EUROPEAN COURT OF HUMAN RIGHTS

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GRAND CHAMBER JUDGMENTS IN THE CASES OF: McELHINNEY v. IRELAND, AL-ADSANI v. THE UNITED KINGDOM and FOGARTY v. THE UNITED KINGDOM

The European Court of Human Rights has this morning delivered at a public hearing in Strasbourg the following three Grand Chamber judgments:

In the case of ***McElhinney v. Ireland*** (application number 31253/96), the Court held:
- by 12 votes to five, that there had been **no violation of Article 6 § 1** (right to a fair hearing) of the European Convention on Human Rights.

In ***Al-Adsani v. the United Kingdom*** (no. 35763/97), the Court held:
- unanimously, that there had been **no violation of Article 3** (prohibition of torture) of the Convention,
- by nine votes to eight, that there had been **no violation of Article 6 § 1**.

In ***Fogarty v. the United Kingdom*** (no. 37112/97), the Court held:
- by 16 votes to one, that there had been **no violation of Article 6 § 1**,
- unanimously, that there had been **no violation of Article 14** (prohibition of discrimination) **taken in conjunction with Article 6 § 1**.

All three judgments are available, in English and in French, on the Court's internet site http://www.echr.coe.int.

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1. Principal facts

McElhinney v. Ireland **-** John McElhinney, an Irish national born in 1944 and living in Greencastle, County Donegal, is a Garda (policeman). Following an incident in March 1991 at the Northern Ireland border, in which a British soldier was carried over the border on the tow-bar of the applicant's vehicle, the applicant was allegedly assaulted by the soldier in the Republic of Ireland. The precise circumstances of the incident are disputed between the parties. The applicant was subsequently prosecuted and convicted for his refusal to provide blood and urine samples, after being arrested on suspicion of driving having consumed excess alcohol. In June 1993 the applicant lodged an action against the soldier and the British Government claiming damages. The Irish High Court accepted the British Government's application to have the summons set aside, applying the doctrine of sovereign immunity, on the ground that the applicant was not entitled to bring an action in the Irish courts against a member of a foreign sovereign government. This decision was upheld on appeal by the Supreme Court.

Al-Adsani v. the United Kingdom - Sulaiman Al-Adsani, who has dual British and Kuwaiti nationality, was born in 1961 and lives in London. He is a pilot.

The applicant's description of events underlying the dispute can be summarised as follows. The applicant served in the Kuwaiti Air Force during the Gulf War and, after the Iraqi invasion, remained behind as a member of the resistance movement. He came into possession of sexual videotapes involving Sheikh Jaber Al-Sabah Al-Saud Al-Sabah ("the Sheikh"), who is related to the Emir of Kuwait. By some means these tapes entered general circulation, for which the applicant was held responsible by the Sheikh. On or about 2 May 1991, the Sheikh and two others gained entry to the applicant's house, beat him and took him at gunpoint in a government jeep to the Kuwaiti State Security Prison, where he was falsely imprisoned for several days and repeatedly beaten by security guards. He was released on 5 May 1991, having been forced to sign a false confession. On or about 7 May 1991 the Sheikh took the applicant at gunpoint in a government car to the Emir of Kuwait's brother's palace. The applicant's head was repeatedly held underwater in a swimming pool containing corpses, and he was then dragged into a small room where the Sheikh set fire to mattresses soaked in petrol.

The applicant spent six weeks in hospital in England being treated for burns covering 25 per cent of his body. He suffered psychological damage and has been diagnosed as suffering from a severe form of post-traumatic stress disorder.

In August 1992 he instituted civil proceedings in England for compensation against the Kuwaiti Government and the Sheikh and, in December 1992, obtained a default judgment against the Sheikh. In January 1994 the Court of Appeal granted a renewed application to serve the writ on the Kuwaiti Government. In May 1995 the High Court ordered that the action be struck out finding that State immunity applied under the State Immunity Act 1978 (the 1978 Act), which granted immunity to sovereign States for acts committed outside their jurisdiction, without an implied exception for acts of torture. This ruling was upheld by the Court of Appeal and the applicant was refused leave to appeal to the House of Lords. His attempts to obtain compensation from the Kuwaiti authorities via diplomatic channels have proved unsuccessful.

Fogarty v. the United Kingdom - Mary Fogarty is an Irish national, born in 1959 and living in London. On 8 November 1993 she started working as an administrative assistant at the United States Embassy in London, in the Foreign Broadcasting Information Service, a subsidiary of the Central Intelligence Agency. After being dismissed in February 1995, she issued proceedings against the United States Government before an industrial tribunal. She claimed that her dismissal had been the result of sex discrimination, contrary to the Sex Discrimination Act 1975 (the 1975 Act), alleging that she had suffered persistent sexual harassment from her supervisor and that working relationships had broken down in consequence. On 13 May 1996 the tribunal upheld her complaint and she was paid 12,000 pounds sterling in compensation.

In June 1996 and August 1996 she applied unsuccessfully for two posts at the US Embassy. On 15 September 1996 she issued a second application before an industrial tribunal, claiming the embassy had refused to re-employ her as a consequence of her previous successful sex discrimination claim, which constituted victimisation and discrimination under the 1975 Act. On 6 February 1997 she was advised that the United States Government were entitled to claim immunity under the 1978 Act, which grants immunity from suit in relation to administrative and technical staff of a diplomatic mission seeking to bring proceedings concerning their contract of employment.

2. Procedure

McElhinney v. Ireland, which originated in an application brought against both Ireland and the United Kingdom, was lodged with the European Commission of Human Rights on 16 April 1996. On 1 November 1998, it was transmitted to the Court. On 31 August 1999, a Chamber of seven judges decided to relinquish jurisdiction in favour of the Grand Chamber in accordance with Article 30 of the Convention and Rule 72 § 1 of the Rules of Court. By a decision of 9 February 2000, following a hearing on admissibility and the merits, the Grand Chamber declared the case partly admissible concerning Ireland and inadmissible concerning the United Kingdom.

Al-Adsani v. the United Kingdom was lodged with the Commission on 3 April 1997 and ***Fogarty v. the United Kingdom*** on 8 July 1997. Both were transmitted to the Court on 1 November 1998. On 19 October 1999, a Chamber decided to relinquish jurisdiction in favour of the Grand Chamber. By a decision of 1 March 2000, following a hearing on admissibility and the merits held on 9 February 2000, the Grand Chamber declared both cases admissible. On 13 September 2000 the Grand Chamber decided to grant the United Kingdom Government's request for a further hearing on the merits in both cases and a hearing took place on 15 November 2000.

3. Composition of the Court

In ***McElhinney v. Ireland*** judgment was given by the Grand Chamber, composed as follows:

Luzius **Wildhaber** (Swiss), ***President***,
Elisabeth **Palm** (Swedish),
Christos **Rozakis** (Greek),
Luigi **Ferrari Bravo**[1] (Italian),
Gaukur **Jörundsson** (Icelandic),
Lucius **Caflisch**[2] (Swiss),
Loukis **Loucaides** (Cypriot),
Ireneu **Cabral Barreto** (Portuguese),
Karel **Jungwiert** (Czech),
Nicolas **Bratza** (British),
Boštjan **Zupančič** (Slovenian),
Nina **Vajić** (Croatian),
Matti **Pellonpää** (Finnish),
Margarita **Tsatsa-Nikolovska** (FYROMacedonia),
Egils **Levits** (Latvian),
Anatoly **Kovler** (Russian), ***Judges***,
Nicolas **Kearns** (Irish), **ad hoc** ***Judge***,

and also Paul **Mahoney**, ***Registrar***.

[1] Elected as the judge in respect of San Marino.
[2] Elected as the judge in respect of Liechtenstein.

In ***Al-Adsani v. the United Kingdom*** and ***Fogarty v. the United Kingdom*** judgment was given by the Grand Chamber, composed as follows:

Luzius **Wildhaber** (Swiss), ***President***,
Elisabeth **Palm** (Swedish),
Christos **Rozakis** (Greek),
Jean-Paul **Costa** (French),
Luigi **Ferrari Bravo**[3] (Italian),
Gaukur **Jörundsson** (Icelandic),
Lucius **Caflisch**[4] (Swiss),
Loukis **Loucaides** (Cypriot),
Ireneu **Cabral Barreto** (Portuguese),
Karel **Jungwiert** (Czech),
Nicolas **Bratza** (British),
Boštjan **Zupančič** (Slovenian),
Nina **Vajić** (Croatian),
Matti **Pellonpää** (Finnish),
Margarita **Tsatsa-Nikolovska** (FYROMacedonia),
Egils **Levits** (Latvian),
Anatoly **Kovler** (Russian), ***Judges***,

and also Paul **Mahoney**, ***Registrar***.

4. Summary of the judgments[5]

Complaints

Mr ***McElhinney*** complained principally that by applying the doctrine of sovereign immunity the Irish courts had denied him the right to a judicial determination of his compensation claim, in breach of Article 6 § 1.

Mr ***Al-Adsani*** contended that the United Kingdom had failed to secure his right not to be tortured, contrary to Article 3, read in conjunction with Articles 1 (obligation to respect human rights) and 13 (right to an effective remedy). He also complained of a violation of his right of access to a court under Article 6 § 1.

Ms ***Fogarty*** complained, relying on Articles 6 § 1 and 14, of lack of access to a court and discrimination.

Decision of the Court

Article 6 § 1

In all three cases, the Court noted that sovereign immunity was a concept of international law, by virtue of which one State was not subject to the jurisdiction of another. It considered that granting sovereign immunity to a State in civil proceedings pursued the legitimate aim of

[3] Elected as the judge in respect of San Marino.
[4] Elected as the judge in respect of Liechtenstein.
[5] This summary by the Registry does not bind the Court.

complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

The Court further observed that the European Convention on Human Rights should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to State immunity. It followed that measures which reflected generally-recognised rules of public international law on State immunity could not in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1.

In ***McElhinney v. Ireland*** the Court observed that there appeared to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice was by no means universal. Further, it appeared that the trend might primarily refer to "insurable" personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, might involve sensitive issues affecting diplomatic relations between States and national security. The Court agreed with the Irish Supreme Court that it was not possible, given the present state of the development of international law, to conclude that Irish law conflicted with its general principles.

The Court also noted that it would have been open to the applicant to bring an action in Northern Ireland against the United Kingdom Secretary of State for Defence. The Court recalled that it had held inadmissible, for non-exhaustion of domestic remedies, the applicant's complaint that it was not open to him to pursue an action against the United Kingdom in Northern Ireland.

The decisions of the Irish courts upholding the United Kingdom's claim to immunity could not, therefore, be said to have exceeded the margin of appreciation allowed to States in limiting an individual's right to access to court. There had, therefore, been no violation of Article 6 § 1.

In ***Al-Adsani v. the United Kingdom,*** while noting the growing recognition of the overriding importance of the prohibition of torture, the Court did not find it established that there was yet acceptance in international law of the proposition that States were not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State. The 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, was not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity. The application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity could not, therefore, be said to have amounted to an unjustified restriction on the applicant's access to court. It followed that there had been no violation of Article 6 § 1.

In ***Fogarty v. the United Kingdom*** the Court observed that there appeared to be a trend in international and comparative law towards limiting State immunity in respect of employment-related disputes. However, where the proceedings related to employment in a foreign mission or embassy, international practice was divided on the question whether State immunity continued to apply and, if it did, whether it covered disputes relating to the contracts of all staff or only more senior members of the mission. Certainly, it could not be said that the United Kingdom was alone in holding that immunity attached to suits by

employees at diplomatic missions or that, in affording such immunity the United Kingdom fell outside any currently accepted international standards.

The Court further observed that the proceedings which the applicant wished to bring did not concern the contractual rights of a current embassy employee, but instead related to alleged discrimination in the recruitment process. Questions relating to the recruitment of staff to missions and embassies might by their very nature involve sensitive and confidential issues, relating to the diplomatic and organisational policy of a foreign State. The Court was not aware of any trend in international law towards a relaxation of the rule of State immunity regarding issues of recruitment to foreign missions.

The Court therefore considered that, in conferring immunity on the United States in the present case by virtue of the provisions of the 1978 Act, the United Kingdom could not be said to have exceeded the margin of appreciation allowed to States in limiting an individual's access to court. It therefore followed that there has been no violation of Article 6 § 1.

Article 3

In ***Al-Adsani v. the United Kingdom*** the applicant did not contend that the alleged torture took place within the jurisdiction of the United Kingdom or that the United Kingdom authorities had any causal connection with its occurrence. In those circumstances, it could not be said that the United Kingdom was under a duty to provide a civil remedy to the applicant in respect of torture allegedly carried out by the Kuwaiti authorities. It therefore followed that there had been no violation of Article 3.

Article 14

In ***Fogarty v. the United Kingdom*** the Court recalled that the applicant was prevented from pursuing her claim in the Industrial Tribunal by virtue of sections 1 and 16(1)(a) of the 1978 Act, which conferred an immunity in respect of proceedings concerning the employment of embassy staff. This immunity applied in relation to all such employment-related disputes, irrespective of their subject-matter and of the sex, nationality, place of residence or other attributes of the complainant. It could not therefore be said that the applicant was treated any differently from other people wishing to bring employment-related proceedings against an embassy, or that the restriction placed on her right to access to court was discriminatory. It followed that there had been no violation of Article 14 in conjunction with Article 6 § 1.

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In ***McElhinney v. Ireland*** Judges **Rozakis** and **Loucaides** expressed separate dissenting opinions and Judges **Caflisch**, **Cabral Barreto** and **Vajić** expressed a joint dissenting opinion.

In ***Al-Adsani v. the United Kingdom***, concurring opinions were expressed by: Judge **Zupančič** and Judges **Pellonpää** and **Bratza.** Judges **Rozakis** and **Caflisch,** joined by Judges **Wildhaber**, **Costa**, **Cabral Barreto** and **Vajić**, expressed a joint dissenting opinion and separate dissenting opinions were expressed by Judges **Ferrari Bravo** and **Loucaides**.

In ***Fogarty v. the United Kingdom*** Judges **Caflisch**, **Costa** and **Vajić** expressed a joint concurring opinion and Judge **Loucaides** expressed a dissenting opinion.

All these opinions are annexed to the relevant judgments.

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The European Court of Human Rights *was set up in Strasbourg in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights. On 1 November 1998 a full-time Court was established, replacing the original two-tier system of a part-time Commission and Court.*