Torture, Human Rights and the Northern Ireland Conflict

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At what point does harsh treatment of detainees amount to torture? With the US Senate report on CIA interrogation practices dominating all the headlines, this question is very much on our minds right now. That the European Court of Human Rights will have to consider this question, is a mere coincidence, though. The Irish Government has decided to reopen a decades old case from the darkest days of the Northern Ireland conflict (*Ireland v United Kingdom*). The case will raise once again the ugly spectre of the systematic abuse of prisoners in Northern Ireland. Moreover, the litigation has the potential to have far-reaching effects in the relationship between the European Court and the United Kingdom, and in the constitutional settlement within the United Kingdom itself.

Background to the Case

The case itself is well-known to students of ECtHR law. It concerned what were called the 'five techniques' during the 1970s in Northern Ireland – wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink (several of these were recently revealed to have been used by the CIA). The Court held that the application of these techniques amounted to inhuman and degrading treatment, but did not 'occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.' Accordingly, the UK was held not to have breached the higher threshold of torture under Article 3.

One difficulty which attended the litigation in the case arose from the fact that it was an inter-State dispute. This meant that it fell to the European Commission on Human Rights to adduce evidence in relation to the accusations. In the course of the proceedings, the Commission argued that the United Kingdom 'did not always afford it the assistance desirable' (at [148]).

On June 4th 2014, the Irish State Broadcaster, Raidió Teilifís Éireann, broadcast a programme which alleged that the British Government had not revealed all relevant evidence in the course of the proceedings. It alleged that evidence which was led before the European Court of Human Rights was contradicted by the internal evidence prepared for British authorities. This evidence was implicated in the death of one of those subjected to 'deep interrogation', Sean McKenna. This contradicted the evidence led in Europe, which was based on the fact that the effects of the five techniques was not long-lasting.

As a result of this programme, the Irish Government indicated that it intends to attempt to re-open the litigation under Rule 80 of the Rules of Court.

Rule 80 Procedure

Rule 80 states as follows:

> *A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment.*

The argument will run that the evidence which was suppressed by the British Government would have been sufficient, had it been known in the original litigation, to justify a finding of torture under Article 3.

The Second Section had occasion to consider the Rule in relation to a liquidated company in *Metalco BT v Hungary* but was satisfied that the rule did not apply given that the State had access to the relevant official information, the proceedings were at an advanced stage, and the continued interest of the liquidator in the

proceedings. There does not appear to be any litigation which applies to a case which occurred so far in the past. Nonetheless, we can see in *Metalco* some indication of the difficulties which the United Kingdom is likely to face if the case is accepted.

The integrity of the proceedings in *Metalco* were upheld on the basis that the Hungarian Government had access to the information. However, if the allegations in the television programme are true, then the United Kingdom attempted to undermine the integrity of initial proceedings in Europe itself. The Court will surely be cognisant of the precedental value of this case in future potential proceedings.

Evolutive Interpretation and *Ireland*

The standard to be applied appears relatively straightforward. It calls for the discovery of a fact which 'which might … have a decisive influence…' The question is clearly backward-facing and thus calls for the test to be applied on the basis of a point which might have had an influence at the point in time when the decision was originally made. It does not call for a re-litigation of the case *ab initio*.

Notwithstanding the clear intention of Rule 80, it is difficult to see how exactly the Court could simply ignore the case-law which has occurred since *Ireland v UK*. In *A v. Secretary of State for the Home Department* [2005] UKHL 71 Lord Bingham of Cornwall indicated that the techniques used in *Ireland v UK* might now be held to constitute torture under Article 3 [at 53]. In circumstances where even the House of Lords have indicated that the test might now justify a finding of torture, the temptation must exist to hold that the new facts provide sufficient grounding for a finding of torture under Article 3.

Furthermore, the use of the *Ireland v UK* case by international authorities must surely have left a bad taste in the mouth of the ECHR. They cannot but be aware of the reliance placed on the case by the OLC in the memoranda prepared under the Bush administration. The current litigation provides the Court with the opportunity to revise that decision in a manner more compatible with current jurisprudence.

On the opposite side of the implicit scales is the deteriorating relationship between the Government of the United Kingdom and the ECtHR. Recently, the Conservative Party indicated their preference for a withdrawal from the ECHR in the absence of substantial changes in the relationship between the UK and the Convention. A finding of torture by the UK against its own citizens would surely cause a further breakdown in that relationship to the point where it may be irretrievable.

The temptation of the Court would necessarily be an implicit one given the clear imprecation of the rule, but it nonetheless provides an intriguing subtext to the upcoming litigation.

The Constitution of the United Kingdom and the Human Rights Act

From the point of view of the United Kingdom, there is one further consideration that comes into play: the devolution agreement and the relationship between Ireland and the United Kingdom.

The Bill of Rights project championed by the Conservative Party has drawn a great degree of suspicion from the devolved Governments. The Commission on a Bill of Rights reported that any proposals for a UK Bill of Rights were greeted with 'some scepticism, particularly in Northern Ireland and Scotland' [at p. 165]. The Northern Ireland Peace Agreement signed between the Republic of Ireland and the United Kingdom specifically provides that the UK Government will incorporate the European Convention on Human Rights into the legal system of Northern Ireland. If there were an adverse finding against the UK in this case and there was a subsequent attempt to temper the jurisdiction of the ECtHR based on the Conservative party's proposals, the scepticism mentioned by the Commission on a Bill of Rights will harden into outright hostility.

Moreover, while there is some political will to revise the relationship between the European Court of Human Rights and the United Kingdom, there is essentially no will to revisit the Good Friday Agreement in Westminster. Under the circumstances, it appears unlikely that the British schism with Europe could occur on the basis of this case. This actually allows the European Court greater latitude than it might realise based on the relationship between Europe and the UK; the UK focus on this litigation is more likely to be domestic than international.

Conclusion

The litigation promises to be a potent one which straddles the boundaries of constitutional law and constitutional politics. Nonetheless, the focus of the case must be on whether the allegations alleged are true and whether the victims were subject not simply to the five techniques, but also to subterfuge which compounds the initial injustice.

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