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Judgment: approved by the Court for handing down | *Delivered:* **12/11/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

MAIRTIN O'MUILLEOIR

PLAINTIFF;

-and-

MICHAEL McDOWELL

DEFENDANT;

_____

BETWEEN:

ROBIN LIVINGSTONE

PLAINTIFF;

-and-

MICHAEL McDOWELL

DEFENDANT;

_____

HIGGINS LJ

[1] The plaintiff Mairtin O'Muilleoir is the Managing Director of the Andersonstown News Group and the plaintiff Robin Livingstone is a Director of the same News Group. The defendant in each action is the Minister for Justice, Equality and Law Reform in the Government of Ireland. On 22 May

2005 identical writs of summons were issued out of the High Court of Justice in Northern Ireland, on behalf of each plaintiff, against the defendant. The terms of the writ of summons in each case are –

> The Plaintiff's claim is for
>
> 1. For (sic) damages for libel of and concerning him published and broadcast by the Defendant his servants or agents in a statement on the Internet in Northern Ireland on or about the 13th day of January 2005 on the website of the Department of Justice of the Government of Ireland.
> 2. An injunction restraining the Defendant by himself his servants or agents from further publication of the said libel.

[2] On 5 July 2005 the Government of Ireland caused a Notice of Motion to issue out of the High Court of Justice in Northern Ireland, for an order that the defendant in these proceedings is immune from the jurisdiction of the Courts of the United Kingdom, by virtue of the provisions of the State Immunity Act 1978. The notice of motion is grounded in the affidavits of Dermot McCarthy, Secretary General to the Government of Ireland of the Department of the Taoiseach, and Paul Spring, a partner in the firm of Mills Selig, Solicitors, instructed by the Chief State Solicitor of Ireland, to act on behalf of the Defendant and the Government of Ireland. In his affidavit Mr McCarthy deposed that a meeting of the Government of Ireland took place on 21 June 2005. At the meeting it was noted that claims for damages for defamation had been made against the defendant by the plaintiffs. It was also noted that the claims related to a statement of the defendant in his capacity as Minister for Justice, Equality and Law Reform and when exercising the executive power of the State within the meaning of Article 28 of the Constitution of Ireland and that the statement of the defendant had been obtained from the website of the Department of Justice, Equality and Law Reform. In those circumstances Mr McCarthy was instructed by the Government of Ireland, to inform the Chief State Solicitor to plead sovereign immunity in accordance with the law applicable in Northern Ireland.

[3] The Andersonstown News Group, through Daily Ireland Ltd., is publisher of a new daily newspaper entitled Daily Ireland, which commenced distribution on 1 February 2005. Plans to publish this new daily newspaper commenced in June 2003. Mr O'Muilleoir deposed in his affidavit that Andersonstown News Group, via the Bank of Ireland, provided the majority of funding for the new newspaper.

[4] On 13 January 2005 the defendant issued a statement under his own name and which was promulgated on the website of the Department of Justice, Equality and Law Reform. The relevant parts of the statement were in the following terms -

"**Statement issued by Michael McDowell, TD**
Minister for Justice, Equality and Law Reform

The recent attribution of the Northern Bank robbery in Belfast to the Provisional IRA was done by the Chief Constable of the PSNI after careful consideration of the progress of the investigation. It was done with a view to having a political effect.

…..

I have no reason at all to disbelieve or discount his assessment on which the attribution was made.

….

Now, concerning the Northern Bank heist, the IRA has been making denials again. And, once more, that's been good enough for Mr Adams. 'The IRA has said it wasn't involved,' he said this week. 'I believe that to be the case.'

Does any sane person believe that the IRA or Sinn Fein would now acknowledge that it had carried out the Northern Bank robbery?

…..

There is and can be no room in representative politics or in governmental institutions anywhere on this island for any political party allied to any group or body which:

- Supports the use or threatened use of force or violence
- Possesses firearms or explosives
- Violently resists An Garda Siochana or the PSNI
- Usurps the policing function in any part of this island
- Engages in robbery or theft

…..

The small minority in the media who pander to the Provisional agenda should always remind themselves of the fact that the IRA Chief of Staff took an oath to deny involvement in the IRA before a Dublin jury as part of a plan to cripple media free speech and to get damages for being revealed for what he was. They might also keep in their minds the name of the witness who swore up against him and was believed by that jury. He was found battered to death near the border.

Small wonder that the Provisionals are now backing a new daily newspaper heavily featured in last week's An Phoblacht. Will it be to Irish democracy what the Volkischer Beobachter was to pre-WWII German democracy?

We should not passively stand by as a naked plan to subvert democracy by those who are allied to such a movement is put into effect. We are being invited into the Orwellian nightmare of the Provo parallel universe where truth becomes falsehood, where words mean only what the speaker wishes them to mean, and where common humanity is expendable in pursuit of insatiable ideology.

Central to this project is a plan to re-write history and to baptise the most brutal, cowardly, blood-soaked, divisive, anti-republican, sectarian, hate-driven and destructive terror campaign as an heroic struggle for peace and human rights. As the Provo propaganda machine gears itself up to claim against all historical truth that they are the party founded in 1905 by Arthur Griffith, we can see a crazy 'centenary myth' developing before our eyes, designed to fool those with short memories and no knowledge of Irish history into believing a grotesque falsehood. Why?

……

The Massive Untruth

The massive untruth at the heart of Sinn Fein is that it claims to operate as an organisation wholly separate from the IRA. In fact, as the Taoiseach has said repeatedly, Sinn Fein and the IRA are two sides of

> one coin. The Independent Monitoring Commission concluded that there was an overlap at senior leadership level between the IRA and Sinn Fein. That confirmed what I had previously said about the presence of household names on the Army Council.
>
> ……
>
> Instead, the Provos have by their actions opened up a gulf of mistrust. They have successfully polarised Northern politics at the expense of those who are reconcilers in the centre ground.
>
> The true republican imperative of reconciling orange and green has been set back for decades by their actions. The door into exclusively democratic and peaceful politics is open for them and will remain open. But it is not a threshold which can be straddled or camped on by those who want to put one foot into democracy while leaving the other foot planted in terrorism.
>
> Our freedoms, our democracy and our future all depend on that proposition. We must stand by the one and only republic that we have – the state that was built by the generation that won us our freedom and that has been sustained since by democracy and the rule of law. There is but one army entitled to be considered Oglaigh na h-Eireann – the Defence Forces maintained by the Oireachtas under Bunreacht na h-Eireann."

[5] On 21 January 2005 the firm of solicitors acting on behalf each plaintiff sent letters of claim on their behalf in respect of the website publication to the defendant. The letter was sent to him at the Department of Justice, Equality and Law Reform in Dublin. This letter stated –

> "We act for Mr Mairtin O'Muilleoir who is one of a number of persons who are promoting a new daily newspaper called Daily Ireland Our clients are journalists and business people of the highest standing and integrity who have sought to bring peace and democracy to Northern Ireland. Indeed Mr O'Muilleoir holds Public appointments North and South. They are involved with an existing award-

winning business and have received written support from the Taoiseach for their new venture. They resent very much the gross and unwarranted slur that they are about to publish a newspaper equivalent to the 'Volkischer Beobachter' This was a Nazi newspaper, which supported a regime guilty of some of the vilest crimes against humanity that have ever been committed without the slightest semblance of a justifiable cause.

Your article amounts to an hysterical and biased condemnation of the entire present day Republican movement. We note in passing your facile attempts to claim to have inherited the mantle of the only true Republicanism which "won us our freedom" although in the War of Independence the acts of the then IRA were no different in principle from many of the acts condemned by you.

However, my clients present complaints are not about the expression of your views on Republicanism, however distorted and selective they may be, but on the gross imputation that they are supporters of Nazi ideas.

My clients' have never by act or omission endorsed or countenanced the evils of Nazism, which they regard with total abhorrence. They have never condoned or endorsed the acts you recite and are utterly opposed to violence.

They have consistently and unswervingly sought to promote peace and justice in Northern Ireland.

The new newspaper will be completely independent of any political party. It will strive towards the highest standards of journalism and will work unremittingly for the betterment of the entire community.

As well as damaging their reputations and efforts to promote peace your imputations have occasioned the utmost distress and insult. You will be aware that the National Union of Journalists has also strongly condemned your comments and the increased personal safely risk that has been created.

> We must call upon you, without delay to agree to apologise to them for this gross slur, in a form and in a manner, which is acceptable to them.
>
> Failing this, proceedings will be issued without delay."

[6] On 23 March 2005 identical writs of summons were issued on behalf of each plaintiff. The writs were sent to the defendant's constituency office address at Ranelagh in Dublin and copied to the Chief State Solicitor of the Government of Ireland. On 9 June 2005 the solicitor acting on behalf of the plaintiffs served a Notice of each writ of summons on the Chief State Solicitor in the Republic of Ireland. On 14 June 2005 acceptance of service was endorsed on each Notice by the Chief State Solicitor. On 5 July 2005 a Notice of Motion issued on behalf of the Government of Ireland was served on each plaintiff seeking an Order –

> "that the Defendant is immune from the jurisdiction of the Courts of the United Kingdom by virtue of the provisions of the State Immunity Act 1978."

[7] Dermot McCarthy is Secretary General to the Government of Ireland and is authorised to swear an affidavit on behalf of that Government. In his affidavit he deposed at paragraph 2 (1)(b) –

> "that the said claim relates to a statement of Michael McDowell in his capacity as Minister for Justice, Equality and Law Reform and when exercising the executive power of the State within the meaning of Article 28 of the Constitution and obtained from the website of the Department of Justice, Equality and Law Reform."

[8] In his replying affidavit Mr O'Muilleor deposed the following. He is the Managing Director of the Andersonstown News Group and that the idea of a new daily newspaper entitled Daily Ireland was originated by him in June 2003. The majority of the funding was provided by the Andersonstown News Group via the Bank of Ireland. By letter dated December 2004 the Taoiseach, Mr Aherne, welcomed the development of the new newspaper. This plaintiff has been a journalist for over 20 years. Between 1987 and 1997 he was a Sinn Fein representative on Belfast City Council. In 1997 he left political life to take up a full-time managerial position within the Andersonstown News Group. He has worked consistently to support the peace process and made clear that the newspaper Daily Ireland would advocate against violence and support peace. A number of threats to his life

and that of employees of the News Group have been made over the years. He considers the remarks made by the defendant to represent a link between himself and employees of Daily Ireland, with the Irish Republican Army. He is not and never has been a member of the Irish Republican Army. The link made by the defendant has increased the risk to his life and that of others employed by the News Group. Potential advertisers have shunned the newspaper and the defendant's remarks have been the subject of other media interest. In support of the threats made he details three incidents in September and October 2004.

[9] In his replying affidavit Mr Livingstone deposed that he has been a journalist for over twenty years and the Editor in Chief for the Andersonstown News Group during the past five years and was involved in the early discussions that led to the launch of Daily Ireland. He is an Irish Nationalist who has never been a member of any political organisation and has supported the peace process constantly.

[10] It was submitted by Mr Fee QC who, with Mr Cush appeared on behalf of the defendant, that the defendant is immune from suit in the jurisdiction of the United Kingdom. They rely on the provisions of the State Immunity Act 1978 which protect the defendant.

[11] Mr Lavery QC, who with Mr Keogh appeared on behalf of both plaintiffs, submitted that the doctrine of state immunity was not an absolute principle and did not apply to a government official who was acting in a personal capacity rather than an official capacity. Consequently the State Immunity Act 1978 was not relevant. Alternatively he submitted that the rights of the plaintiffs under Article 2 of the European Convention on Human Rights were engaged and that such fundamental rights could not be overridden by the State Immunity Act 1978. He relied on the series of cases concerning the former President of Chile, Augustine Pinochet. Mr Lavery QC submitted that these cases provided authority for the proposition that neither statute nor common law provided any immunity from prosecution for acts of torture sanctioned by a former head of state. By analogy, Mr Lavery submitted that any act which breaches the right to life or creates a grave threat to life, cannot be subject to state immunity, either at common law or under the 1978 Act.

[12] It was accepted by Mr Lavery QC that the incident referred to as 'the Northern Bank robbery' and the Police Service of Northern Ireland Chief Constable's attribution of it to the Irish Republican Army, were matters of legitimate public comment by the defendant in his official capacity as Minister of Justice, Equality and Law Reform of the Government of Ireland. But the additional words published by the defendant about the Daily Ireland newspaper (and by implication about the plaintiffs) were so inflammatory that they could only be regarded as a political tirade by the defendant in his

personal capacity and not an official publication by the Government of Ireland about the matter. In addition they were irrelevant to the Chief Constable's views about the incident and contrary to the support given by the Taoiseach to the launch of the newspaper.

[13] Mr Fee QC submitted that the statement by the defendant was made in his capacity as Minister for Justice, Equality and Law Reform. He referred to the affidavit of the Secretary General of the Government of Ireland that the statement was made in that capacity and to the fact that it was published on the official website of the Department. In relation to the plaintiffs' Article 2 rights, Mr Fee QC submitted that no evidence had been put forward by Mr Livingstone relating to any threat to his life. In relation to Mr O'Muilleor the only evidence adduced was one line in his affidavit in which he deposed that he believed that the 'linkage made by Mr McDowell to have increased the risk to my life and others employed by the Newspaper Group'. The three police messages warning of a threat all pre-dated the date of the defendant's statement. Even if the Article 2 rights of the plaintiffs were engaged by the statement, the doctrine of state immunity does not offend the Convention rights, which must be interpreted to give recognition and effect to customary international law including state immunity.

[14] At common law, a foreign sovereign state and its head of state were entitled to claim immunity from the jurisdiction of the courts of the United Kingdom in any action brought against it. No distinction was drawn between actions which arose from the official acts of the foreign state (acta jure imperii) and those which arose from its commercial activities (acta jure gestionis). In 1972, the United Kingdom signed the European Convention on State Immunity. This Convention draws a distinction between actions relating to official acts and those relating to commercial activities. From 1976 Courts of the United Kingdom adhered to this distinction. The State Immunity Act of 1978, which replaces the rules of common law, maintains that distinction between the two classes of case. The Act provides for certain exceptions to the doctrine of state immunity. When these exceptions apply the common law (or other statutue) may govern the issue whether the foreign state is entitled to immunity.

[15] The State Immunity Act 1978 makes new provision with respect to proceedings in the United Kingdom by or against other States. It also makes provision for giving effect to judgments made against the United Kingdom in the courts of other countries that are parties to the European Convention on State Immunity, as well as extending immunities and privileges under the Diplomatic Privileges Act 1964 to heads of state and their families and servants. Part I is relevant for the purposes of this summons, Section 1 of which provides –

> 1 (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
>
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

[16] It is noteworthy that the court shall apply and give effect to the doctrine of immunity, even though the state does not appear in the proceedings and take issue with the jurisdiction of the court. In this instance the issue as to jurisdiction is taken, both by the defendant and the Government of Ireland.

[17] Sections 2 to 11 specify proceedings in which a sovereign state is not immune to the jurisdiction of the court. Section 16 provides for certain exclusions including those from criminal proceedings (see section 16(4)). For example a state is not immune in proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom (Section 1(1)) or in relation to commercial transactions entered into by the state (Section 3(1)(a)). It is not suggested that any of the statutory exceptions apply in this instance.

[18] Section 14 provides that the immunities and privileges conferred by Part I of the Act, apply to a foreign state and define what is included in the references to a 'State'. Section 14 provides –

> (1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—
>
> (a) the sovereign or other head of that State in his public capacity;
> (b) the government of that State; and
> (c) any department of that government,
>
> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.
>
> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune."

[19] Thus the immunities and privileges conferred by Part I of the State Immunity Act 1978 apply to a department of a foreign government. The Department of Justice, Equality and Law Reform of the Government of Ireland is such a department. Therefore the Department of Justice, Equality and Law Reform is immune from the jurisdiction of this court by virtue of the provisions of the State Immunity Act 1978.

[20] The doctrine of state immunity and the State Immunity Act 1978 were considered by the House of Lords in Holland v Lampen-Wolfe 2000 1 WLR 1573. This was a libel action in which the Government of the United States of America asserted state immunity on behalf of an education services officer at a US Armed Forces base in England. The plaintiff was a University Professor, and also an American citizen, who taught at the base and who alleged the education services officer had libelled her in a memorandum. The House of Lords upheld the claim for state immunity at common law. In his opinion Lord Hope said at page 1575 -

"The immunity which is accorded by English law to foreign states in civil proceedings is the subject of two separate regimes. The first is that laid down by Part I of the State Immunity Act 1978, by which a foreign state is immune from the jurisdiction of the United Kingdom courts unless one of a series of exceptions to immunity in sections 2 to 11 applies. The only exception on which the plaintiff seeks to rely in this case is that which is to be found in section 3 of the Act, which relates to commercial transactions and contracts to be performed in the United Kingdom. The second regime is that under the common law. It applies to all cases that fall outside the scope of Part I of the Act. It is also necessary in this case to consider section 16(2) of the State Immunity Act 1978, as this section disapplies Part I of that Act where the proceedings relate to "anything done by or in relation to the armed forces of a state while present in the United Kingdom"

In the same case Lord Millet dilated further on the nature of state immunity when he said at page 1583 -

> "It is an established rule of customary international law that one state cannot be sued in the courts of another for acts performed jure imperii. The immunity does not derive from the authority or dignity of sovereign states or the need to protect the integrity of their governmental functions. It derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal. The rule is "par in parem non habet imperium:" see I Congreso del Partido [1983] 1 A.C. 244, 262, per Lord Wilberforce. As I explained in Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147, 269, it is a subject-matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another. The existence of the doctrine is confirmed by the European Convention on State Immunity (1972) (Cmnd. 5081), the relevant provisions of which are generally regarded as reflecting customary international law. In according immunity from suit before the English courts to foreign states the State Immunity Act 1978 and the common law give effect to the international obligations of the United Kingdom."

Where the immunity applies, it covers an official of the state in respect of acts performed by him in an official capacity. In the present case, it is common ground that at all material times the defendant acted in his capacity as an official of the United States Department of Defense, being the department responsible for the armed forces of the United States present in the United Kingdom. The United States has asserted immunity on behalf of the defendant. Dr. Holland has not challenged the proposition that, if the United States is entitled to the immunity it claims, that immunity bars the present proceedings.

[21] Mr Lavery QC accepted that these passages represented the law relating to state immunity and that the doctrine protects an official of the state in respect of acts performed in an official capacity. However Mr Lavery QC submitted that the statement issued by the defendant was couched in terms which rendered it a statement made in the defendant's personal capacity and could not be regarded as an official publication of the Government of Ireland.

The statement was issued through the official website of the Department of Justice, Equality and Law Reform. It was headed – 'Statement issued by Michael McDowell, TD Minister for Justice, Equality and Law Reform'. Those facts in themselves provide strong support for the suggestion that this was a statement issued in the defendant's official capacity. However the affidavit of the Secretary General in which he refers to a meeting of the Government of Ireland at which it was noted that the plaintiffs' claims relate to a statement of the defendant in his capacity as Minister for Justice, Equality and Law Reform and when exercising the executive power of the State within the meaning of Article 28 of the Constitution of Ireland, is proof conclusive that the statement was so issued. Thus the Government of Ireland is entitled to assert and claim immunity from the jurisdiction of this court under the State Immunity Act 1978.

[22] It was submitted by Mr Lavery QC that even if the Government of Ireland and the defendant came within the terms of the State Immunity Act 1978 (and/or the Common Law principles relating to immunity) nevertheless this court should not grant immunity where the act giving rise to the cause of action has breached or could potentially breach the rights of the plaintiffs under Article 2 of the European Convention on Human Rights, now enshrined in our domestic law. Article 2 provides that 'everyone's right to life shall be protected by law'. It was submitted that this fundamental right could not be overridden by either statute or common law. The 1978 Act was to be construed along with the European Convention and the Human Rights Act 1998 like any other legislative provision. In any event it was submitted that the immunity granted, either by the 1978 Act or common law, was not absolute and could not be relied on in every circumstance. Reliance was placed on 'the Pinochet series of cases'. However I do not find these cases are comparable or of any assistance. They did not fall within Part 1 of the 1978 Act. Rather they were criminal proceedings related to the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

[23] Mr Fee QC submitted that no evidence of an increased risk to the Plaintiff Mr O'Muilleior had been demonstrated as arising from the statement issued by the defendant and the three incidents referred to in his affidavit pre-dated the date of the statement. The other plaintiff Mr M Livingstone had not sought to argue that any risk to life or limb arose. Mr Lavery QC countered that the risk to the latter plaintiff, arose through his association with Mr O'Muilleoir and the newspaper. Mr Fee QC relied on Holland v Lampen-Wolfe, supra, and passages in the opinions of Lord Hope and Lord Millett to the effect that the doctrine of state immunity did not offend Article 6 of the European Convention on Human Rights, which affords everyone the right to a fair trial for the determination of his civil rights and obligations. It was noted that it is state immunity that is protected and that Article 6 is not an absolute right. Reference was also made to three decisions of the European

Court of Human Rights in Fogarty v United Kingdom 2002 34 EHRR 12, McElhinney v Ireland 12 BHRC 114 and Al-Adsani v United Kingdom 12 BHRC 88, in which the European Court upheld the views expressed in Holland v Lampen-Wolfe, that the doctrine of state immunity did not breach Article 6 of the Convention. In Al-Adsani the plaintiff brought proceedings in England for compensation against the government of Kuwait and a Kuwaiti national. It was alleged that the plaintiff was tortured in Kuwait by Kuwaiti nationals in state buildings and later threatened in England should he take action or give publicity to his allegations. It was held that Article 6 should be considered along with generally accepted and recognised rules of public international law and the comity of nations. It is sufficient to refer to paragraph 3 of the head-note which states -

> "The grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty. Moreover, the convention, including art 6, ought not to be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it formed part, including those relating to the grant of state immunity. Accordingly measures taken by a contracting state which reflected generally recognised rules of public international law on state immunity did not in principle impose a disproportionate restriction on the right of access to court as embodied in art 6(1). Just as the right of access to court was an inherent part of the fair trial guarantee in that article, so some restrictions on access had likewise to be regarded as inherent, such as those limitations generally accepted by the community of nations as part of the doctrine of state immunity. Furthermore, although the prohibition of torture had achieved the status of a peremptory norm in international law, the instant case concerned not the criminal liability of an individual for alleged acts of torture, but the immunity of a state in a civil suit for damages in respect of acts of torture within the territory of that state. Notwithstanding the special character of the prohibition of torture in international law, there was no firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in the courts of another state where acts of torture were alleged. Accordingly the 1978 Act, which granted 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. Thus the application by the English courts of the provisions of the 1978 Act to uphold Kuwait's claim to immunity did not amount to an unjustified restriction on the applicant's access to court. It followed that there was no violation of art 6(1) (see paras 52–67, post); R v Evans, ex p Pinochet Ugarte (No 3) (1999) 6 BHRC 24 considered."

[24] The substance of Mr Lavery's submission was that Parliament could not have intended that acts of murder or threats thereof or other breaches of human rights could fall within the immunity afforded by the 1978 Act. The immunity is one from the jurisdiction of the court. It seems to me that in reality Mr Lavery's argument is that the plaintiffs should not be denied access to the courts of the United Kingdom, that is, an Article 6 issue, in the context of an alleged risk to life, which is protected by Article 2. I shall assume that the contents of the statement do give rise to the alleged increased threat to life. In Al-Adsani the plaintiff alleged torture, if not attempted murder, followed by threats. The European Court held that such did not prevent the government of Kuwait from enjoying the immunity afforded by the 1978 Act.

[25] The State Immunity Act 1978 was considered by the House of Lords in Jones and others v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others 2006 UKHL 26. In this case several British nationals brought proceedings in England for compensation for, inter alia, alleged torture by servants or agents of the Kingdom of Saudi Arabia. The particulars of claim, which were denied, alleged severe, systematic and injurious torture and the medical reports, annexed to the statement of claim, appeared to substantiate those claims. None of the claims fell within the exceptions specified in Part 1 of the 1978 Act. It was contended that to uphold the claim for immunity put forward by the Kingdom of Saudi Arabia would be incompatible with the plaintiffs' rights under Article 6 of the Convention to have access to a court to determine their rights and that the grant of immunity for acts of torture, is precluded by international law and the UN Convention. The House of Lords affirmed the decision of the Master upholding the claims to state immunity made on behalf of the Kingdom of Saudi Arabia and the individual state agents. In his opinion Lord Bingham, with which the other Law Lords agreed, expressed the following views –

> "14. To succeed in their Convention argument (and the onus is clearly on them to show that the ordinary approach to application of a current domestic statute

should not be followed) the claimants must establish three propositions. First, they must show that article 6 of the Convention is engaged by the grant of immunity to the Kingdom on behalf of itself and the individual defendants. In this task they derive great help from *Al-Adsani v United Kingdom* (2001) 34 EHRR 273 where, in a narrowly split decision of the Grand Chamber, all judges of the European Court of Human Rights held article 6 to be engaged. I must confess to some difficulty in accepting this. Based on the old principle par in parem non habet imperium, the rule of international law is not that a state should not exercise over another state a jurisdiction which it has but that (save in cases recognised by international law) a state has no jurisdiction over another state. I do not understand how a state can be said to deny access to its court if it has no access to give. This was the opinion expressed by Lord Millett in *Holland v Lampen-Wolfe* [2000] 1 WLR 1573, 1588, and it seems to me persuasive. I shall, however, assume hereafter that article 6 is engaged, as the European Court held. Secondly, the claimants must show that the grant of immunity to the Kingdom on behalf of itself and the individual defendants would deny them access to the English court. It plainly would. No further discussion of this proposition is called for. Thirdly, the claimants must show that the restriction is not directed to a legitimate objective and is disproportionate. They seek to do so by submitting that the grant of immunity to the Kingdom on behalf of itself or its servants would be inconsistent with a peremptory norm of international law, a jus cogens applicable erga omnes and superior in effect to other rules of international law, which requires that the practice of torture should be suppressed and the victims of torture compensated.

……..

17. The claimants' key submission is that the proscription of torture by international law, having the authority it does, precludes the grant of immunity to states or individuals sued for committing acts of torture, since such cannot be governmental acts or exercises of state authority entitled to the protection of state immunity ratione materiae. In support of this

submission the claimants rely on a wide range of materials including: the reasoning of the minority of the Grand Chamber in *Al-Adsani v United Kingdom* (2001) 34 EHRR 273; observations by members of the House in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 1)* [2000] 1 AC 61 and *(No 3)* [2000] 1 AC 147 (hereinafter *Pinochet (No 1)* and *Pinochet (No 3)*); a body of United States authority; the decision of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Furundzija* (1998) 38 ILM 317; the decision of the Italian Court of Cassation in *Ferrini v Federal Republic of Germany* (2004) Cass sez un 5044/04; 87 Rivista di diritto internazionale 539; and a recommendation made by the Committee against Torture to Canada on 7 July 2005. These are interesting and valuable materials, but on examination they give the claimants less support than at first appears.

18. The Grand Chamber's decision in *Al-Adsani* is very much in point, since it concerned the grant of immunity to Kuwait under the 1978 Act, which had the effect of defeating the applicant's claim in England for damages for torture allegedly inflicted upon him in Kuwait. The claimants are entitled to point out that a powerful minority of the court found a violation of the applicant's right of access to a court under article 6 of the European Convention. The majority, however, held that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty (para 54); 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 the grant of state immunity (para 55); and that some restrictions on the right of access to a court must be regarded as inherent, including those limitations generally accepted by the community of nations as part of the doctrine of state immunity (para 56). The majority were unable to discern in the international instruments, judicial authorities or other materials before the court any firm basis for concluding that, as a matter of international law, a state no longer enjoyed immunity from civil suit in

the courts of another state where acts of torture were alleged (para 61). While noting the growing recognition of the overriding importance of the prohibition of torture, the majority 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 (para 66). It is of course true, as the claimants contend, that under section 2 of the 1998 Act this decision of the Strasbourg court is not binding on the English court. But it was affirmed in *Kalogeropoulou v Greece and Germany* (App No 50021/00) (unreported) 12 December 2002, when the applicant's complaint against Greece was held to be inadmissible, and the House would ordinarily follow such a decision unless it found the court's reasoning to be unclear or unsound, or the law had changed significantly since the date of the decision. None of these conditions, in my opinion, obtains here.

……

28. It follows, in my opinion, that Part 1 of the 1978 Act is not shown to be disproportionate as inconsistent with a peremptory norm of international law, and its application does not infringe the claimants' Convention right under article 6 (assuming it to apply). It is unnecessary to consider any question of remedies."

Lord Hoffman in his concurring opinion expressed the following view –

"39. The argument in support of this submission involves three steps. First, article 6 of the European Convention on Human Rights (hereafter "the Convention") guarantees a right of access to a court for the determination of civil claims and that right is prima facie infringed by according immunity to the Kingdom. Secondly, although the right is not absolute and its infringement by state immunity is ordinarily justified by mandatory rules of international law, no immunity is required in cases of torture. That is because the prohibition of torture is a peremptory norm or jus cogens which takes precedence over other rules of international law, including the rules of state

> immunity. Thirdly, section 3 of the Human Rights Act 1998 (hereafter "HRA") requires a court, so far as it is possible to do so, to read legislation in a way which is compatible with the Convention rights. This can be done by introducing an implied exception. I do not accept any of these steps in the argument but will postpone consideration of the first and third until I have discussed the second."

[26] If a case alleging such torture attracts immunity, is a claim associated with an alleged breach of Article 2 either generally or in the context of creating a risk or increased risk to life exceptional, or so exceptional as to be distinguishable in principle. I do not think so. The instant case whether it be associated with a breach of Article 2 of the Convention or a risk or increased risk thereof, is no different in principle and the Government of Ireland is entitled to claim state immunity under the 1978 Act in respect of the statement issued by the defendant. It should be remembered that the plaintiffs could issued proceedings in the Republic of Ireland.

[27] Therefore the Government of Ireland and the defendant as a Minister thereof, are immune from the jurisdiction of this court and are entitled to the order sought in the Notice of Motion, namely that the Defendant is immune from the jurisdiction of the Courts of the United Kingdom in these proceedings, by virtue of the provisions of the State Immunity Act 1978.