing on 28 July 1998 (nor at the actual inquest) that any officer had suffered any threat, and that in any event the previous threats to Officer B were not in relation to a shooting and could not be construed as serious.

86. The Coroner made it clear that it was open to any party, including the press, to make an application to lift the anonymity order if further information or circumstances warranted it.

87. The Coroner was provided with the witness statements and exhibits gathered in the course of Mr Davies' investigation. The Coroner decided that there should be disclosure of the statements made by 29 witnesses whose evidence he considered material to establishing the relevant facts. According to the applicant, the Coroner misled the family as to the number of witnesses by informing their counsel at the preliminary hearing on 28 July 1998 that there were only approximately 80 witnesses to the incident of whom only 29 witness statements were relevant and were to be disclosed for the full inquest hearing on 24 November 1998.

By a letter dated 17 November, the family's legal representative sought disclosure of further materials. The report prepared by Mr Davies was not among the documents sought. The Coroner decided that the family should be provided with the witness statements of Officers C and D and Superintendent Battle as well as a schedule containing the times of all the important events derived from the radio logs.

88. On 24 November 1998 the inquest proper began. The Coroner made a further decision to the effect that A, B, C and D should remain anonymous. The Coroner gave his reasons for this decision in writing and included among his reasons the following:

“The predominant reasons for granting anonymity for the particular officers beyond my own local knowledge and experience are

a) Bedfordshire police is a small force with a handful only of armed response officers. The naming of officers 'A', 'C' and 'D' would be likely to identify by default officer B.

b) All four officers have expressed fear if their names are made public in this context the privacy and safety of both themselves and their families could be at risk. Some officers live near the locus in quo.

c) Whilst there may be no threat emanating from the deceased's family there are serious and violent criminals living and operating within the locality and identification of members of the armed response team would not be either in the interest of those individuals or in the public interest."

89. The Coroner also ruled that the officers could give evidence from behind a screen. They would, however, be seen by the Coroner, the legal representatives for each of the parties and the jury.

90. The inquest continued for four days.

91. During the course of the inquest the Coroner summoned witnesses to give evidence of the events leading to Michael Fitzgerald's death. These witnesses, who included police officers B, C and D, were cross-examined by counsel representing the family. The jury visited the scene of the incident.

92. The Coroner refused to accede to the family's request to call the police negotiator at the inquest, stating that his evidence was irrelevant since he had played no part in the incident. He further declined to allow in evidence the police radio logs on communications passing between the officers on the night of 26 February 1998 as well as the computer printouts since these materials, like the police negotiator, "would not have added to the knowledge and understanding of those matters which the jury were obliged by law to address." However, at the request of the jury and counsel for the family, Detective Sergeant Denton provided a statement setting out the times of the material events derived from the radio logs and the transcripts of the transmission.

93. The applicant points out that Superintendent Battle conceded at the inquest when cross-examined by the family's legal representative that it might not have been wise of him to have identified himself to the deceased as a police officer, bearing in mind that negotiators should have the appearance of being neutral so that some trust is built up between the person under siege and the negotiator.

94. At the conclusion of the evidence the Coroner summed up the case to the jury and, after hearing submissions from counsel representing the parties, the Coroner's direction on the law included the following:

"I find, as a matter of law, for reasons which I do not need to explain to you, that the only verdict that you can come to in this inquest – and I so direct – is a verdict that Michael James Fitzgerald was lawfully killed."

95. The Coroner went on to explain that any explanation of the verdict was a matter for the jury to decide.

96. The jury returned a verdict of lawful killing and added a recommendation to their verdict that the Home Secretary should ban replica firearms of the type found in Michael Fitzgerald's possession.

97. On 29 November 1998 an article entitled "Cops knew that gun was replica" was published in the 'Bedfordshire on Sunday' newspaper. It was reported that a laboratory technician, Kate Bellamy, a neighbour of Michael Fitzgerald's, had informed the police at about 7.45 p.m. on the night of the incident that Michael Fitzgerald had two replica guns at his home. The Coroner was in possession of a statement made by Kate Bellamy, dated 27 February 1998. This statement, made the day after the incident, had been provided to the Thames Valley investigation. Kate Bellamy did not mention in her statement that she had told the police at the relevant time that Michael Fitzgerald possessed replica firearms. She stated that she had heard and seen an incident developing outside Michael Fitzgerald's flat. She had been in her premises with Amanda Parkin and:

"... both of us decided to go down and see if we could help. When we went out onto the street, Melanie [Joy] was still crying. We were asked by an officer if we could look after Melanie which we agreed and we were advised not to go into my flat and keep away from the windows. Due to this Amanda, Melanie and myself went into Amanda's flat ... after this we all began ringing the local pubs of Michael's to try and locate him. The only positive reply we got was from the Blarney Stone pub who said he'd been in there and left with two blokes from the Grafton pub."

98. In relation to her knowledge of Michael Fitzgerald, she stated:

"I personally have been into Michael's flat on numerous occasions, but not so much recently due to his increasing drinking, the last time I was in there was about a week ago. I was aware that Michael possessed two imitation firearms which were displayed on the wall of his lounge above the stairway recess ..."

99. Amanda Parkin had provided a statement to the police investigation, also dated 27 February 1998. This statement was consistent with Kate Bellamy's and it also contained no suggestion that Kate Bellamy had told the police officers at the time of the incident that the guns in Michael Fitzgerald's home were replicas or that the occupant of the premises possessed a replica firearm.

12. The judicial review proceedings

100. On 17 February 1999, Local Sunday Newspapers Limited, the proprietor and publisher of "Bedfordshire On Sunday", which is a weekly newspaper circulating in the Bedford area, applied for judicial review of the Coroner's decision to grant anonymity to Officers A, B, C and D.

101. On 29 October 1999, the application for judicial review was dismissed by Mr Justice Burton, who stated:

“... in relation to officer B the Coroner was taking into account ... the fact that there was a public interest and also a special need for care and a potential risk of injury and danger in relation to B as a member of the armed response group, in addition to the other ground ... namely his fear in relation to the previous incident amounting to a reasonably objective, attested ground for fear in relation to his particular safety and that of his family.

Once there were two such grounds that in my view enabled the Coroner to say that there was sufficient reason for anonymity provided that he then carried out ... a balancing exercise.”

102. Mr Justice Burton concluded that the Coroner had correctly carried out the balancing exercise and that there had been evidence which entitled the Coroner to conclude that anonymity was necessary in the interests of justice and in order to avoid any risk of injury.

13. The applicant's attempt to challenge the inquest verdict

103. The applicant sought legal aid to pursue proceedings for judicial review of the inquest verdict. This request and a subsequent appeal were refused by the Area Committee of the Legal Aid Board on 9 March 1999.

14. The Police Complaints Authority's post-inquest letter to the applicant

104. Following the inquest, in a letter dated 17 December 1998, the Police Complaints Authority informed the applicant that the investigation had been thorough and had addressed the family's concerns that the police had acted too quickly and had not explored all the options. The letter continued:

“(...) neither the investigation nor the subsequent inquest has disclosed evidence on which to seriously challenge any of the police actions. At the time Michael died, police operations were being managed by a senior officer with considerable experience in firearms incidents who described the attention and planning which he gave to the various decisions needed.

There was clear evidence that the situation could not have been effectively contained if officers were placed behind the brick wall at the rear of the house. This view was supported by Thames Valley Police's own firearms experts and is consistent with national guidelines and training. The repeated giving of warnings is required under the manual and I have to say the police would be at risk of very serious criticism if none or fewer warnings had been given.

There was no evidence that the presence of a top level trained negotiator would have caused a different outcome to what actually happened. The evidence suggests the contrary - that even if one had been present at the time of the shooting, he or she would not have been prevented the train of events which led to your brother's death.

Bedfordshire Police accept that there was confusion on the night as to which officers with level 1 negotiating training were available to go to the scene. I am told that call-out rotas are now entered on the force command and control computer, which

should reduce the chances of delays in the future due to difficulties in contacting the necessary staff. The problems arose due to a poor information system which has now attracted the required management response. I do not consider that this is a matter which justifies any disciplinary action.

(...)”

II. RELEVANT DOMESTIC LAW

1. Inquests

105. Inquests are governed by the Coroners Act 1988 (“the Act”) and Coroners Rules 1984 (“the Rules”). Under section 8 of the Act, an inquest must be held if a person has died “a violent or an unnatural death”. It is the function of an inquest, as defined by section 11 (5)(b) of the Act and Rule 36 of the Rules, that a coroner and a jury shall look into and determine four essential matters: who the deceased was, and where, when and how the deceased came by his/her death.

106. There is no legal aid for representation at inquests. Prior to April 1999, there was no right to disclosure of documents. In R. v. Hammersmith ex parte Peach ([1990] QB 211), the Divisional Court held that as no allegation was made against the family natural justice did not require disclosure of documents to the family and the Coroner had no power to hand over material against the wishes of those who supplied him with it. Since April 1999, and as regards inquests into deaths occurring in police custody, there is a presumption in favour of disclosure of information held by authorities in advance of the inquest hearing. According to paragraph 11 of the new voluntary protocol on disclosure, disclosure of the investigating officer's report as part of a supervised Police Complaints Authority investigation will not normally be expected to form part of the pre-inquest disclosure. That does not mean, however, that it is impossible for such a report to be disclosed where a chief officer considers it would be right to do so. Pursuant to the protocol “he or she should seek the views of the Police Complaints Authority and others with an interest in the report.” If disclosure of the report is ordered “the views and expressions of opinion of the investigating officer should be redacted.”

107. It has been consistently emphasised in the domestic case-law that an inquest is an inquisitorial fact-finding exercise, and not a method of apportioning guilt. For example, Lord Justice Bingham declared in R. v. North Humberside Coroner, ex parte Jamieson [1995 QB 1]:

“It is not the function of a coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. This principle is expressed in Rule 42 of the 1984 Rules.”

108. In R. Inner South London Coroner, ex parte Douglas-Williams ([1999] 1 ALL E R), the Court of Appeal clarified the extent of the discretion of a Coroner not to leave to the jury what is, on the evidence, a possible verdict. Lord Woolf MR stated -p. 348):

“If it appears there are circumstances which, in a particular situation, mean in the judgment of the coroner, acting reasonably and fairly, it is not in the interest of justice that a particular verdict should be left to the jury, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the coroner's conclusion he cannot be criticised if he does not leave a particular verdict.”

109. There is no right of appeal in relation to an inquest and the High Court's role is limited to review, which may be by way of judicial review, or statutory as contained in sections 13 (1) and (2) of the Act. This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner either -

“(a) that he refuses or neglects to hold an inquest which ought to be held; or

(b) where an inquest has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts of evidence or otherwise) it is necessary or desirable in the interests of justice that another inquest should be held.

The High Court may –

order an inquest or, as the case may be, another inquest to be held into the death...”

110. The Government and the applicant draw attention to case-law developments in the light of the entry into force in the United Kingdom of the Human Rights Act 1998, in particular: R. (Amin) v. Secretary for State for the Home Department ([2003] UKHL 51(House of Lords)); R. v. Her Majesty's Coroner for the Western District of Somerset and Other, ex parte Middleton ([2004] UKHL 10 (House of Lords)); R. v. Secretary of State for Health ex parte Mohammed Farooq Khan (Court of Appeal); R. v. Her Majesty's Coroner for Inner North London, ex parte Stanley (Court of Appeal).

111. The *Amin* case concerned the wanton killing of a prisoner by a fellow cell-mate suffering from an untreatable mental condition. No public inquest was ever carried out into the circumstances of the killing. An investigation was conducted by a serving official of the Prison Service as well as by the Commission for Racial Equality. Both investigations were conducted in private with minimal or no participation by the family of the deceased. Having reviewed the case-law of the European Court of Human Rights under Article 2, Lord Bingham of Cornhill concluded that the minimum standards laid down by the Court had not been complied with.

The form of the investigation was deficient, regard being had in particular to the absence of public scrutiny of the investigation, the lack of involvement of the deceased's family and, as regards the official investigation, the lack of independence of the official in charge of the inquiry.

112. The *Khan* case concerned the death of a three-year old child as a result of grossly negligent medical treatment, which was later admitted by the hospital authorities following an internal investigation. Subsequent to an extensive police investigation, the Crown Prosecution Service decided that no criminal proceedings should be taken in respect of the child's death. The family were not permitted to participate effectively in either the internal or police investigation. The Court of Appeal (Lord Justice Brooke) found that neither of the investigations conducted satisfied the minimum procedural obligations under Article 2 of the Convention. Lord Justice Brooke further stated that an independent judicial inquest procedure into the death of the child could fulfil the State's procedural obligations, but only if it allowed the family effective participation with the help of legal aid funding.

113. The *Stanley* case concerned the killing of a civilian by police officers in the mistaken belief that he was armed. An inquest was held into the circumstances of the killing. The jury recorded an open verdict. Following an application for judicial review by the deceased's family, the High Court ordered that the verdict be quashed and that a new inquest be held before a different Coroner. The High Court (Mr Justice Silber) found a number of deficiencies in the way in which the proceedings had been conducted; firstly, the Coroner had allowed evidence of the deceased's criminal convictions, although irrelevant, to be heard by the jury; secondly, the Coroner had allowed the jury to be apprised of the Crown Prosecution Service's conclusion following a police investigation into the killing to the effect there was insufficient evidence to justify the bringing of criminal proceedings against the officers involved; thirdly, the Coroner should have heard independent expert evidence on whether the use by the police officers of their firearms had been justified in the circumstances; fourthly, in the light of the credible accusation of at least manslaughter by the officers involved, the Coroner failed to justify his decisions by explaining, even briefly, why he was not prepared to leave to the jury the verdicts which the family wished the jury to consider. On this point, Mr Justice Silber held that "it will be exceptional for a coroner not to explain, albeit briefly, why he is not prepared to allow the jury to consider a verdict sought by the deceased family's and in relation to which there has been some relevant evidence".

2. *Fatal Accidents Act 1976*

114. The Fatal Accidents Act 1976 confers a right of action for a wrongful act causing death. Section 1(1) provides:

"If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and

recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.”

However, the statutory right of action is reserved to the deceased's dependants (section 1(2) which allows the recovery of their pecuniary loss). If there are no dependants, there is no pecuniary loss to recover as damages. Bereavement damages (fixed at GBP 7,500) are only available to the parents of a child under the age of 18 (section 1A(2)). Funeral expenses are recoverable (section 3(5)).

115. There is no claim under the Fatal Accidents Act for a deceased who leaves no dependants, or who does not fall into the limited category of persons mentioned above. English law does not recognise a tort of wrongful death.

3. Law Reform (Miscellaneous Provisions) Act 1934

116. The Law Reform (Miscellaneous) Provisions Act 1934 provides for the survival of causes of action for the benefit of the deceased's personal estate. The relevant part of section 1(1) provides:

“Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.”

This enables recovery on behalf of the estate of damages for losses suffered by the deceased before he died, including any non-pecuniary loss such as damages for pain and suffering experienced between the infliction of injury and death. Where death is instantaneous, or where it cannot be proved that the deceased experienced pain and suffering before death, damages are not recoverable under the 1934 Act and the only recoverable amount would be funeral expenses.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

117. The applicant contended that Michael Fitzgerald was killed by agents of the respondent State in circumstances which were not compatible with the substantive requirements of Article 2 of the Convention. Furthermore, the investigation into the killing failed to comply with the respondent State's procedural obligations under the same Article. Article 2 provides:

“1. 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.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

118. The Government contested both allegations.

A. Arguments of the parties

1. The applicant

119. The applicant contended that the use of lethal force was not absolutely necessary and was the result of police incompetence in failing to secure information that would have allowed the incident to be brought to a conclusion without loss of life. The police handling of the operation was grossly incompetent, having regard to the following matters: the unauthorised decision of Officers B and D to go over the wall without first ascertaining the layout of the rear of the deceased's premises; the failure of the trained negotiator to turn up at the scene; the negligent way in which Superintendent Battle handled the only police contact with Michael Fitzgerald; Superintendent Battle's failure to communicate vital information to the firearms officers present and to check with Melanie Joy about the identity of the man who identified himself as “Mick” on the phone.

120. In the applicant's further submission, the inquest proceedings were an inadequate investigative mechanism for examining the circumstances surrounding the killing of Michael Fitzgerald and failed to comply with the “most careful scrutiny” test required by the Court's case-law on Article 2.

121. In the first place, legal aid was not available at the material time to enable the family to have publicly-funded representation. Secondly, the family were unable to participate properly in the inquest proceedings since they were either denied disclosure of or not supplied with material evidence, including: the report submitted by Mr Davies to the Police Complaints Authority (“PCA”), the evidence of Kate Bellamy, the correct reasons for granting anonymity to four police officers and the true number of witnesses to the incident. Contrary to the Government's suggestion that the applicant could have applied to the Coroner for disclosure of Mr Davies' report, any

such request would inevitably have been unsuccessful. Domestic case-law at the time operated against disclosure since such reports fell within a class of documents covered by public interest immunity and disclosure would not have been ordered by a Coroner.

122. The applicant stressed that had Mr Davies' report been made available to the family they would have been better placed to dispute the manner in which the operation was planned and conducted and to probe the official view of the proportionality of the police response to the perceived threat posed by Michael Fitzgerald. Thus, for example, had the family been informed that the name "Mick" had been relayed over the police radio to the officers at the scene, it would have been in a position to challenge the police contention that they had no idea who the person was in the flat. The applicant observed that counsel for the family cross-examined at the inquest on the basis that the individual officers were unaware of the fact that the man in the flat had identified himself to Superintendent Battle as "Mick". Furthermore, the disclosure of Mr Davies' report would have provided the family with the expert evidence of the negotiator which had been compiled for the purposes of the PCA's own investigation into Michael Fitzgerald's death. In the applicant's submission, where Article 2 is engaged, the right to an open, fair and transparent procedure into a death caused by the police required that full disclosure be made to the family with, as appropriate, suitable undertakings as to confidentiality.

123. The applicant further contended that the decision to grant police officers anonymity affected the fairness of the inquiry and was contrary to the requirements of openness, transparency, the accountability of State agents for their actions and the principle of equality of arms between the parties. Anonymity was granted on the basis of undisclosed reasons and without proper argument, and created an atmosphere of suspicion that the officers had something to fear from the deceased's family. The Coroner's decision only served to prejudice the fundamental objective of establishing the truth about what happened on the night in question and diminished public confidence in the inquest proceedings.

124. The applicant submitted that it had to be concluded that the Coroner failed to appreciate the breadth of the inquiry required by Article 2 of the Convention, since he excluded all evidence relating to the planning of the operation, with the result that the ambit of the inquest was restricted to the narrow issues of "who, where, when and how" the deceased met his death. This deficiency was further compounded by the Coroner's decision to leave the jury with only one verdict, thus denying the jury the possibility of returning an independent verdict which may have been critical of the overall planning and execution of the police operation.

125. The applicant drew attention to developments in domestic law following the entry into force of the Human Rights Act 1998. In her submission, the domestic courts were now accepting that the scope of an

inquest as described in *R. v. North Humberside Coroner, ex parte Jamieson* (see Relevant domestic law, above) was not compatible with Convention requirements in this area.

2. *The Government*

126. The Government stressed that from the beginning of the incident until the fatal shooting, Michael Fitzgerald gave the impression that he was armed. On several occasions he appeared to threaten the police officers, and just before he was shot dead he actually pointed the gun at the officers positioned at the rear of the premises. Officer B justifiably feared for his life.

127. The Government further submitted that the police operation was planned and conducted so as to minimise, to the greatest extent possible, recourse to lethal force. In particular, Superintendent Battle and Police Constable Wright (the Tactical Firearms Adviser) ultimately decided to approve the deployment of armed officers close to the premises only after careful reflection. It was noteworthy that Inspector Evans and Constable Willerton, both experts, later approved this strategy and Mr Wright accepted their findings. While it was to be regretted that a trained negotiator could not be summoned to the scene in time, the senior police officers present did everything possible to deal with the situation. Superintendent Battle, although not a trained negotiator, knew of the purpose of the role of a negotiator and the principles of negotiation. His attempts to engage the occupant of the premises in a telephone conversation were entirely reasonable and he was only thwarted in his efforts to find a solution by the occupant's unwillingness to engage in conversation.

128. The Government stressed that neither the facts that the occupant identified himself on the telephone as "Mick", nor that the police received information from Melanie Joy at 6.38 p.m. that Michael Fitzgerald had replica firearms on the premises nor that Michael Fitzgerald had given the impression of being drunk when he spoke to Superintendent Battle could have altered the approach to the incident or the course of events. It remained the case that the senior officers at the scene had strong reasons for believing that Michael Fitzgerald was not the person in the premises, and that that person, possibly in a drunken state, was brandishing what clearly seemed to be a genuine pistol and threatening lives.

129. In addition, the Government requested the Court to bear in mind that the occupant was frequently ordered to lay down his weapon and to come out of the premises. No attempt was made to storm the premises and the police actively sought a peaceful solution to a serious situation which arose spontaneously and without any forewarning.

130. Turning to the applicant's criticism of the conduct of the inquest proceedings, the Government averred that the decision to grant anonymity to Officer B as well as to Officers A, C and D was justified. It was accepted

in the judicial review proceedings that Officer B's own safety and that of his family might be placed at risk if he were to be identified by name, and naming the other officers would have resulted in Officer B's identification by default. The Government noted that Officers B, C and D, as well as other officers present during the incident, gave evidence before the Coroner's jury and were cross-examined on their account of the incident. In addition, the fact that the relevant radio and computer records were not produced to the jury cannot be considered a defect in the investigative process given that Detective Sergeant Denton provided a statement to the jury setting out the times of the material events as logged in those records. Moreover, the Coroner in the exercise of his discretion considered that neither Detective Inspector McCart nor Kate Bellamy could add anything of relevance to the proceedings. As to the Coroner's decision not to disclose Kate Bellamy's statement of 27 February 1998 to the jury, the Government observed that Kate Bellamy never in fact mentioned in her statement that she had informed the police officers at the scene of the incident that Michael Fitzgerald had two replica firearms at his home.

131. As to the non-disclosure of Mr Davies' report to the family, the Government maintained in the first place that the family must be taken to have been aware of its existence well before the inquest began. They noted in this connection that the deceased's brother had been informed that a report had been prepared and submitted to the PCA. The family in fact never requested the Coroner to order disclosure of the report. In any event, disclosure of the report containing Mr Davies' opinions and conclusions on the evidence gathered would not have served their cause. What was important was that the Coroner ordered disclosure of all primary materials on which the report was based. The Government further recalled that the report had not been drawn up for the purpose of the inquest and played no part in the proceedings. It was standard practice not to communicate such reports other than to the PCA, the Director of Public Prosecution and the Chief Officer of the police force under investigation.

132. The Government further contended that the Coroner properly decided to limit the jury's verdict to one of lawful killing. This was the only verdict which could realistically reflect the thrust of the evidence as a whole, in particular the clear and compelling evidence that the police officers acted in reasonable self-defence.

133. Finally, the Government observed that the Thames Valley Police Force carried out a prompt, effective and exhaustive investigation into the killing under the supervision of the PCA. The next-of-kin was kept informed of progress. That investigation revealed no wrongdoing on the part of the police and the Director of Public Prosecution saw no justification for taking criminal proceedings against any of the officers involved in the incident.

B. The Court's assessment

1. General principles

134. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

135. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances, including such matters as the planning and control of the actions under consideration. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (*McCann and Others*, cited above, p. 46, §§ 148-149).

136. In determining whether the force used is compatible with Article 2, it may therefore be relevant whether a law enforcement operation has been planned and controlled so as to minimise to the greatest extent possible recourse to lethal force or incidental loss of life (*McCann and Others*, cited above, p. 57, § 194, and *Ergi v. Turkey*, judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV, pp. 1776-77, § 79).

137. Furthermore, 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 (see, *mutatis mutandis*, *McCann and Others*, cited above, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports* 1998-I, p. 324, § 86). 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. This investigation should be independent, accessible to the victim's family, carried out with reasonable promptness and expedition, 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 or otherwise unlawful, and afford a sufficient element of public scrutiny of the investigation or its results (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-109, 4 May 2001; *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002).

2. *Application to the present case*

(a) The actions of Officer B and the planning and control of the operation

i. *The actions of Officer B*

138. The Court sees no reason to doubt that Officer B honestly believed that his life was in danger and that it was necessary to open fire on Michael Fitzgerald in order to protect himself and his colleagues. It recalls in this respect that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and the lives of others (see *McCann and Others*, cited above, pp. 58-59, § 200; *Andronicou and Constantinou v. Cyprus*, judgment of 9 October 1997, *Reports 1997-VII*, p. 2107, § 192; *Brady v. the United Kingdom*, (dec), no. 55151/00, 3 April 2001).

139. It would also add in this connection that, detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life (see, *mutatis mutandis*, *Andronicou and Constantinou*, cited above, § 192). Officer B found himself confronted by a man pointing a gun at him. That man had ignored previous warnings to give himself up and, in defiance of these warnings, conveyed on occasions a clear impression that he would open fire. It is to be noted that even before discharging the fatal shot, Officer B shouted a final warning, which went unheeded.

140. For the Court, the use of lethal force in the circumstances of this case, albeit highly regrettable, was not disproportionate and did not exceed what was absolutely necessary to avert what was honestly perceived by

Officer B to be a real and immediate risk to his life and the lives of his colleagues.

ii. The planning and control of the operation

141. In carrying out its assessment of the planning and control phase of the operation from the standpoint of Article 2 of the Convention, the Court must have particular regard to the context in which the incident occurred as well as to the way in which the situation developed. Its sole concern must be to evaluate whether in the circumstances the planning and control of the operation outside Michael Fitzgerald's flat showed that the authorities had taken appropriate care to ensure that any risk to his life had been minimised and that they were not negligent in their choice of action (see *Andronicou and Constantinou*, cited above, §§ 181-182).

142. It observes at the outset that the police operation was mounted in response to Melanie Joy's anxiety about the presence of an intruder in Michael Fitzgerald's flat and her fear that Michael Fitzgerald might be at risk. This fear would appear to have been confirmed when one of the two police officers who arrived at the scene saw an armed man inside Michael Fitzgerald's flat. That sighting, understandably alarming since the man pointed a gun at the police officer, triggered a major police operation, including the summoning of armed officers and their subsequent positioning to the front and the rear of the flat.

143. It is to be observed that, thereafter, the conduct of that operation remained at all times under the control of senior officers and that the deployment of the armed officers was reviewed and approved by the tactical firearms advisers who were summoned to the scene.

144. It cannot be disputed that the police considered that they were involved in a tense stand-off with an armed man and that measures had to be taken to protect the public. They cordoned off the zone in order to avert any threat to the lives of on-lookers and when darkness fell they had the area around the flat lit so as to increase visibility and minimise the risk of error in the event of an exchange of gunfire. It cannot be disputed either that during this period there was no let-up in the tension. The man was seen on occasions to brandish a firearm in a threatening manner and at various stages he even took up a firing position. It has not been suggested by the applicant that the firearm did not look authentic or that the police officers at the scene could have been expected to have identified it as a replica in light of their firearms training.

145. As to the welfare of the individual inside the flat, it is to be observed that it was of uppermost concern to the police to break the deadlock by persuasion. Numerous warnings were shouted and ample opportunities were afforded to him to give himself up. These warnings were ignored.

146. It is a matter of regret that a trained negotiator was not available at the scene of the incident to broker an end to the siege, in particular by explaining to Michael Fitzgerald why the operation had been mounted and by reassuring him that he would not be harmed if he were to lay down his weapon. It has not been explained why it was never put to Melanie Joy or to a neighbour that the man inside the flat had identified himself on the phone to Superintendent Battle as “Mick” with a view to ascertaining whether “Mick” could in fact be Michael Fitzgerald. Melanie Joy knew him by this abbreviated first name. She also knew him to have a drink problem, and Superintendent Battle had the impression during his phone conversation that the man inside the flat was drunk. Melanie Joy had also informed the police right at the start of the incident that Michael Fitzgerald had replica guns in his home. Given that the police's efforts to trace Michael Fitzgerald's whereabouts had proved unsuccessful during this time, it cannot be excluded that, had these matters been verified, there would have been a greater realisation on the part of the police that, what was first thought to be an armed intruder in the flat, was in fact Michael Fitzgerald - inebriated and brandishing a replica gun.

147. At the same time, the Court must be cautious about revisiting the events with the wisdom of hindsight. It would observe that, having regard to the amount of alcohol found in Michael Fitzgerald's system, there is no guarantee that a trained negotiator would have been any more successful than Superintendent Battle in bringing the matter to a peaceful close. Michael Fitzgerald was at all times aware of the fact that there was a police presence outside his flat, and yet persisted in making threatening gestures with the gun. It was at no stage confirmed for the police that the man in the flat was Michael Fitzgerald. Melanie Joy had shouted his name through the letter box and he had not responded. Furthermore, people questioned about Michael Fitzgerald's last whereabouts had estimated that he had left the Blarney Stone at 6.40 p.m. Melanie Joy, on the other hand, saw a man clambering into the flat through the downstairs window at about 6.25 p.m. The timing suggested that the man was not Michael Fitzgerald. Admittedly, Superintendent Battle spoke on the telephone to the man inside the flat at 8 p.m. and learned that he was called “Mick.” This new information was relayed to the armed officers and was of obvious relevance in establishing the identity of the man inside the flat. However, the Court does not consider that that piece of information alone should have immediately led the police to alter their tactics. The senior officers in front line command still considered that the situation had to be contained pending a peaceful solution.

148. In the circumstances, the Court does not consider that the senior officers can be faulted for not having withdrawn the armed police officers from the rear of the flat. As already noted, the advisability of positioning them there was considered and approved by experienced officers, and there

was at all times a chain of command. It would further note that by the time the fatal shot had been fired the armed officers who had taken up positions at the rear of the flat were aware of the fact that they were overlooked by a window on the first floor of the flat.

Above all, it would appear that the police were at all times unwilling to take precipitate action, but tried to defuse the situation without recourse to lethal force or to tactics which might provoke a violent response from the man inside the flat. It is significant in this connection that Inspector Kelly ordered that night personnel be called out, thus indicating a firm intention to avoid a confrontation and the risk of bloodshed.

149. The Court cannot agree with the applicant's submission that the manner in which the operation was planned and conducted inevitably led to the fatal shooting of Michael Fitzgerald. It must be recalled that the incident was relatively brief in duration and was fraught with risk. During that time operational decisions had to be made as the situation evolved and more information became available. The incident ended abruptly and tragically.

150. It would further observe, and no submissions have been made to the contrary, that the use of firearms by the police as well as the conduct of police operations of the kind at issue were regulated by domestic law and that a system of adequate and effective safeguards exists to prevent arbitrary use of lethal force. In the instant case, none of the key officers concerned operated in a vacuum. They were all trained in the use of firearms and their movements and actions were subject to the control and supervision of experienced senior officers (compare and contrast, *Makaratzis v. Greece*, [GC], no. 50385/99, § 70, ECHR 2004-).

151. Having regard to the above considerations, the Court is of the view that it has not been shown that the operation at issue was not planned and organised in a way which minimised to the greatest extent possible any risk to the life of Michael Fitzgerald.

C. The Court's overall conclusion

152. The Court considers that, having regard to the actions of Officer B who opened fire and to the planning and control of the operation at issue, the killing of Michael Fitzgerald resulted from the use of force which was no more than was absolutely necessary in defence of Officer B and his colleagues, in conformity with Article 2.

There has, accordingly, been no violation of that Article under its substantive limb.

(b) Alleged failure to comply with the procedural obligation to provide an effective investigation

153. The Court observes at the outset that it has already had occasion to conclude that the inquest procedure in England and Wales is capable of

fulfilling the Article 2 requirements of an effective investigation into an alleged killing by State agents. Thus, in the above-mentioned *Hugh Jordan* case it noted that inquests are public hearings conducted by coroners, who are independent judicial officers, normally sitting with a jury, to determine the facts surrounding a suspicious death. Judicial review lies from procedural decisions by coroners and in respect of any mistaken directions given to the jury. There are thus strong safeguards as to the lawfulness and propriety of the proceedings. Furthermore, a coroner's jury can return a range of verdicts. In the event of a verdict of "unlawful death" the Director of Public Prosecutions is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. Although a coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances, this does not prevent examination of matters such as the planning and conduct of, for example, a police operation which results in the loss of life, having regard in particular to the fact that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about (*ibid.*, §§ 125-129).

154. The Court must address the deficiencies alleged by the applicant in the fact-finding role of the inquest in the instant case with a view to ascertaining whether, individually or cumulatively, they undermined that role and, hence the effectiveness of the investigation into the circumstances surrounding Michael Fitzgerald's death.

155. As to the Coroner's decision to grant anonymity to Officers A, B, C and D, the Court observes that this decision was reached only after careful consideration of the competing interests at stake. The Coroner heard representations from the family's lawyers. He addressed in the light of the family's interests the possible threat of reprisals against Officer B and his family if his identity were to be disclosed. Moreover, the Coroner gave full reasons for his decision, reasons which were endorsed by the High Court in the proceedings on the judicial review application brought by London Sunday Newspapers Limited.

156. The Court recalls in this connection that it has had occasion to discuss the compatibility of a judge's decision to grant anonymity to a prosecution witness with the requirements of a fair trial under Article 6 of the Convention. Admittedly the inquest proceedings did not involve the determination of a criminal charge against Officer B. For that reason, and in so far as the applicant relies on Article 6 to contest the fairness of the procedure, her complaint must be considered incompatible *ratione materiae* with the provisions of the Convention. Nevertheless, the principles which emerge from its Article 6 case-law on the issue of anonymous witnesses (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, *Reports* 1996-II, p. 470, § 70, *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, *Reports* 1997-III, p.p. 771-772, §§ 51-55) are

not without relevance to its Article 2 assessment of whether the inquest guaranteed, firstly, the applicant a sufficient measure of participation in the investigation into the death of Michael Fitzgerald and, secondly, an appropriate forum for securing the public accountability of the State and its agents for their alleged acts and omissions leading to the death of Michael Fitzgerald.

157. In this connection, it notes that Officers B, C and D gave evidence at the inquest and were cross-examined by the family's legal representative. Accordingly, the shortcoming identified by the Court in the *Hugh Jordan* case (cited above, § 127), namely the non-compellability as a witness of the police officer suspected of causing the death of the applicant's son, is absent in the instant case. Furthermore, any handicaps under which the family may have laboured were sufficiently counterbalanced by the procedures followed by the Coroner: Officers B, C and D were hidden from the public by a screen, but gave evidence and were questioned on their evidence in the sight of the Coroner, the family's lawyers and the jury.

158. These considerations lead the Court to conclude that the effectiveness of the inquest was not undermined on account of the decision to grant anonymity to Officers A, B, C and D.

159. The applicant further contests the Coroner's decision not to hear Kate Bellamy as a witness. However, the Court considers that, in the circumstances, this decision was properly within the discretion of the Coroner. Whilst it is of the utmost importance that a complete and accurate picture emerges of the events leading up to a killing by State agents, the evidence to be gathered to that end must be filtered in accordance with its relevance. In the instant case, the Coroner, an independent judicial officer, chose not to admit the statement made by Kate Bellamy to the police for reasons of relevance. It is not for the Court to gainsay that decision. It would simply observe that Kate Bellamy's information about Michael Fitzgerald being in possession of two replica firearms was never communicated to the police during the operation outside his flat. Accordingly, the statement was of no importance to the fact-finding procedure.

160. For similar reasons, the Court does not find fault with the non-attendance of Detective Inspector McCart at the Inquest. Superintendent Battle was cross-questioned by the family's lawyers about the wisdom of his approach to the telephone conversation with Michael Fitzgerald. There was, accordingly, ample scope for pressing home the point that things might have been conducted differently had a trained negotiator been present at the scene. Indeed, Superintendent Battle conceded before the jury that the manner in which he approached his telephone contact with Michael Fitzgerald was not beyond criticism.

161. Turning to the issue of non-disclosure of particular documents/materials to the family of the deceased, the Court recalls that the

non-disclosure decision was taken by the Coroner. It does not appear that any documentation was withheld on the unilateral decision of the police. What is important for the Court is the fact that the family had at its disposal as much information as was commensurate with the defence of its interests in the inquest proceedings, namely clarifying the facts surrounding the death of Michael Fitzgerald and securing the accountability of the police officers involved for any alleged acts and omissions. Having regard to the considerable number of witnesses who gave evidence at the inquest and to the fact that all essential witnesses who could help shed light on the events testified, the Court does not consider that the non-disclosure of, for example, the report of the investigation carried out into Michael Fitzgerald's death undermined the fact-finding role of the inquest or denied the family an effective participation in the procedure. It notes that counsel for the police officers concerned did not place any reliance on the conclusions reached by Mr Davies so as to exonerate them or their commanding officers from blame.

Similar considerations apply to the non-disclosure of the police radio log of the incident or the computer printouts. It observes that the applicant has not disputed the Government's observation that the jury was apprised of all relevant transmissions logged during the incident.

162. The Court must also have regard to the fact that, during the PCA investigation, considerable efforts were made by the police to keep the family informed of developments. Members of the family gave statements, and Michael Fitzgerald's brother was given an Interim Statement on Mr Davies's report to the PCA indicating the various materials on which the latter's final conclusions were based.

163. The Court observes in conclusion that the inquest was held over a four-day period. Many witnesses were heard. The jury visited the scene of the incident. Even if refused legal aid, the family was legally represented throughout the proceedings by experienced counsel. Although the Coroner directed the jury to return a verdict of lawful death, it does not consider that this deprived the proceedings of their effectiveness. If an independent judicial officer such as a Coroner decides after an exhaustive public procedure that the evidence heard on all relevant issues clearly points to only one conclusion, and does so in the knowledge that his decision may be subject to judicial review, it cannot be maintained that this decision impairs the effectiveness of the procedure.

164. The applicant has drawn attention to recent domestic case-law in the wake of the entry into force of the Human Rights Act 1998 (see paragraphs 110-113 above). In the applicant's submission, that case-law indicates that the current inquest procedure in the respondent State is at variance with the Court's case-law under Article 2. However, the Court would stress that it must confine itself to the case at hand with a view to ascertaining whether or not the inquest procedure complied with Article 2

requirements. It has tested that procedure against the applicable principles and finds that they have been complied with in the circumstances of this case.

165. Having regard to the above considerations, the Court concludes that there has been no violation of the respondent State's procedural obligations under Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

166. The applicant maintained that, having regard to the defects which marked the conduct of the inquest, it had to be concluded that she had been denied an effective remedy and that Article 13 of the Convention had been breached as a result. Article 13 provides:

“Everyone whose rights and freedoms as set forth in [the] 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.”

167. The applicant added that the PCA's investigation into the conduct of the officers involved in the incident did not meet the requirement of independence and could not therefore constitute an effective remedy. Furthermore, Michael Fitzgerald had died instantly and without dependents. That meant that neither the Law Reform (Miscellaneous Provisions) Act 1934 nor the Fatal Accidents Act 1976 (see Relevant domestic law, above) allowed either the applicant or the deceased's estate to pursue an action for damages against the State.

168. The applicant reiterated her view that since the entry into force of the Human Rights Act 1998, the domestic courts were now accepting that the narrowness of the scope of the inquiry afforded by an inquest failed to respond to Convention requirements. According to the applicant, it was not surprising that she was refused legal aid to challenge the inquest proceedings given that the scope of the inquest's review in her deceased brother's case was considered to be in line with domestic law at the time.

169. The Government submitted that the circumstances of the case did not disclose any arguable breach of Article 2. The question of an effective remedy did not therefore arise. Had the police acted improperly, the estate of Michael Fitzgerald would have had a claim under the Law Reform (Miscellaneous Provisions) Act 1934. Moreover, and in relation to the applicant, judicial review proceedings would have been available to quash the inquest verdict if it had been conducted unfairly. In the event, there was no proper basis for seeking judicial review, and the decision to refuse the applicant legal aid for this purpose was therefore justified. In addition, it would have been open to the applicant to apply for judicial review of, firstly, the decision of the Director of Public Prosecutions not to prosecute any of the police officers involved in the incident and, secondly, the decision of the PCA not to institute any disciplinary proceedings.

170. According to the Court's case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52, *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002). Although it has found that there has been no breach of Article 2 in this case, that does not prevent the applicant's complaint under that Article from being "arguable" for the purposes of Article 13 (see *Kaya*, cited above, § 107). It notes in this connection that although the inquest procedure provided in the circumstances an effective mechanism for subjecting the circumstances surrounding the killing of Michael Fitzgerald to public and searching scrutiny, and thereby satisfied the respondent State's procedural obligations under Article 2, no judicial determination has ever been made on the liability in damages, if any, of the police on account of the manner in which the incident was handled and concluded. It is true that the Coroner's jury returned a verdict of lawful killing at the close of the inquest. However, that finding cannot be taken to be dispositive of the issue of whether or not any civil liability attached to the police, a matter which has to be resolved in a different domestic fact-finding forum and according to different principles of law and in application of a different standard of proof. Moreover, the Court's own finding on the basis of the materials before it that there has been no substantive breach of the right to life was reached in the light of the relevant principles derived from its case-law in this area, and in particular from the standpoint of the authorities' Convention liability (see paragraphs 134-136 above).

171. The Court recalls in this connection that it has already had occasion to declare that in the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress (see *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 109, ECHR 2001-V, *Keenan v. the United Kingdom*, no. 27229/95, § 129, ECHR 2001-III, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 97-98, ECHR 2002-II).

172. In the instant case, it is to be noted that the applicant is excluded from the scope of the Fatal Accidents Act 1976 since she is not a "dependant". Furthermore, the most that could be recovered under the Law Reform (Miscellaneous Provisions) Act 1934 on behalf of the deceased's estate would have been funeral expenses. It must be concluded that the applicant had no prospect of obtaining compensation for non-pecuniary damage suffered by her if, ultimately, a court were to rule in her favour. The Court would add that the impossibility to recover compensation for non-pecuniary damage would almost certainly have had a negative bearing on

any application by her for legal aid to take civil proceedings against the police.

173. For the above reasons, the Court concludes that there has been a breach of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

174. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

175. The applicant claimed pecuniary damages in respect of her expenditure on legal representation at the inquest. She also claimed an unspecified sum by way of damages for non-pecuniary loss caused by the frustration of not being able to participate effectively in the inquiry into the death of her brother and by the personal strain, tension and pressure which she suffered as a result of the inconclusive outcome.

176. The Government stated that the applicant's claim for pecuniary loss should be disallowed as any expenses incurred did not arise from the breach of the Convention alleged. As to her request for moral damage, they pointed out that a family liaison officer was appointed to assist the deceased's next-of-kin, the PCA kept the next-of-kin informed of the investigation and that the applicant was represented by experienced counsel at the inquest.

177. The Court recalls that it has found a violation only in respect of Article 13 of the Convention and only to the extent that the domestic law did not afford her a realistic chance of taking a civil action against the police and, if successful, recovering compensation for non-pecuniary damage on behalf of the estate of her deceased brother. In the circumstances, the Court awards the applicant the sum of 10,000 euros (EUR).

B. Costs and expenses

178. The applicant claimed a total amount of GBP 27,186.57 inclusive of VAT for legal costs and expenses incurred in the Convention proceedings. The applicant submitted in justification of her claim the detailed fee notes drawn up by a Queen's Counsel (QC) and assisting counsel, as well as a statement of professional charges and hourly rates drawn up by the solicitors acting for her in the case.

179. The Government observed that the hourly rate charged and the total amount billed by the QC were unreasonable. Furthermore, there was a significant overlap in some of the legal work carried out by both counsel, which served to inflate the costs unnecessarily. As to the solicitors' costs, the Government maintained that the hourly rate charged by a partner in the firm (GBP 250) and the total hours he worked on the dossier (40) were clearly excessive and unreasonable. Furthermore, the lack of a detailed breakdown of the time spent on various aspects of the case made it difficult to assess whether the amounts charged were unreasonable.

180. Having regard to the materials in its possession, to its criteria for making an award for costs and expenses and to the fact that its finding of a violation is limited to the applicant's complaint under Article 13, the Court awards the applicant the sum of EUR 12,000.

C. Default interest

181. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been no violation of Article 2 of the Convention under its substantive head;
2. *Holds* unanimously that there has been no violation of Article 2 of the Convention under its procedural head;
3. *Holds* by six votes to one that there has been a violation of Article 13 of the Convention;
4. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 12,000 (twelve thousand euros) in respect of costs and expenses;

- (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 March 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Boštjan M. ZUPANČIČ
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr Zagrebelsky is annexed to this judgment.

B.M.Z.
V.B.

PARTLY DISSENTING OPINION OF JUDGE
ZAGREBELSKY

I regret that I am unable to share the opinion of the majority of the Court that there has been a violation of Article 13 of the Convention in this case.

In my view, given that the Court concluded that there has been no violation of Article 2, it is incorrect to find that Article 13 has been violated for the reason that there is no domestic remedy to redress the violation of Article 2.

In paragraph 170 of the judgment, the Court considers that “although it has found that there has been no breach of Article 2 in this case, that does not prevent the applicant's complaint under that Article from being “arguable” for the purposes of Article 13” and quoted its *Kaya v. Turkey* judgment of 19 February 1998 (§107 thereof) in this connection. The *Kaya* case was, however, very different. In *Kaya* the Court considered that it had not been established beyond reasonable doubt that the deceased was indeed unlawfully killed as alleged and found a violation of Article 2 only under its procedural head on account of the failure of the authorities of the respondent State to conduct an effective investigation into the killing. In *Kaya* it was clear that the procedural obligations under Article 2 had not been fulfilled and, for that reason, the Court found also a violation of Article 13.

In my opinion there can be no automatic correspondence between a procedural violation of Article 2 and a violation of Article 13. In my partly dissenting opinion in the Court's judgment of 24 February 2005 in *Khashiyev and Akayeva v. Russia* (nos. 57942/00 and 57945/00), I suggested that there is no reason to find a violation of Article 13 on the basis of the mere fact that there has been a violation of the procedural obligation under Article 2. Moreover, it has to be underlined that in the present case the situation is different. The reference to *Kaya* could be useful, but *a contrario*, because here no violation has been found neither of the substantive nor of the procedural aspect of Article 2.

The Court in paragraph 171 recalls that “in the case of a breach of Articles 2 and 3 of the Convention, ..., compensation for non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress”. We can then consider that a right to compensation arises from the violation of Article 2 and that this right is a Convention right. Consequently, this right should be considered as one referred to by Article 13. But Article 13 is applicable only if this right gives rise to an arguable claim in the precise case. I wonder how one could consider that a claim founded on a violation of the Convention is “arguable” and at the same time consider that there has not been a violation of the Convention.

I admit that the applicant's claim has been declared admissible by this Court. However, I do not think that the claim should be, on that account, declared “arguable” for the purposes of proceedings before a national judge. In my view, what counts is the final judgment of the Court, which in this case is one of non-violation. The decision on admissibility is a preliminary one of procedural effect only. I would add that in the present case following the admissibility decision the Court found it necessary to request further information from the parties on certain matters concerning the conduct of the police operation and the investigations carried out. Therefore, in my view there are no reasons for declaring “arguable” a claim that the Court in its judgment considers in reality to be ill founded.