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42. The European Court of Human Rights and the Commission have clearly recognised that

> "The nature and degree of scrutiny which satisfies [the] minimum threshold [of a public and independent scrutiny] must, in the Commission's view, depend on the circumstances of the particular case".

(*McCann v United Kingdom* (1995) 21 EHRR 97, para 193.)

> "What form of investigation will achieve those purposes may vary in different circumstances".

(*Jordan v United Kingdom* (2001) 37 EHRR 52, para 105.) See also *Edwards v United Kingdom* (2002) 35 EHRR 487.

43. Such investigation must however be by an independent person, and be "effective" to satisfy the relevant duty. (*Edwards* at paras 69-73). There must be a sufficient element of public scrutiny and the next of kin or the family must be involved to an appropriate extent. (*Jordan v United Kingdom* (2001) 37 EHRR 52).

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

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

46. There were here a number of inquiries of different kinds which

went some way to fulfil the minimum threshold duty but for the reasons given by Lord Bingham there were features of each stage of the inquiry which did not achieve the minimum threshold.

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

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

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

LORD STEYN

My Lords,

50. In my view the Court of Appeal approached the Strasbourg jurisprudence, and in particular the decision in *Edwards v United Kingdom* (2002) 35 EHRR 487 in the wrong way. The Court of Appeal observed ([2003] QB 581, 607- 608, para 62):

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

The Court of Appeal plainly thought that in the case of acts by state agents causing death in custody there is a more exacting and rigorous duty to investigate than in cases of negligent omissions leading to death in custody. That cases in the former category may be a greater affront to the public conscience than cases in the latter category can

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

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

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

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

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

53. For the reasons given by Lord Bingham of Cornhill, as well as my

brief reasons, I would also allow the appeal and restore the order of Hooper J.

LORD HOPE OF CRAIGHEAD

My Lords,

54. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. I agree with them, and for the reasons which they have given I too would allow the appeal and restore the order of Hooper J. I should like however to add a few words by way of a supplement to Lord Bingham's review of the domestic law on the investigation of deaths in prison.

55. There is no coroner in Scotland. The system in Scotland for the investigation of sudden deaths depends instead on the sheriff and the public prosecutor. To a large extent the question whether an investigation is needed is left to the discretion of the procurator fiscal of the area where the death occurred. In the performance of that function he is answerable to the Lord Advocate. But in some cases the holding of a public inquiry is mandatory, and it has for a long time been recognised in Scotland that it is in the public interest for a public inquiry to be held into the death of a person who at the time of the death was being held in legal custody. Section 53 of the Prisons (Scotland) Act 1877 (40 & 41 Vict, c 53), to which Lord Bingham has referred, was replaced by section 25 of the Prisons (Scotland) Act 1952 (15 & 16 Geo 6 & 1 Eliz 2, c 61). In the event of the death of a prisoner it was the duty of the governor under that section to give immediate notice to the procurator fiscal in whose area the prison was situated and, where practicable, to the prisoner's nearest relative. It was the duty of the procurator fiscal then to hold a public inquiry into the death before the sheriff and, where practicable, to allow sufficient time for the prisoner's next of kin to attend the inquiry.

56. The legislation on this subject was consolidated and amended by the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976. It comprised the Fatal Accidents Inquiry (Scotland) Act 1895 (58 & 59 Vict, c 36), which provided for a compulsory inquiry into any death resulting from an accident sustained during industrial employment or occupation, the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1906 (6 Edw 7, c 35), which gave the Lord Advocate discretion to order an inquiry into any sudden or suspicious death where he considered this to be expedient in the public interest, and section 25 of the Prisons (Scotland) Act 1952. The system which was introduced by the 1895 Act was for an investigation to be held in public by a sheriff and jury, whose verdict set forth when and where the accident and the death took place and the cause of death: section 4(7). Section 2 of the 1906 Act required the jury's verdict to deal also with the cause of the accident, the person if any who was responsible for it, the precautions if any by which it might have been avoided and any other facts disclosed

by the evidence which in the opinion of the jury were relevant to the inquiry. In practice, the verdict of the jury was usually dictated by the sheriff and in many cases the jury simply returned a formal verdict.

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

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

59. An example of the flexibility of this system and its ability to deal with complex and difficult issues is provided by the fatal accident inquiry which was held in 1996 by Sheriff Sir Stephen Young in Paisley Sheriff Court into the crash of the RAF Chinook helicopter into the Mull of Kintyre on 2 June 1994 which killed all those who were on board the aircraft. The evidence for the Crown was presented by counsel. The families of the two pilots were separately represented, as were the families of all the deceased other than the pilots and the manufacturer of the helicopter. The inquiry involved the hearing of evidence and submissions over some 16 days, and the sheriff's determination which extended to 123 pages contained a detailed and careful analysis of the

evidence: see *Report from the Select Committee on Chinook ZD 576* (HL Paper 25 (iii), Session 2001-2002) (31 January 2002), paras 19 - 21.

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

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

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

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

62. In my opinion failures by the prison service which lead to a prisoner's death at the hands of another prisoner are no less

demanding of investigation, and of "the widest exposure possible", than lethal acts which state agents have deliberately perpetrated. Indeed there is a strong case for saying that an even more rigorous investigation is needed if those who are responsible for such failures are to be identified and made accountable and the right to life is to be protected by subjecting the system itself to effective public scrutiny. Some form of effective investigation is, of course, needed when prisoners have been killed as a result of force by, inter alios, agents of the state: *McCann v United Kingdom* (1995) 21 EHRR 97, 163, para 161. But, as the words "inter alios" indicate, the obligation to safeguard the lives of prisoners is not confined to those who are at risk of the acts of state agents. It extends with equal force to all those whose lives are at risk from the criminal acts of another individual: *Osman v United Kingdom* (1998) 29 EHRR 245, 305, para 115.

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

64. For reasons which she has explained in her affidavit HM Coroner for West London, in the exercise of her discretion, declined to reconvene the inquest into Zahid Mubarek's death which was formally opened and then adjourned to await the prosecution of Robert Stewart for murder. As she pointed out, a number of practical problems are posed by the workload and availability of the coroner which would have made it very difficult for her to commit the time and resources that would have been needed to conduct the investigation that is required in this case. She accepts that the conditions of the office would be no answer if it was plain that the holding of an inquest was the appropriate remedy. But there are other, more fundamental, reasons for not taking this course. These are to found in the legal restraints which are provided by the Coroners Act 1988 and the Coroners Rules 1984. The coroner is restricted to a simple short verdict. She cannot make recommendations, and many of the issues which still need to be investigated in public as indicated in Hooper J's judgment would be beyond the scope of her inquest.

65. I agree that the various investigatory processes into Mr Mubarek's killing which have been conducted so far fall well short of providing the effective public scrutiny that is needed in a case of this kind. Substantial changes in the existing system for the investigation of deaths by coroners have been proposed: *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a*

Fundamental Review (Cm 5831) (June 2003). But they will require legislation, and it must be assumed that these changes will not be applied retrospectively to deaths which have already occurred. The only alternative in these circumstances is for the Secretary of State to order the holding of an independent public inquiry into the circumstances which led to Mr Mubarek's death. Subject to the observations at the end of Lord Bingham's speech with which I am in full agreement and to the fact that the person who conducts it will lack the powers which could only be given by statute, I suggest that the conduct and scope of this inquiry should be as close to the Scottish model as possible.

LORD HUTTON

My Lords,

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

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