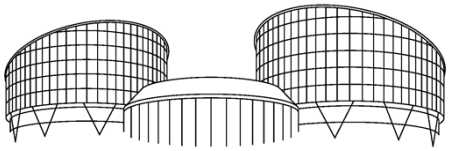

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF IRELAND v. THE UNITED KINGDOM

(Application no. 5310/71)

JUDGMENT
(*Revision*)

STRASBOURG

20 March 2018

FINAL

10/09/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ireland v. the United Kingdom (request for revision of the judgment of 18 January 1978),

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

Helena Jäderblom, *President,*
Branko Lubarda,
Luis López Guerra,
Helen Keller,
Dmitry Dedov,
Síofra O'Leary, *judges,*
Robert Reed, ad hoc *judge,*

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 6 February 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5310/71) lodged on 16 December 1971 with the European Commission of Human Rights ("the Commission") by the Government of Ireland ("the applicant Government") against the Government of Great Britain and Northern Ireland ("the respondent Government") under former Article 24 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The Commission adopted its report on 25 January 1976. The case was referred to the Court by the applicant Government.

2. In a judgment delivered on 18 January 1978 ("the original judgment"), the Court held, in so far as relevant in the context of the present revision request, that the use of the five techniques of interrogation in August and October 1971 constituted a practice of inhuman and degrading treatment, in breach of Article 3 of the Convention, and that the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3 (see paragraphs 165-69 and points 3 and 4 of the operative part of the original judgment).

3. On 4 December 2014 the applicant Government informed the Court that no earlier than 4 June 2014 documents had come to their knowledge which by their nature might have had a decisive influence on the Court's judgment in respect of Article 3 of the Convention had they been known to the Court at the time of delivering judgment. They accordingly requested revision of the judgment within the meaning of Rule 80 of the Rules of Court.

4. The applicant Government were represented by their Agent, Mr P. White, of the Department of Foreign Affairs and Trade. The respondent Government were represented by their Agent, Mr P. McKell, of the Foreign and Commonwealth Office.

5. Pursuant to Rule 109 §§ 1 and 2 of the Rules of Court, which deals with requests for revision of a judgment given before the entry into force of Protocol No. 11 to the Convention, the President of the Court assigned the case to the First Section and, following a change in the composition of the Court, to the Third Section. The Chamber constituted within that Section in accordance with Rule 109 § 3 included *ex officio* Judges Síofra O'Leary, the judge elected in respect of Ireland, Paul Mahoney, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 109 § 3 (b)) and Luis López Guerra, the President of the Section, (Rule 109 § 3 (a)). The other members designated by the President of the Section by means of a drawing of lots from among the members of the Section were Judges Helena Jäderblom, Dmitry Dedov, Helen Keller and Johannes Silvis. Subsequently, Judge Mahoney withdrew from sitting in the Chamber (Rule 28). The President accordingly designated Lord Reed to sit as an *ad hoc* judge (Rule 29 in conjunction with Rule 109 § 3 (b)). Judge Silvis, whose term of office had ended on 31 August 2016, was replaced by Judge Branko Lubarda, substitute judge. On 1 February 2017 Judge Jäderblom succeeded Judge López Guerra as President of the Section.

6. On 22 March 2016 the Chamber considered the request for revision and decided to communicate it to the respondent Government for observations. Those observations were received on 15 December 2016. The observations in reply by the applicant Government were received on 20 February 2017. Upon the respondent Government's request, the President authorised a second round of observations. Those of the respondent Government were received on 13 April 2017 and those in reply by the applicant Government on 8 May 2017.

7. On 18 January 2018 the President of the Court, on the basis of the order of the President of the European Commission of Human Rights of 29 October 1999, decided to lift the confidentiality restrictions in respect of the transcripts of the proceedings before the Commission, as redacted by the two Governments, to which direct reference is made by the parties in their submissions in the present revision proceedings. A schedule of the redacted documents was attached to that decision.

THE REQUEST FOR REVISION

8. The applicant Government requested revision of the Court's judgment of 18 January 1978 to the effect that the use of the five techniques of

interrogation in depth amounted to a practice not merely of inhuman and degrading treatment but of torture within the meaning of Article 3 of the Convention.

I. THE PROCEEDINGS BEFORE THE COMMISSION

A. The hearings before the Commission

9. In the original proceedings the Commission took evidence *inter alia* by hearing witnesses. A brief summary of the hearing of witnesses, as far as relevant in the present case, is given below.

10. In relation to the five techniques, the Commission's delegates heard evidence, at hearings held between 26 and 29 November 1973, from two of the men subjected to the five techniques, Mr P.C. and Mr P.S. (referred to as T 13 and T 6 in the Commission's report). They described the physical and mental effects which the use of the five techniques had had on them when they were applied and the mental disturbances from which they had suffered thereafter. The Commission's delegates also heard Dr M., a consultant psychiatrist and neurologist (referred to as Dr 1 in its report), who had examined both men shortly after the five techniques had been applied to them in August 1971 and had examined P.S. a second time in August 1972. He had been called as an expert by the Commission. He had found that P.C. had recovered but had observed active psychiatric symptoms in P.S. which still persisted when he examined him a second time. He found it difficult to make any long-term prognosis. Two further psychiatric experts were called by the applicant Government, Professors Daly and Bastiaans. The former, who had also seen both men, disagreed with Dr M. He found that both men still suffered from psychiatric after-effects and that P.S. in particular would continue to be affected. Professor Bastiaans considered that serious, long-term effects were to be expected in both cases.

11. Dr L. (referred to as Dr 5 in the Commission's report), a psychiatric expert called by the respondent Government, was heard initially at the hearings of 15 June 1974. He was questioned at length about the physical and mental effects and possible after-effects the use of the five techniques had had on the two men. He had examined both of them in February/March and again in December 1973, as an expert for the respondent Government in the context of civil proceedings for damages that were pending at that time before the courts in Northern Ireland. He found that they had suffered acute psychiatric symptoms in the period in which they had been subjected to the five techniques. Any after-effects were diminishing and not severe and were partly due to living conditions in Northern Ireland.

12. Dr L. was heard a second time on 18 January 1975. On that date he was questioned extensively about his professional background and experience. He then gave evidence about the general effects produced by the

use of the five techniques in the persons subjected to them. He disagreed with the views expressed by Professors Daly and Bastiaans and gave as his own view that the use of the five techniques would not cause lasting damage. In addition, questions were put to him in respect of the amounts received by the victims of the five techniques by way of settlement in the above-mentioned domestic proceedings, and in particular whether those high amounts were indicative of the seriousness of the effects of the five techniques and thus inconsistent with the views expressed by him. He considered that had the effects been as described by Professors Daly and Bastiaans the amounts would have been much higher.

B. The report of the Commission

13. The report of the Commission of 25 January 1976 contains the following text relating to the establishment of the facts and its opinion regarding the use of the five techniques (see pp. 395-402):

> "3. ESTABLISHMENT OF THE FACTS
>
> The cases of T.13 and T.6.
>
> General remarks
>
> The applicant Government have submitted the cases of eight persons in which the use of the five techniques and sometimes also other forms of ill-treatment were alleged. The Commission has examined the illustrative cases of T.13 and T.6. The allegations in regard to T.6 concern both the five techniques and other forms of alleged ill-treatment, whereas the allegations in regard to T.13 concern the five techniques only.
>
> Both cases were among the eleven cases investigated by the Compton Committee. However, neither T.13 nor T.6 had given evidence before that Committee, which based its findings on the oral evidence of the persons who supervised the operations at the centre and of the medical officer who was stationed there, as well as on various medical records, colour photographs and the feeding record (cf. Compton Report, paras. 54 and 55, at p. 14).
>
> The Delegates of the Commission heard both case witnesses who gave their evidence in detail and were also cross-examined by the respondent Government. They had before them extracts from the medical officer's journal at Crumlin Road Prison, the medical examination records on arrival and on departure from the interrogation centre and colour photographs of T.6 as well as various reports by psychiatrists who also gave oral evidence.
>
> However, the Delegates were not able to hear oral evidence from members of the security forces in relation to the allegations concerning the interrogation centre. In the first place no witnesses who had been present at that centre were made available. Secondly, the respondent Government stated at the hearing of witnesses at Sola in January 1975 that all of their witnesses had now been instructed not to reply to any questions regarding the five techniques and their use on the ground that the use of these techniques had been discontinued and that there were security considerations involved. This 'embargo' on the evidence also related to matters connected with a 'seminar' held in Northern Ireland in April 1971 by the English Intelligence Centre

for members of the RUC [Royal Ulster Constabulary], where the use of the techniques was taught orally (cf. Parker Report, Minority Report, para. 6 at p. 12; also Witness 13G at VR 6, pp. 190 et seq.).

The Commission does not consider it necessary to pursue this matter any further. It is satisfied that the five methods in aid of interrogation which, as a matter of public record, were used in emergency situations at various other places before they were used in Northern Ireland in 1971 (see Parker Report, Majority Report, para. 10 at p. 3 [..]) were applied to the two case witnesses in the present case. It is further satisfied that a 'seminar' as described was held in April 1971 by the English Intelligence Centre.

Course of events

The evidence before the Commission bears out the allegations made by the case witnesses and confirms the findings of the Compton Committee as regards the course of the events for the persons subjected to the five techniques.

T.13 and T.6 were, together with others, arrested in the early morning hours of 9 August 1971 and brought to Magilligan Camp, being one of the three Regional Holding Centres set up to receive arrested persons. They were held there for two days and, having been selected for special interrogation were brought, on 11 August 1971, to the unknown interrogation centre. On arrival at the centre they were medically examined and at one stage they were taken by helicopter to another place where they were served with a detention order. They were taken back to the centre where they were interrogated in depth being subjected to the five techniques in the following way:

a. Wall-standing – the witnesses demonstrated how they were spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers (the stress position). They were forced to remain in this position. The exact length of time during which the witnesses were required to stand could not be established. Both witnesses said that they lost their sense of time but that it must have been many hours. The Compton Committee while describing the position as being a different one, found that T.13 had been against the wall during periods totalling 23 hours, and T.6 29 hours.

b. Hooding – a black or navy coloured bag was put over the witnesses' heads. Initially it was kept there all the time, except during interrogations, but later T.13 was allowed to take it off when he was alone in the room, provided that he turned his face to the wall.

c. Noise – pending interrogations the witnesses were held in a room where there was a continuous loud and hissing noise.

d. Sleep – pending interrogations the witnesses were deprived of sleep, but it was not possible to establish for what periods each witness had been without sleep.

e. Food and drink – the witnesses were subjected to a reduced diet during their stay at the centre and pending interrogations. It was not possible to establish to what extent they were deprived of nourishment and whether or not they were offered food and drink but refused to take it.

The witnesses were at the centre from 11 to 17 August 1971, when they were transferred to Crumlin Road Prison in accordance with the detention order.

In 1971 T.13 and T.6 instituted domestic proceedings to recover damages for wrongful imprisonment and for assault and their claims were settled in 1973 and 1975 respectively for £ 15,000 and £ 14,000.

Physical and mental effects resulting from the use of the techniques

(i) Physical effects

The Commission is satisfied from the evidence given that the witnesses suffered loss of weight resulting from their detention at the unknown interrogation centre and from the use of the five techniques. It is furthermore established that, particularly the wall-standing technique, caused physical pain while it was being applied, but that the pain ceased when the person was no longer in that position.

(ii) Mental effects

The witnesses themselves described feelings of anxiety and fear, as well as disorientation and isolation during the time they were subjected to the techniques and afterwards. However, the intensity of such sensations was different in respect of T.13 than in respect of T.6, as a result of differences in their personality. Consequently, T.13 had been more strongly affected by the application of the techniques than T.6.

On the other hand, the psychiatrists disagreed considerably on the after-effects of the treatment and on the prognosis for recovery. Professors Daly and Bastiaans considered that both witnesses would continue for a long time to have considerable disability shown by bouts of depression, insomnia and a generally neurotic condition resembling that found in victims of Nazi persecution. Drs. 5 and 1 considered that the acute psychiatric symptoms developed by the witnesses during the interrogation had been minor and that their persistence was the result of everyday life in Northern Ireland for an ex-detainee carrying out his work travelling to different localities. In no sense could the witnesses' experiences be compared with those of the victims of Nazi persecution.

On the basis of this evidence the Commission is unable to establish the exact degree of the psychiatric after-effects which the use of the five techniques might have had on these witnesses or generally on persons subjected to them. It is satisfied, however, that, depending on the personality of the person concerned, the circumstances in which he finds himself, and the conditions of everyday life in Northern Ireland at the relevant time, some after-effects resulting from the application of the techniques cannot be excluded.

Findings of the Commission

The five techniques in aid of interrogation were used in August 1971 on T.13 and T.6. They were applied prior to, between and during interrogations, but not after interrogation was terminated. This means that the persons concerned were subject to the techniques during at least four, possibly five, days. The exact times could not be established. The Commission is satisfied the total periods during which the two witnesses were at the wall, [were] 23 and 29 hours respectively. A certain degree of force was used to make the detainees stand at the wall in the required posture which caused physical pain and exhaustion. The posture required was a stress position and not a normal position required to search a person, although it cannot be considered to be proved that the enforced stress position lasted all the time they were at the wall.

No physical injury resulted from the application of the techniques as such, but it caused mentally a number of acute psychiatric symptoms. It cannot be excluded that in certain persons some of these symptoms continue to exist for some time afterwards.

The damages granted to them under settlements in court are substantial sums and, although it is not possible in any settlement to say what part was paid with a view to what claim, it may be presumed that the greater part of the sum was awarded in view of the allegations of ill-treatment including the application of the five techniques, having regard to sums normally awarded by courts for claims of assault as compared with sums normally granted for claims of wrongful imprisonment.

4. OPINION OF THE COMMISSION

In the present case the Commission is called upon to express an opinion as to whether or not the combined application of the five techniques in the cases of T.13 and T.6, and in the other cases referred to in the Compton Report, constituted a practice in breach of Art. 3 of the Convention.

As has already been stated, the question of practice is not in dispute as the use of the five techniques was admittedly authorised by the respondent Government and the existence of a practice has therefore been found to be established by the Commission in its decision on the admissibility of the case.

On the other hand, the question of whether or not the use of the five techniques taken together constituted a violation of Art. 3 of the Convention is still in issue between the parties.

The Commission has therefore examined the question whether or not, in the light of the considerations on the interpretation of that provision above (pp. 376-379), the five techniques were consistent with Art. 3 of the Convention. In doing so, it has also taken into account certain statements and legal texts which seem to throw some light on the kind of treatment against which Art. 3 of the Convention should protect, and are relevant to the particular facts established in this part of the present case.

In this connection, it first had regard to the preparatory works of the Convention, and, in particular, to a proposal by Mr. Cocks (United Kingdom) at the Plenary Sitting of the Consultative Assembly of the Council of Europe on 9 September 1949 to amend the draft Recommendation for the Convention on Human Rights. Mr. Cocks proposed to add to Art. 2 (1) of the Recommendation in the context of the protection of security of persons, the following text:

> 'In particular no person shall be subjected to any form of mutilation or sterilisation or to any form of torture or beating. Nor shall he be forced to take drugs nor shall they be administered to him without his knowledge and consent. Nor shall he be subjected to imprisonment with such an excess of light, darkness, noise, or silence as to cause mental suffering' (Collected Edition of the 'Travaux Préparatoires', Vol. I, p. 116/117).'

This proposal was later withdrawn because it was felt that the point which Mr Cocks wished to make was already in substance covered by the general terms of Art. 5 of the UN Declaration which corresponds to Art. 3 of the Convention. Nevertheless, there was agreement in the Assembly that the substance of what Mr. Cocks had emphasised in his amendment was to be read into the Convention (see Debate in 'Collected Edition', Vol. I, pp. 153-154).

The Commission has further had regard to the Geneva Conventions of 1949 to which reference has also been made by Lord Gardiner in the Parker Report. It is, of course, clear that the main provisions of these Conventions are not directly applicable to the detainees in Northern Ireland. Nevertheless, they include provisions concerning investigation procedures and may also be relevant in the sense that they constitute an

expression of the general principles of international law in regard to them and to the treatment of prisoners in general.

Thus Art. 13 of the Third Geneva Convention concerning prisoners of war prohibits all acts causing death or seriously endangering the health of a prisoner. Acts of intimidation and insults are specifically mentioned. As regards interrogation procedures, Art. 17, para. 4 states: 'No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.'

The Fourth Geneva Convention concerning the protection of civilians provides in Art. 89 that internees shall receive sufficient food to keep them in a good state of health. Art. 118, para. 2, states; 'Imprisonment in premises without daylight and, in general, all forms of cruelty without exception are forbidden'. Under Art. 119, para. 2, disciplinary measures may not be 'inhuman, brutal, or dangerous for the health of internees'.

Concerning the five techniques in the present case, the Commission considers that it should express an opinion only as to whether or not the way in which they were applied here, namely in combination with each other, was in breach of Art. 3. It observes that, if they were considered separately, deprivation of sleep or restrictions on diet might not as such be regarded as constituting treatment prohibited by Art. 3. It would rather depend on the circumstances and the purpose and would largely be a question of degree.

In the present case, the five techniques applied together were designed to put severe mental and physical stress, causing severe suffering, on a person in order to obtain information from him. It is true that all methods of interrogation which go beyond the mere asking of questions may bring some pressure on the person concerned, but they cannot, by that very fact, be called inhuman. The five techniques are to be distinguished from those methods.

Compared with the inhuman treatment discussed earlier (pp. 376 seq.), the stress caused by the application of the five techniques is not only different in degree. The combined application of methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or to give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will.

It is this character of the combined use of the five techniques which, in the opinion of the Commission, renders them in breach of Art. 3 of the Convention in the form not only of inhuman and degrading treatment, but also of torture within the meaning of that provision.

Indeed, the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been know over the ages. Although the five techniques – also called 'disorientation' or 'sensory deprivation' techniques – might not necessarily cause any severe after-effects the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions.

CONCLUSION

The Commission is of the opinion, by a unanimous vote, that the combined use of the five techniques in the cases before it constituted a practice of inhuman treatment and torture in breach of Art. 3 of the Convention."

II. THE COURT'S JUDGMENT OF 18 JANUARY 1978

14. Regarding the establishment of the facts in respect of allegations of ill-treatment the Court stated as follows:

"III. ALLEGATIONS OF ILL-TREATMENT

A. Introduction

92. As recounted above at paragraphs 39 and 41, on 9 August 1971 and thereafter numerous persons in Northern Ireland were arrested and taken into custody by the security forces acting in pursuance of the emergency powers. The persons arrested were interrogated, usually by members of the RUC, in order to determine whether they should be interned and/or to compile information about the IRA. In all, about 3,276 persons were processed by the police at various holding centres from August 1971 until June 1972. The holding centres were replaced in July 1972 by police offices in Belfast and at Ballykelly Military Barracks.

93. Allegations of ill-treatment have been made by the applicant Government in relation both to the initial arrests and to the subsequent interrogations. The applicant Government submitted written evidence to the Commission in respect of 228 cases concerning incidents between 9 August 1971 and 1974.

The procedure followed for the purposes of ascertaining the facts (Article 28, sub-paragraph (a), of the Convention) was one decided upon by the Commission and accepted by the Parties. The Commission examined in detail with medical reports and oral evidence 16 'illustrative' cases selected at its request by the applicant Government. The Commission considered a further 41 cases (the so-called '41 cases') on which it had received medical reports and invited written comments; it referred to the remaining cases.

The nature of the evidence submitted by the two Governments and the procedure followed by the Commission in its investigation of such evidence are set out in some detail in the Commission's report. The Commission came to view that neither the witnesses from the security forces nor the case-witnesses put forward by the applicant Government had given accurate and complete accounts of what had happened. Consequently, where the allegations of ill-treatment were in dispute, the Commission treated as 'the most important objective evidence' the medical findings which were not contested as such.

The following account of events is based on the information set out in the Commission's report and in the other documents before the Court.

94. In order to protect the identity of certain persons, notably witnesses, the published version of the Commission's report (see paragraph 7 above) incorporated changes to the original text; these changes mainly took the form of designating such persons by letters and/or figures.

95. The Commission grouped the cases into five categories, according to the place where the ill-treatment was said to have been inflicted, namely:

(1) the unidentified interrogation centre or centres;
(2) Palace Barracks, Holywood;
(3) Girdwood Park Barracks;
(4) Ballykinler Regional Holding Centre; and

(5) various other miscellaneous places.

B. The unidentified interrogation centre or centres

96. Twelve persons arrested on 9 August 1971 and two persons arrested in October 1971 were singled out and taken to one or more unidentified centres. There, between 11 to 17 August and 11 to 18 October respectively, they were submitted to a form of 'interrogation in depth' which involved the combined application of five particular techniques.

These methods, sometimes termed 'disorientation' or 'sensory deprivation' techniques, were not used in any cases other than the fourteen so indicated above. It emerges from the Commission's establishment of the facts that the techniques consisted of:

(a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

The Commission's findings as to the manner and effects of the application of these techniques on two particular case-witnesses are referred to below at paragraph 104.

97. From the start, it has been conceded by the respondent Government that the use of the five techniques was authorised at 'high level'. Although never committed to writing or authorised in any official document, the techniques had been orally taught to members of the RUC by the English Intelligence Centre at a seminar held in April 1971.

98. The two operations of interrogation in depth by means of the five techniques led to the obtaining of a considerable quantity of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents.

99. Reports alleging physical brutality and ill-treatment by the security forces were made public within a few days of Operation Demetrius (described above at paragraph 39). A committee of enquiry under the chairmanship of Sir Edmund Compton was appointed by the United Kingdom Government on 31 August 1971 to investigate such allegations. Among the 40 cases this Committee examined were 11 cases of persons subjected to the five techniques in August 1971; its findings were that interrogation in depth by means of the techniques constituted physical ill-treatment but not physical brutality as it understood that term. The Committee's report, adopted on 3 November 1971, was made public, as was a supplemental report of 14 November by Sir Edmund Compton in relation to 3 further cases occurring in September and October, one of which involved the techniques.

100. The Compton reports came under considerable criticism in the United Kingdom. On 16 November 1971, the British Home Secretary announced that a further Committee had been set up under the chairmanship of Lord Parker of Waddington to consider 'whether, and if so in what respects, the procedures currently authorised for interrogation of persons suspected of terrorism and for their custody while subject to interrogation require amendment'.

The Parker report, which was adopted on 31 January 1972, contained a majority and a minority opinion. The majority report concluded that the application of the techniques, subject to recommended safeguards against excessive use, need not be ruled out on moral grounds. On the other hand, the minority report by Lord Gardiner disagreed that such interrogation procedures were morally justifiable, even in emergency terrorist conditions. Both the majority and the minority considered the methods to be illegal under domestic law, although the majority confined their view to English law and to 'some if not all the techniques'.

101. The Parker report was published on 2 March 1972. On the same day, the United Kingdom Prime Minister stated in Parliament:

'[The] Government, having reviewed the whole matter with great care and with reference to any future operations, have decided that the techniques ... will not be used in future as an aid to interrogation.'

He further declared:

'The statement that I have made covers all future circumstances. If a Government did decide ... that additional techniques were required for interrogation, then I think that ... they would probably have to come to the House and ask for the powers to do it.'

As foreshadowed in the Prime Minister's statement, directives expressly prohibiting the use of the techniques, whether singly or in combination were then issued to the security forces by the Government (see paragraph 135 below).

102. At the hearing before the Court on 8 February 1977, the United Kingdom Attorney-General made the following declaration:

> 'The Government of the United Kingdom have considered the question of the use of the 'five techniques' with very great care and with particular regard to Article 3 of the Convention. They now give this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation.'

103. The Irish Government referred to the Commission 8 cases of persons submitted to the five techniques during interrogation at the unidentified centre or centres between 11 and 17 August 1971. A further case, that of T 22, considered in the Commission's report in the context of Palace Barracks, concerned the use of the five techniques in October 1971. The Commission examined as illustrative the cases of T 6 and T 13, which were among the 11 cases investigated by the Compton Committee.

104. T 6 and T 13 were arrested on 9 August 1971 during Operation Demetrius. Two days later they were transferred from Magilligan Regional Holding Centre to an unidentified interrogation centre where they were medically examined on arrival. Thereafter, with intermittent periods of respite, they were subjected to the five techniques during four or possibly five days; neither the Compton or Parker Committees nor the Commission were able to establish the exact length of the periods of respite.

The Commission was satisfied that T 6 and T 13 were kept at the wall for different periods totalling between twenty to thirty hours, but it did not consider it proved that the enforced stress position had lasted all the time they were at the wall. It stated in addition that the required posture caused physical pain and exhaustion. The Commission noted that, later on during his stay at the interrogation centre, T 13 was allowed to take his hood off when he was alone in the room, provided that he turned his face to the wall. It was not found possible by the Commission to establish for what periods T 6 and T 13 had been without sleep, or to what extent they were deprived of nourishment and whether or not they were offered food but refused to take it.

The Commission found no physical injury to have resulted from the application of the five techniques as such, but loss of weight by the two case-witnesses and acute psychiatric symptoms developed by them during interrogation were recorded in the medical and other evidence. The Commission, on the material before it, was unable to establish the exact degree of any psychiatric after-effects produced on T 6 and T 13, but on the general level it was satisfied that some psychiatric after-effects in certain of the fourteen persons subjected to the techniques could not be excluded.

105. T 13 claimed in addition to have been beaten and otherwise physically ill-treated, but the medical evidence before the Commission, as the delegates explained at the hearing before the Court on 21 April 1977, gave reason to doubt that he had been assaulted to any severe degree, if at all. Accordingly, the Commission treated the allegations in regard to T 13 as concerning the five techniques only.

T 6 similarly alleged that he was also assaulted in various ways at, or during transport to and from, the centre. On 17 August 1971 he was medically examined on leaving the centre and also on his subsequent arrival at Crumlin Road Prison where he was then detained until 3 May 1972. The medical reports of these examinations and photographs taken on the same day revealed on T 6's body bruising and contusions that had not been present on 11 August. While not accepting all T 6's allegations, the Commission was 'satisfied beyond a reasonable doubt that certain of these injuries ... [were] the result of assaults committed on him by the security forces at the centre'. As a general inference from the facts established in T 6's case, the Commission also found it 'probable that physical violence was sometimes used in the forcible application of the five techniques'.

106. Although several other cases were referred to before the Commission by the applicant Government in connection with the unidentified interrogation centre or centres, no detailed allegations or findings are set out in the Commission's report except in the case of T 22 which was one of the '41 cases'. The medical evidence established that when leaving the centre and on entering Crumlin Road Prison, T 22 had suffered superficial bruising. The Commission's short assessment of this case, which it described as comparable to the case of T 6, was that 'there exists a strong indication that the course of events was similar to that found in the illustrative [case]'.

107. T 13 and T 6 instituted civil proceedings in 1971 to recover damages for wrongful imprisonment and assault; their claims were settled in 1973 and 1975 respectively for £15,000 and £14,000. The twelve other individuals against whom the five techniques were used have all received in settlement of their civil claims compensation ranging from £10,000 to £25,000."

15. Regarding the legal assessment of the five techniques under Article 3 of the Convention the Court found as follows:

"AS TO THE LAW

148. ... They [the applicant Government] also maintain – though they do not ask the Court to make a specific finding – that the British Government failed on several occasions in their duty to furnish the necessary facilities for the effective conduct of the investigation. The Commission does not go as far as that; however, at various places in its report, the Commission points out, in substance, that the respondent Government did not always afford it the assistance desirable. The Court regrets this attitude on the part of that Government; it must stress the fundamental importance of the principle, enshrined in Article 28 sub-paragraph (a) *in fine*, that the Contracting States have a duty to cooperate with the Convention institutions.

...

B. Questions of proof

160. In order to satisfy itself as to the existence or not in Northern Ireland of practices contrary to Article 3, the Court will not rely on the concept that the burden of proof is borne by one or other of the two Governments concerned. In the cases referred to it, the Court examines all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*.

161. The Commission based its own conclusions mainly on the evidence of the one hundred witnesses heard in, and on the medical reports relating to, the sixteen 'illustrative' cases it had asked the applicant Government to select. The Commission also relied, but to a lesser extent, on the documents and written comments submitted in connection with the '41 cases' and it referred to the numerous 'remaining cases' (see paragraph 93 above). As in the 'Greek case' (Yearbook of the Convention, 1969, The Greek case, p. 196, para. 30), the standard of proof the Commission adopted when evaluating the material it obtained was proof 'beyond reasonable doubt'.

The Irish Government see this as an excessively rigid standard for the purposes of the present proceedings. They maintain that the system of enforcement would prove ineffectual if, where there was a prima facie case of violation of Article 3, the risk of a finding of such a violation was not borne by a State which fails in its obligation to assist the Commission in establishing the truth (Article 28, sub-paragraph (a) in fine, of the Convention). In their submission, this is how the attitude taken by the United Kingdom should be described.

The respondent Government dispute this contention and ask the Court to follow the same course as the Commission.

The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3. To assess this evidence, the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.

C. Questions concerning the merits

162. As was emphasised by the Commission, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

163. The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and, under Article 15 para. 2, there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.

164. In the instant case, the only relevant concepts are 'torture' and 'inhuman or degrading treatment', to the exclusion of 'inhuman or degrading punishment'.

1. The unidentified interrogation centre or centres

(a) The 'five techniques'

165. The facts concerning the five techniques are summarised at paragraphs 96-104 and 106-107 above. In the Commission's estimation, those facts constituted a practice not only of inhuman and degrading treatment but also of torture. The applicant

Government asks for confirmation of this opinion which is not contested before the Court by the respondent Government.

166. The police used the five techniques on fourteen persons in 1971 that is on twelve including T 6 and T 13, in August before the Compton Committee was set up, and on two in October whilst that Committee was carrying out its enquiry. Although never authorised in writing in any official document, the five techniques were taught orally by the English Intelligence Centre to members of the RUC at a seminar held in April 1971. There was accordingly a practice.

167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

On these two points, the Court is of the same view as the Commission.

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Moreover, this seems to be the thinking lying behind Article 1 in fine of Resolution 3452 (XXX) adopted by the General Assembly of the United Nations on 9 December 1975, which declares: 'Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment'.

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.

168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3."

16. The operative part of the original judgment, so far as relevant, reads as follows:

"FOR THESE REASONS, THE COURT

I. ON ARTICLE 3

...

3. *holds*, by sixteen votes to one that the use of the five techniques in August and October 1971 constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3;

4. *holds*, by thirteen votes to four, that the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3; ..."

III. THE RELEASE OF RELEVANT DOCUMENTS INTO THE RESPONDENT GOVERNMENT'S PUBLIC ARCHIVES

17. According to the respondent Government, the majority of files relating to the *Ireland v. the United Kingdom* case were released into the public archives pursuant to the "thirty years rule" between 2003 and 2008.

18. Furthermore, the respondent Government referred to proceedings which had been brought recently before the courts in Northern Ireland by or on behalf of the men who had been subjected to the five techniques, raising materially identical allegations to those raised in the present case. In the course of those proceedings the respondent Government had conducted a review of the material which had not been passed to the National Archives held by six Government Departments, namely the Ministry of Defence, the Northern Ireland Office, the Foreign and Commonwealth Office, the Home Office, the Attorney General's Office and the Cabinet Office, and of closed files held by the National Archives. Certain files containing material relevant to the nature, conduct and effects of the five techniques were still being withheld from the public archives on grounds of protecting the health and safety of individuals, data protection grounds and on the ground that they contained information relating to intelligence or national security matters. In contrast, according to the respondent Government, all documents which could be disclosed under domestic law had been provided to the claimants in the above proceedings.

IV. THE GROUNDS FOR REVISION RELIED ON BY THE APPLICANT GOVERNMENT

19. The applicant Government stated that on 4 June 2014,the Irish television network, Raidió Teilifís Éireann (RTÉ), broadcast a programme entitled "The torture files" which discussed the original proceedings before the Commission and the Court and highlighted a number of documents which had become available from the United Kingdom archives in Kew, London. The applicant Government submitted that they had subsequently obtained a large number of documents from RTÉ and had them reviewed by counsel in order to ascertain whether they disclosed grounds for revision. They maintained that the documents in question demonstrated that the then respondent Government had withheld from the Commission and the Court certain important pieces of information which had therefore not been known to the Court at the time of the judgment and which would or might have had a decisive influence on the Court's judgment on the specific question of whether or not the use of the five techniques amounted to torture.

20. In particular, in the light of those documents, the applicant Government formulated the following two grounds for revision:

Firstly, that the then respondent Government had information within their possession, including medical reports from Dr L. demonstrating that the effects of the five techniques could be substantial, severe and long-lasting while that Government, through the evidence of the same Dr L. before the Commission, had alleged in the Convention proceedings that the said effects were minor and short-term.

Secondly, the archive material revealed the extent to which, at the relevant time, the respondent Government had adopted and implemented a policy of withholding information from the Commission and the Court about key facts concerning the five techniques, including that their use had been authorised at ministerial level and their purpose in doing so.

The applicant Government submitted a number of documents in support of each of these two grounds for revision. These documents are described below.

A. Documents submitted in respect of the first ground for revision

21. In support of the first ground of their revision request the applicant Government submitted the documents listed below. Regarding the context from which these documents stem, the Court observes that the men who had been subjected to the five techniques had brought civil proceedings for damages before the courts in Northern Ireland, which were all terminated by way of settlements (see the report of the Commission, at paragraph 13 above, and the original judgment, § 107).

22. A partial document from the respondent Government's archives appears to be an excerpt from an opinion of counsel for the respondent Government as to the evidence in the domestic proceedings referring to three internees, Mr S.K., Mr B.T. and Mr W.S., who had all been examined by Dr L.

Paragraph 21 refers to Mr S.K. as having been released from prison on medical grounds in May 1972 for admission to a mental hospital. It records that when Dr L. examined him on 10 April 1974 he was

> "... tense and anxious and sobbed at times during the interview, and complained of many serious psychiatric symptoms, including contemplation of suicide."

Paragraph 22 refers to B.T.'s case and a nervous breakdown suffered by him and says that at his hearing there would

> "... obviously be prolonged debate as to whether the deep interrogation had played a part in causing his subsequent nervous breakdown ..."

Paragraph 23 of the document refers to the case of W.S. and says that when Dr L. examined him on 8 April 1974, Mr W.S. complained

"... that he has continued to be apprehensive, nervous and to sleep poorly, and it appears that Dr L. thought that [W.]S. was not a man who exaggerated."

23. A report of Dr L. in respect of his examination of Mr S.K. on 3 June 1975 is contained in the respondent Government's archives. It contains the following opinion:

"Mr [S.K.] is now suffering from severe angina and a moderate hypertension. He has clearly gone downhill physically since I last saw him. On reading all the medical records, I note that prior to interrogation it was recorded by the doctor who examined him on admission to the Interrogation Centre on 11.8.71 that he suffered from mild heart trouble and that, in fact, I had asked him about this and he had told me that he had suffered from pain in the chest. I checked this matter through with Mr [S.K.] and he confirmed that it was the same kind of pain, although of a much milder character than he had been getting recently. It is clear, therefore, that at the time of admission to the Detention Centre he was already suffering from angina pectoris, and that his angina has increased in severity. In addition, he complained to me of a number of psychiatric symptoms, mainly of an anxious and fearful nature. He had suffered from an attack of facial palsy some time in December 1974, but has had no other illness experiences since I last examined him.

Angina pectoris is by many considered to be a psychosomatic disorder; it is a symptom of underlying heart disorder and is always associated with the risk of sudden death. It seems that Mr. [S.K.] was suffering from angina before he was interrogated and I think it would be hard to show

(a) that it was wise to proceed with the interrogation, and

(b) that the interrogation did not have the effect of worsening his angina.

With regard to his other psychiatric symptoms, I think that one will probably have to regard them as being the result of the so-called 'deep interrogation' procedures."

The applicant Government underlined the fact that Mr S.K. died within days of that examination.

24. A partial document dated 5 October 1974 from the respondent Government's archives is headed "Civil actions in Northern Ireland against the Ministry of Defence: Interrogation in Depth cases".

Paragraph 3 refers to:

"... one or two cases where the present psychiatric condition of the plaintiffs can be demonstrated to be very serious."

At paragraph 4 it refers to:

"... the growing disposition of medical opinion to acknowledge the possibility that persons subjected to maximum stress and psychiatric trauma as in deep interrogation, become more liable to physical illness including illnesses of a malignant nature at a later stage, and that mental breakdown can take place many years after deep interrogation was undergone."

Paragraph 5 contains the following passage:

"In fact there is no certainty that there will be long term effects, but equally none that there will be not. This uncertainty was first noted in the Parker inquiry and has persisted. What is new is the confidence with which the view is being expressed that there are such effects. The evidence draws on experience of other interrogation procedures, not excluding those of the wartime concentration camps. ..."

Paragraph 7 states:

> "... the longer that these cases go on without being disposed of, the greater is the risk that medical opinion will further crystallize on the question of long term effects, and this will manifest itself in ever more enhanced settlement figures. ..."

Paragraph 8 refers again to:

> " ... one or two cases where the very serious psychiatric effects of the deep interrogation are likely to be sufficiently proven. ..."

25. Another partial document (undated) from the respondent Government's archives is headed "Deep interrogation" and refers to counsel's opinion that if a case were heard in open court,

> "... the medical evidence produced by the plaintiff would seek to demonstrate the thesis that interrogation in depth can lead to various forms of cancer. Our own medical evidence would be unlikely to disprove this thesis and may well be adjudged to be biased towards the Army bearing in mind that Dr L. will be cross-examined on the basis that he is an official medical adviser to the Army."

26. Another partial document (undated) from the respondent Government's archives contains a discussion in relation to the domestic proceedings and refers to the case of Mr P.S., one of the internees who had been subjected to the five techniques. It states that

> "... there is substantial medical evidence of lasting psychiatric damage, which led to a considerably higher assessment of damages on the count of psychiatric sequelae."

27. In the applicant Government's view, the new documents showed that the evidence given by Dr L. before the Commission was misleading. It was at variance with his own contemporaneous findings based on the examination, for the purpose of domestic proceedings, of some of the internees who had been subjected to the five techniques. Had the Commission and the Court been aware of these findings, they would have concluded that the unanimous available expert evidence was that the suffering inflicted by the application of the five techniques was intense and that it often produced long-term effects. It was difficult to see how the Court could have reached the conclusion it did on the intensity of the suffering caused by the five techniques. At the very least the newly discovered documents might have had a decisive influence on its conclusion.

B. Documents submitted in respect of the second ground for revision

28. In support of the second ground of their revision request the applicant Government submitted the documents listed below.

29. A document described as "Loose minute" containing a summary of the respondent Government's internal view of the inter-State case was attached to a letter of 8 November 1972 from an official of the Ministry of

Defence addressed to an official of the Republic of Ireland Department, Foreign and Commonwealth Office. It states as follows at paragraph 6:

> "The Attorney General is satisfied that the methods used in deep interrogation cannot be described as other than administrative practice. The evidence is clear that the RUC were instructed by the Army and that Ministers approved the methods used if not the exact way in which they were used."

30. A letter of 15 December 1976 from Roy Mason MP, Secretary of State for Northern Ireland, to Airey Neave MP stating that the Hooded Men cases brought at domestic level had to be settled out of court because of the embarrassment which could arise for those concerned at the time, including Lord Carrington [the then Secretary of Defence].

31. A document described as "Loose minute" was attached to a letter of 8 December 1976 from an official of the Ministry of Defence to the Assistant Under Secretary (General Staff) and others. The document relates to the deep-interrogation cases and explains the decision to settle them. It states that the Government had sought the very best legal advice on the fourteen civil actions, which were for wrongful arrest, false imprisonment, negligence, trespass to the person and assault, and conspiracy. The "uncompromising advice" was that the plaintiffs were certain to succeed. It goes on to note that

> "The gravest allegation is that of conspiracy between the defendants (e.g. Mr Brian Faulkner [the then Prime Minister of Northern Ireland] and Lord Carrington) to subject the plaintiffs to unlawful acts."

The document also records the disadvantages of fighting the cases, mentioning, among others:

> "The plaintiffs would require discovery of a large number of sensitive Government papers relating to the deep interrogation operation, and could call as witnesses those responsible for authorising and carrying out the deep interrogation procedures."

32. A minute by an official of the Northern Ireland Office, dated 13 February 1978, with the title "Irish State case: Investigation of allegations of ill-treatment and prosecution of offenders", from which it appears that after the Court's judgment was delivered some consideration was given to the question of investigating and prosecuting allegations of ill-treatment. It states that although most, but not all, of the cases before the Commission were investigated at the time, there was a large area of doubt about the adequacy of the investigations. It records that in April 1977 the Attorney General

> "decided ... to be considerably more circumspect in what he said to the Court about previous police investigations than he had been in February of that year. ..."

The document goes on to say that

> "... there was undoubtedly a cover-up on the part of the RUC at least in the years 1971 and 1972. Presumably it was this which led to the complete absence of prosecutions in the illustrative cases and to the paucity of prosecutions in the remaining cases."

Further, the document says that the Commission's report and the Court's judgment are

> "... broadly in accordance with the facts as we know them: that the record of investigations and prosecutions is deplorable in relation to 1971, but that the picture thereafter, although uncertain, is probably better."

As regards the five techniques in particular, the document records that

> "there is no point in talking about evidence or investigations. It would not be a week's work to discover who was responsible if we set our minds to it. As I understand it, the decision not to prosecute was, and is, a policy decision (and no doubt an admirable one)."

The document also refers to the Court having been told that the RUC and the Army would investigate complaints whatever their source and notes:

> "the obvious point that even some of the complaints brought to the notice of the RUC as having been included in the Irish Government's application do not seem to have been investigated, since the police could be said to have some kind of immunity as regards these cases."

33. A minute dated 8 December 1976, by Mr B.B. Hall, Treasury Solicitors, addressed to 10 Downing Street, in which it is explained that Mr W.S., who was one of the internees subjected to the five techniques, claimed that there had been a conspiracy by the defendants, who included the Ministry of Defence, Mr Faulkner and Sir Graham Shillington, and opines that it would not be possible to meet allegations of ill-treatment as no rebutting evidence could be called and that the damages would be very high if there were a finding that the treatment constituted torture as found by the Commission.

34. A minute dated 22 August 1972, referring to the Joint Directive on Military Interrogation in Internal Security Operations Overseas of 17 February 1965 as amended in February 1967 and stating that it was already published as an annex to the Parker report, but only in part. It also refers to Standing Orders for the running of the interrogation centre which were "for the Attorney General's information only".

35. A document (undated) with the title "Irish State case at Strasbourg: the next stage" containing a discussion of tactics to be pursued by the respondent Government in the Convention proceedings. The document discusses the relationship between the likely timetable of the Convention proceedings and of progress towards a political settlement in Northern Ireland:

> "It is desirable from our point of view that the Irish should clearly be seen to be pursuing a vendetta against a defunct administration since replaced by new constitutional arrangements generally accepted as representing a just and workable settlement. While maintaining a generally cooperative attitude toward the Commission we should therefore take every opportunity to delay the proceedings and should strongly resist any Irish attempt to speed them up."

The document goes on to consider a number of possible methods of exerting pressure on the applicant Government to drop or settle the proceedings. It concludes that the United Kingdom should gather whatever evidence was possible and

> "... spin out the proceedings as long as possible, short of laying ourselves open to a charge of deliberately obstructing the Commission."

36. A document dated 31 October 1974 by a Legal Counsellor at the Foreign and Commonwealth Office, addressed to the Attorney General's Department. It states:

> "On Article 14 we reverted once again to the problem of producing a witness of sufficient authority and position to persuade the Commission of our problems and to convince it of our bona fides in dealing with the evolving situation in the way in which we do, in fact, deal with it. A top man is essential."

The document suggests that efforts should be made to convince General Tuzo and Sir Graham Shillington to give evidence, but goes on to say the following:

> "One obstacle to calling a witness of this calibre has always been considered the possibility of his being cross-examined on deep interrogation. Some of us, however, take the view that if we do field such a witness we should, and could, take the line that we are not going to deal, or permit them to deal with matters of deep interrogation (for one reason or another)."

37. A letter dated 6 November 1974 by a Legal Adviser at the Foreign and Commonwealth Office, addressed to the Attorney General's Department, discussing which officials should give evidence regarding the Article 14 claim and stating that further efforts should be made to see if General Tuzo and Sir Graham Shillington could be persuaded to give evidence. He expresses the view that

> "... we could properly call them to give evidence under Article 14 and resist any attempts to ask them to deal with the allegations under Article 3, and in particular matters of deep interrogation."

38. A letter dated 28 November 1974 from Mr Bryars, Assistant Under Secretary of State, Ministry of Defence, to DJ Trevelyan, Northern Ireland Office, which reads as follows:

> "There is one consideration bearing on the possible attendance of top level witnesses at Strasbourg which was not mentioned in the minute .... This is the policy which has already been decided on the settlement of the domestic cases in Northern Ireland involving deep interrogation.
>
> ...

> An important object of the continuing efforts to achieve settlement in these cases has been to avoid any one of them coming into court, with the possible results of adverse publicity at a difficult time and, more importantly, of a damaging finding against HMG on the issue of conspiracy. The defendants are:
>
> | | |
> |---|---|
> | Brian Faulkner | Graham Shillington |
> | The Police Authority | Superintendent Reginald Speers |
> | The Ministry of Home Affairs | The MOD |
>
> If top level witnesses attended at Strasbourg, there is a strong possibility, to put it no higher, that attempts will be made by the Irish side to draw them out on the whole issue of deep interrogation, whether they attend the Commission in relation to Article 3 or Article 14. ... it would place these witnesses in much the same position on this point at Strasbourg as they would be in the domestic cases which it has been our strategy to avoid; and if they refuse to answer questions ... the effect could be to stimulate those concerned with the conduct of the plaintiff's cases there to bring a case to court..."

39. A memo dated 16 January 1975 to Sir John Hunt, with a handwritten note addressing it also to the Prime Minister, concerning a possible informal meeting of some potential witnesses with the delegates of the Commission. It starts by saying:

> "A difficulty has arisen which the Attorney General intends to discuss with the Prime Minister and the Secretary of State for Northern Ireland at Chequers tomorrow."

It refers to the fact that the Prime Minister had agreed that memoranda (not witnesses) should be provided to cover the Faulkner period when internment was introduced and that some of the delegates should have "a talk in London with Sir Frank Cooper, Mr. Woodfield, General Tuzo and, possibly, Sir Graham Shillington". It records that it was important

> "that these should constitute a team; if one of them was led to make damaging statements the others would be able to set the record straight."

It notes that the Irish objected in strong terms to the proposal of an informal discussion, but that the Commission rejected the Irish view that an informal discussion was an "improper procedure". Furthermore, it records that the Commission

> "... expressed disappointment that we were not making Ministers available."

Finally, it records that the Commission decided that they would meet informally with General Tuzo and Sir Graham Shillington only.

40. A letter dated 10 February 1975 from Sir Basil Hall, Treasury Solicitor, to the Ministry of Defence enclosing a draft note to be given to the three witnesses to be heard by the Commission,

> "giving instructions as to how the question of interrogation in depth is to be handled."

In particular, the witnesses were not supposed to discuss the seminar referred to in the Parker report or any training for deep interrogation and/or

indicate who recommended or authorised the use of the five techniques, the reasons for selecting particular individuals or the location where the interrogation in depth was carried out.

41. A letter dated 3 December 1973 from Mr J.B. Donnelly of the Foreign and Commonwealth Office to Mr White. It contains a discussion on the interconnection between the Strasbourg proceedings and domestic political progress on Northern Ireland. The author expresses the view that the further the case advances, the more it weakens the United Kingdom's argument for early settlement based on the destabilising effect of the proceedings. It includes the following line:

> "our trump card, to hold events in the North hostage to the end of the case, cannot be played."

The author concludes that the time has come to "de-politicise the case" and not expect Ireland to be persuaded to drop or settle the case. There are various handwritten notes on the document, one of which states that

> "... no one will sabotage the achievement of 20 months (a power sharing Executive) for this silly Strasbourg quarrel. We have always said that S'bg should not be allowed to affect what is right or necessary in NI, that therefore the Irish have no lever to influence NI affairs, on points that matter."

42. A Northern Ireland Office note dated 18 April 1975 describing a conversation with the Irish ambassador stating as follows:

> "I then rounded upon the Ambassador and suggested that if anything we had grounds for feeling that relations were strained by the insistence of his Government in pursuing the case at Strasbourg. We found this an irritation and it caused us a lot of work. It certainly was not conducive to the maintenance of good relations. What particularly puzzled me was the motive. I could not see that the Republic could be pursuing the case for anything other than a desire to use it for propaganda purposes ..."

43. A letter dated 31 March 1977 from the Secretary of State for Northern Ireland, Mr Merlyn Rees, to the Prime Minister. It is headed "Meeting between the Attorneys General of the Republic of Ireland and the United Kingdom" and refers to a meeting between the Attorneys General on 25 March of that year, at which the question of prosecution and/or disciplinary proceedings against those responsible for the acts found by the Commission to be in breach of Article 3 was raised. The letter continues as follows:

> "It is my view (confirmed by Brian Faulkner before his death) that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by Ministers – in particular Lord Carrington, then Secretary of State for Defence.
>
> If at any time methods of torture are used in Northern Ireland contrary to the view of the Government of the day I would agree that individual policemen or soldiers should be prosecuted or disciplined, but in the particular circumstances of 1971/72 a political decision was taken."

The Court notes that the respondent Government objected to the choice of the extract by the applicant Government. The author of the letter, following a protest by the then Secretary of State for Defence, Mr F. Mulley, had corrected his comment in a later memorandum stating that instead of referring to "the decision to use methods of torture in Northern Ireland in 1971/72" it would have been better to refer to "the decision to use interrogation in depth in Northern Ireland in 1971/72".

44. In sum, the applicant Government considered that the above documents shed light on the then respondent Government's attitude towards the evidence gathering process, and showed a pattern of preventing the Commission and the Court from accessing the full truth about the five techniques. Had the Court been aware of the respondent Government's intention to avoid the hearing of evidence and to protect its Ministers, it would have resolved differently the various conflicts of fact which had arisen before it.

THE LAW

45. Rule 80 § 1 of the Rules of Court reads 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."

I. THE PARTIES' SUBMISSIONS

A. The respondent Government

46. The respondent Government made a number of preliminary points. They pointed out, firstly, that they had publicly accepted in the 1970s and accepted today that the five techniques had been authorised at a high level, represented an administrative practice and were unlawful under domestic law. Secondly, before the Commission, they had not made any positive case in relation to the five techniques, but had simply argued that the Commission should not express a view about their compatibility with Article 3 because they had been abandoned. Moreover, all the victims had received substantial compensation following the settlement of civil claims in the domestic courts. The Commission's attention had been drawn to those settlements which had been concluded at the time of its hearings. Thirdly, before the Court, the respondent Government had not contested the Commission's finding that the application of the five techniques amounted

to torture. They had argued that a ruling would not be necessary given that the techniques would not be applied again. Fourthly, they had given a series of undertakings, both before the United Kingdom Parliament and before the Court, that the five techniques would not be used again.

47. The respondent Government's principal argument was that the revision request did not fulfil the requirements laid down in Rule 80 § 1 of the Rules of Court.

48. The respondent Government contested the applicant Government's position that the six-month time-limit had started running on 4 June 2014, the day of the RTÉ broadcast. In their view, it followed from the Court's case-law that the time-limit for a revision request started running from the date on which the applicant could reasonably have known the new fact (*Grossi and Others v. Italy* (revision), no. 18791/03, §§ 23-24, 30 October 2012). A party "could reasonably have known" new facts from the moment it was aware of the existence of documents demonstrating these facts, not only from the date on which it obtained copies of the relevant documents (ibid.; *McGinley and Egan v. the United Kingdom* (revision), nos. 21825/93 and 23414/94, §§ 35-36, ECHR 2000-I). Moreover, facts which were ascertainable from publicly accessible databases had to be treated as known (*Bugajny and Others v. Poland*, (revision) no. 22531/05, §§ 25-26, 15 December 2009). In their view, information in the public domain suggested that the applicant Government had acquired knowledge of the alleged new facts before the date of the RTÉ broadcast. They noted that research using documents released to the United Kingdom National Archives in Kew had been carried out in 2013 by an Irish non-governmental organisation, the Pat Finucane Centre (hereinafter "the PFC"). According to a PFC press release of 6 August 2013, the Irish Department for Foreign Affairs was notified of the existence of documents establishing the alleged new facts. Moreover, according to a BBC news article the Irish Attorney General had received copies of relevant documents no later than 28 November 2013.

49. The respondent Government pointed out that the applicant Government had, in reply to their submissions, conceded having received a number of documents, including Dr L.'s medical report on Mr S.K. (for the latter, see paragraph 23 above), more than six months before filing the request for revision. The respondent Government deemed this to be the key document on which the revision request was based. None of the other documents was a first-hand report of Dr L.'s opinions and they could therefore not offer any basis for claiming that Dr L. had misled the Commission. Moreover, given that the applicant Government were aware of the research carried out by the PFC, other materials relied on in the revision request, which were available in public archives, could reasonably have been known to them at least a year before they submitted their request for revision. However, the respondent Government explicitly accepted that the

six-month time-limit had not started running years earlier when the documents had become accessible at their National Archives.

50. Furthermore, the respondent Government observed that the applicant Government were asking the Court to vary the grounds on which the finding of a violation in respect of the five techniques had been based in the original judgment. They were in fact seeking a rehearing, asking the Court to reconsider and weigh up a wide range of evidence. Nothing in the Court's case-law suggested that the revision procedure was meant to fulfil such a purpose. It was considered as an extraordinary procedure, designed to correct clear errors of assessment where the requesting party demonstrated that the Court had proceeded on an identifiable error of fact.

51. In the respondent Government's view, the documents submitted by the applicant Government did not demonstrate any new fact. The Court's case-law under Rule 80 of the Rules of Court required that the Court be made aware of a specific fact which might have a decisive influence on its findings. The respondent Government pointed out, in particular, that the Commission had not heard direct evidence on the long-term consequences of the five techniques. Two of the illustrative cases concerned men who had been subjected to the five techniques. The Commission had heard five different witnesses in respect of each of those two men, namely the victim himself, Professors Daly and Bastiaans and Doctors L. and M. Each of those witnesses had given lengthy and complex evidence concerning the men's physical and mental health. Dr L.'s position had been measured. He recognised that the victims had some psychiatric symptoms but considered that they were not severe, while stressing the uncertain and predictive nature of the exercise.

52. In sum, there was nothing in the material submitted by the applicant Government to show that the evidence given by Dr L. had been misleading. At its strongest, the applicant Government's case concerning Dr L. was that his views might have developed to some degree in the light of his later re-examination of another victim of the five techniques (Mr S.K.) for the purpose of civil-damages claims before the domestic courts. The applicant Government had failed to demonstrate that the Court had proceeded on the basis of a false fact as would be required by its case-law.

53. Even assuming that the material submitted by the applicant Government demonstrated new facts, these were not by their nature decisive for the original judgment.

54. In this connection the respondent Government argued that the first ground for revision rested on three propositions, namely that the United Kingdom's position before the Commission and the Court was that the effects of the five techniques were minor and short-term; that Dr L. had misled the Commission in his evidence and that the documents demonstrated this; and that, had the Court known the actual position, this might have had a decisive influence on its finding on the issue of torture.

55. In the respondent Government's view, each of these propositions was incorrect. In the first place, they had not denied the breach of Article 3 in the original proceedings. Before the Court, they had even expressly accepted the Commission's finding that the five techniques amounted to torture.

56. Secondly, as already indicated above, they considered that the material did not demonstrate that Dr L. had misled the Commission. Dr L. was a leading international expert on neurological disorders resulting from imprisonment and interrogation. He had given a reasonable professional opinion describing himself as a conservative evidence-based psychiatrist, cautious before concluding that a person was suffering from a severe psychiatric illness. The medical report of June 1975 concerning Mr S.K. did not alter this position, as a change of opinion in a single case, involving an individual with a serious pre-existing medical condition, could not be generalised. There was no evidence that Dr L. had changed his opinion on the effects of the five techniques in the two cases before the Commission or in general.

57. Thirdly, the report relating to Mr S.K. was privileged and confidential legal advice obtained by the respondent Government in the context of the friendly settlement of domestic proceedings which did not need to be disclosed. In any case, it had by no means been demonstrated that the Court would have come to another conclusion. It followed from the original judgment that the Court had wished to reserve the epithet "torture" for the most serious cases.

58. Turning to the second ground for revision, the respondent Government argued in particular that they had conceded in the original proceedings that the five techniques had been authorised at a sufficiently high level to constitute an administrative practice. The Court itself had noted that the five techniques had been authorised at a "high level" and was aware that they had been taught to members of the RUC at a seminar held in April 1971.

59. The respondent Government went on to comment in detail on the documents submitted in support of the second ground for the revision request. They concluded that much of the material was not new as the Court had been aware of the facts demonstrated by it. The material not within the Court's knowledge was largely privileged material that was properly not disclosed at the time of the original proceedings. In any event, knowledge of those documents could not conceivably have resulted in the Court reaching a different view on whether the five techniques amounted to torture, given that the United Kingdom had conceded that there had been an administrative practice authorised at a high level and had accepted the Commission's finding.

60. Lastly, for the respondent Government, the revision request served no useful wider purpose as the Court's case-law on Article 3 of the

Convention had evolved since 1978. They referred in particular to *Selmouni v. France* [GC] (no. 25803/94, § 101, ECHR 1999-V), in which the Court had rejected the argument submitted by the respondent State based on the *Ireland v. the United Kingdom* judgment, and had found that "greater firmness" and an "increasingly high standard" were needed in assessing alleged breaches of Article 3. They also mentioned that at least since the Court's judgment in *Egmez v. Cyprus* (no. 30873/96, § 78, ECHR 2000-XII), long-term effects have been relevant to the classification of acts as torture.

B. The applicant Government

61. As a preliminary observation, the applicant Government reiterated the grounds on which they had based their revision request.

62. Firstly, the respondent Government had had within their possession information, including opinions of Dr L., which showed that the effects of the five techniques could be substantial, whereas their position presented to the Court through the evidence of Dr L. was that the effects were minor and short-term. Secondly, the archive material revealed the extent to which the then Government of the United Kingdom had adopted a policy of withholding from the Commission and the Court certain information regarding the five techniques and their purpose in doing so.

63. They maintained their position that the evidence before the Commission and the Court was divided as to the long-term effects of the five techniques; that the new documents demonstrated that Dr L.'s evidence had been misleading; that the misleading evidence concerned a crucial issue and that knowledge of the withholding of evidence might have had a decisive influence on how the Court resolved conflicts of evidence.

64. As to compliance with the requirements of Rule 80 § 1 of the Rules of Court, the applicant Government made the following submissions.

65. The revision request had been made within the six-month time-limit. That time-limit had started running on 4 June 2014, the date of the RTÉ broadcast. Before that date they could not reasonably have been aware of the relevant facts relied on in their revision request.

66. The applicant Government provided the following chronology of events: on 1 August 2013 the PFC informed the Department of Foreign Affairs and Trade that its members were reviewing declassified files in the United Kingdom which related to the *Ireland v. the United Kingdom* judgment of 1978, but did not furnish any documents. On 24 October 2013 a Belfast law firm transmitted a number of documents to the Office of the Attorney General of Ireland. These dealt mainly with the level of knowledge within the then respondent Government about the use of the five techniques and the location of detention centres. They were reviewed by counsel but were not of themselves considered sufficient to merit a request for revision.

Two of the documents were later submitted in support of the revision request (see paragraphs 34 and 35 above). On 6 March 2014 the PFC submitted a number of documents to the Attorney General's Office, relating primarily to Mr S.K. and including a record of a medical examination by Dr L. in June 1975. Again, these documents were reviewed by counsel with the same conclusion as above. One of these documents, namely the above-mentioned medical report by Dr L., was later submitted in support of the revision request (see paragraph 23 above). The applicant Government contested the respondent Government's view that the said medical report was the key document on which the request for revision was based, noting that it had not been considered to form a sufficient basis for a revision request of itself. It had only taken on greater significance in the light of the other documents which were received later.

67. Following the RTÉ broadcast, the PFC submitted several thousand pages of documents to the Department of Foreign Affairs on 13 June 2014. Additional material was transmitted by RTÉ on 23 June and 24 November 2014. The documents were reviewed by counsel with the help of documentary counsel. Thus, with the exception of three documents which counsel had not considered to merit of themselves a request for revision, all documents submitted in support of the revision request had been received between June and November 2014, following the RTE broadcast of 4 June 2014. The revision request had been lodged on 4 December 2014.

68. The applicant Government contested the respondent Government's view that they could have been expected to make further enquiries once they had received Dr L.'s report on Mr S.K. in March 2014. They argued in particular that in the case of *Bugajny and Others* (cited above), relied on by the respondent Government, the Court had refused a request for revision on the ground that the relevant information could have been obtained from the publicly available land register. However, the present case differed in that they could not reasonably be expected to search another Member State's archives. The case of *Cernescu and Manolache v. Romania* (revision) (no. 28607/04, 30 November 2010) was more relevant in the present context, as it showed that, even where information on relevant facts was publicly available, a party's failure to inform the Court of those facts in the original proceedings might be a relevant consideration in the examination of a revision request. In conclusion, they maintained that the revision request had been submitted in good time.

69. The applicant Government submitted that neither Rule 80 nor the Court's case-law indicated that the Court would be prevented from modifying the grounds on which a violation was found. In their view, the Court was called upon to reconsider, in the light of the new material, the grounds on which it had found a violation of Article 3 in respect of the five techniques.

70. Furthermore, the applicant Government contended that the documents on which they relied in their revision request contained new facts which had been "unknown to the Court" when the original judgment had been delivered. They argued that the Commission and the Court had considered evidence as to the long-term effects of the five techniques which was at odds with the views that Dr L., the respondent Government's chief witness on those effects, had expressed in the context of domestic proceedings brought by the men who had been subject to these techniques. They maintained their conclusion that Dr L. had misled the Commission on this point.

71. Turning to the question whether the newly discovered facts "might by [their] nature have a decisive influence" on the original judgment, the applicant Government asserted that the new facts might and, in all probability, would have had such a decisive influence. They highlighted the importance of the long-term effects to determining what constitutes torture. Furthermore, they pointed out that the Commission had noted that the experts it had heard had disagreed on the matter and that it had thus been unable to establish the exact degree of the psychiatric after-effects. The Court in turn had relied on the evidence taken by the Commission.

72. Furthermore, in reply to the respondent Government's observations, the applicant Government commented in detail on the relevance of the documents submitted in support of the revision request.

73. They maintained that Dr L. had been the only expert who had expressed the view that the five techniques would not have long-term effects. The experts called by the applicant Government, Professors Daly and Bastiaans, gave evidence that the effects would be substantial, severe and long-lasting. Regarding Dr M., the applicant Government noted that this witness had been called by the Commission and not by the applicant Government. In the applicant Government's view, Dr M, who had examined the two men (Mr P.C. and Mr P.S.) in August/September 1971 in the immediate aftermath of the application of the five techniques and one of them also a year later, had not excluded the possibility that they might produce long-term effects.

74. Referring to the transcripts of the hearings before the Commission, the applicant Government observed that Dr L. had given evidence on 15 June 1974 in the case of two men who had been subjected to the five techniques in 1971 and whom he had examined in 1973. On 18 January 1975 he had given evidence on his more general findings and conclusions, expressing the view that the five techniques did not expose the persons to whom they were applied to very severe stress and that their effects were rather minor and short-term than long-term, disagreeing strongly with the views of the other experts heard. In the applicant Government's view, the evidence given by Dr L. was not the balanced, disinterested evidence of an independent expert as claimed by the respondent Government but was a

robust and emphatic statement that the effects of the five techniques were neither severe nor long-lasting. Much was made by the respondent Government of the fact that Dr L. had made a number of concessions under cross-examination. However, he had only done so where necessary and had not allowed such concessions to detract from his overall views on the minor and short-term effects of the five techniques.

75. The documents submitted in relation to the first ground for revision were relevant in that they showed that Dr L. had expressed different views in the context of the domestic proceedings brought by the men who had been subjected to the five techniques. The applicant Government noted that the first document (see paragraph 22 above) contained legal advice on the amount of compensation to be awarded in domestic proceedings to three men who had been subjected to the five techniques (Mr S.K., Mr B.T. and Mr W.S.). It referred to views expressed by Dr L. in April 1974 when he had examined the men. Those views were radically different from the evidence he gave to the Commission in June 1974 and January 1975. The second document (see paragraph 23 above), that is the medical report by Dr L. in respect of the examination of Mr S.K. of June 1975, had been drawn up between the conclusion of the taking of evidence and the submission of the Commission's report. In the applicant Government's view, this did not relieve the respondent Government of their duty to bring relevant information to the attention of the Convention organs. That document too disclosed views with conflicted with the evidence given by Dr L. before the Commission. The third document (see paragraph 24 above) was a report of 5 October 1974 in the context of domestic proceedings, referring to a growing tendency in medical opinion to acknowledge long-term effects of deep interrogation and advising strongly to settle the cases out of court. The views expressed by Dr L. before the Commission as to the possible long-term effects of the five techniques were in striking contrast to the views expressed in this report.

76. In relation to the second ground for revision, the applicant Government submitted that the new documents showed the concern of the then respondent Government not to co-operate with the Convention organs in order to avoid damage to their reputation from any adverse finding of the Commission and the Court. The Commission and the Court would have considered the evidence given by Dr L. with greater scrutiny had they been aware of the full extent of those efforts. Furthermore, referring to the case of *Cernescu and Manolache* (cited above), the applicant Government argued that, according to the Court's case-law, a party's failure to comply with its obligations in the Convention proceedings might be relevant for the consideration of a request for revision.

77. Lastly, the applicant Government argued that the revision request served a wider purpose and had current relevance. Although the Court's case-law had evolved in respect of torture, the *Ireland v. the United*

Kingdom judgment had a continuing life of its own, being relied on by other Governments, including Israel and the United States of America in 1999 and 2002, to classify conduct as not amounting to torture. The evolution of the Court's case-law had not prevented the use of its findings in the original judgment for what did or did not constitute torture. The applicant Government stressed that both in 1977, when it had sought a ruling from the Court, and today, its chief concern was to establish clear guidance regarding what constituted torture under Article 3 of the Convention. Neither then nor now did it seek to embarrass the respondent Government.

II. THE COURT'S ASSESSMENT

A. General principles

78. The Court notes the embodiment of the principle of finality of judgments in Article 44 of the Convention and reiterates that, in so far as it calls into question the final character of judgments of the Court, the possibility of revision, which is not provided for in the Convention but was introduced by the Rules of Court, is considered to be an exceptional procedure. Requests for revision of judgments are therefore to be subjected to strict scrutiny (see *McGinley and Egan*, cited above, § 30, with references to *Pardo v. France* (revision – admissibility), 10 July 1996, § 21, *Reports of Judgments and Decisions* 1996-III, and *Gustafsson v. Sweden* (revision – merits), § 25, *Reports* 1998-V).

79. In order to establish whether the facts on which a request for revision is based "might by [their] nature have a decisive influence" they have to be considered in relation to the decision of the Court whose revision is sought (see, for instance, *Pardo* (revision – admissibility), cited above, § 22, and *Hertzog and Others v. Romania* (revision), no. 34011/02, § 15, 14 April 2009).

B. Application of these principles to the present case

80. In the present case two main points are in dispute, namely whether the documents submitted by the applicant Government disclose new facts "which by their nature might have a decisive influence" and whether the revision request has been submitted within the six-month time-limit.

81. The Court will begin its examination with the question whether the revision request has been submitted in good time.

1. Whether the six-month time-limit laid down in Rule 80 § 1 of the Rules of Court has been complied with

82. Pursuant to Rule 80 § 1, a request for revision of a judgment has to be introduced "within a period of six months after [the] party acquired knowledge" of "a fact which might by its nature have a decisive influence and which, when the judgment was delivered, was unknown to the Court and could not reasonably have been known to that party" (hereinafter also referred to as the "new fact[s]").

83. As has already been set out above, the applicant Government relied on two grounds or new facts in support of their revision request. Based on a number of documents from the United Kingdom's archives, they claimed, firstly, that Dr L. had misled the Commission regarding the long-term effects of the five techniques and, secondly, that the then respondent Government had adopted a clear policy of withholding from the Commission and the Court certain information regarding the five techniques. The question therefore arises when the applicant Government "acquired knowledge" of the documents containing these facts.

84. The applicant Government argued that they had become aware of the relevant facts on 4 June 2014, the date of the RTÉ broadcast (see paragraph 19 above).

85. The respondent Government contested this view. They submitted in particular that the applicant Government had received the key document on which they relied in their revision request, namely Dr L.'s medical report relating to Mr S.K., in March 2014. Moreover, the applicant Government had already been aware by the end of 2013 that substantial volumes of documents had been obtained and analysed by the PFC. Consequently, the materials relied on in the revision request had been available to them, or could reasonably have been known to them, more than six months before the application was made on 4 December 2014.

86. The Court notes the applicant Government's submission that they had received documents on two occasions before 4 June 2014. In October 2013 they had received documents relating mostly to the level of knowledge within the then respondent Government about the use of the five techniques. Two of these documents (see paragraphs 34 and 35 above) were later submitted with the revision request. In March 2014 they had received documents relating mainly to Mr S.K., including Dr L.'s medical report. The latter document (see paragraph 23 above) was subsequently submitted in support of the revision request. All other documents were received between June and November 2014, following the RTÉ broadcast of 4 June 2014.

87. The applicant Government submitted the documents received in October 2013 and March 2014, respectively, for review by counsel and were advised that they were not of themselves sufficient to merit a request

for revision. In these circumstances, the Court accepts that the applicant Government had not "acquired knowledge" of any new facts at that time.

88. However, the respondent Government argued, firstly, that the six-month time-limit for a revision request started running from the date on which the applicant Government could reasonably have known the new facts. While accepting that the six-month time-limit did not start running with the release of documents to their National Archives, the respondent Government asserted that the applicant Government could reasonably have known the alleged new facts from the moment they learned about the research carried out by the PFC and started receiving documents, that is, more than a year before they submitted the request for revision or at the latest from March 2014, when they received Dr L.'s medical report on Mr S.K. They argued, secondly, that facts ascertainable from publicly accessible sources were to be treated as known.

89. The Court observes that most of the case-law relied on by the parties does not deal with the six-month time-limit but with a separate requirement of Rule 80 § 1, namely whether the new fact "could not reasonably have been known" to the party seeking revision when the judgment was delivered. This requirement relates to situations in which the new fact forming the basis for the revision request could already have been known to the party *before* the delivery of the original judgment, not, as in the present case, long *after* the conclusion of the original proceedings.

90. The case-law shows that the assessment of what a party can reasonably be expected to have known depends on the circumstances of each case.

91. In *McGinley and Egan* (cited above, §§ 33-36), in which the applicants relied in their revision request on a series of letters relating to proceedings which could be relevant to their case, the Court observed that they had been aware of the existence of the correspondence and had obtained detailed information about the proceedings at issue. It therefore rejected the applicants' request, finding that they could reasonably have been aware of the new facts before the delivery of the original judgment, although they might not have obtained copies of the relevant correspondence until thereafter. In *Bugajny and Others* (cited above, §§ 22-26) the Court rejected the Government's request for revision on the ground that they could reasonably have known the new fact, namely that the applicants had concluded easement contracts with the buyers of their real estate. While considering that the applicant's conduct was improper, as they had failed to inform the Court of this fact, it found that the Government should have consulted the land register which was a public register kept by the district courts in order to make the status of immovable properties known to the public. Similarly, in *Pennino v. Italy* (revision), no. 43892/04, §§ 17-20, 8 July 2014 and *De Luca v. Italy* (revision), no. 43870/04, § 17-20, 8 July 2014, the Court rejected the Government's request for

revision, on the ground that they could reasonably have known the new fact at the time of delivery of the judgment. It considered that the body administering an insolvent Town Council was an organ of the State and that the Government could and should have requested that body or the Town Council to provide information about the payment of the applicant's claim.

92. In contrast, in *Cernescu and Manolache* (cited above, §§ 12-14) the Court found that the Government could not reasonably have known the new fact, namely that the applicants had obtained restitution of the property concerned. In the Court's view, the Government, who had enquired about the legal situation of the property with the domestic authorities before submitting their observations, could not be reproached for not having been aware of the judgment in favour of the applicants which had been given subsequently, even though it was public information. Moreover, the applicants had knowingly failed to inform the Court of the restitution (see, as a further similar case, *Hertzog and Others,* cited above, §§ 16-18, 14 April 2009). Furthermore, in *Stoicescu v. Romania* (revision) (no. 31551/96, §§ 47-48, 21 September 2004), having regard to the absence, at the time, of a computerised system of judicial data, the Court held that the Government could not be expected to carry out extensive research in the relevant registers without having any indication that the applicant's certificate of heritage had been challenged before the courts.

93. In the present case the issue arises whether the case-law described above can be transposed to the phase *after* the delivery of the original judgment. Though the wording of Rule 80 § 1 – that the relevant fact has to be capable of having 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" – would point to the contrary, there may nonetheless be arguments in favour of a certain duty of diligence. In that context the Court refers in particular to the exceptional nature of the revision procedure, which calls the final character of judgments of the Court into question. It could therefore be argued that once aware of possible grounds for revision a party has to take reasonable steps to ascertain whether such grounds actually exist, in order to put the Court in a position to rule on the matter without delay. The case of *Grossi and Others* (cited above, §§ 22-24) appears to indicate such an approach. In that case the Government had become aware of the existence of documents demonstrating a new fact, namely the actual size of the property at issue, shortly *after* the delivery of the judgment but only submitted their revision request within six months from the date on which the competent Ministry had actually received the documents. The Court rejected the request as belated, on the ground that the Government could reasonably have known the new facts relied on as soon as they became aware of the existence of the documents.

94. In the present case there are a number of elements to be taken into consideration: what was at stake was not the obtaining of a specific set of

documents, the existence and relevance of which were known to the applicant Government from October 2013 or March 2014, nor the verification of a single fact (such as for example the existence of a contract in respect of real property or the payment of a claim) which can be ascertained by consulting one particular register or database. The present request for revision is of a more complex nature. The Court would accept the applicant Government's claim that circumstances transpired from a significant number of documents which, analysed together, led them to the conclusion that there was a basis for seeking revision. The Court observes that the applicant Government did not remain passive when they received documents in October 2013 and March 2014 potentially disclosing new facts. On both occasions they had the documents reviewed by counsel, who advised them that the documents were not of themselves sufficient to justify a request for revision. As to whether they were under a duty to do more, for instance to actively carry out research, in particular after the receipt of Dr L.'s report on Mr S.K. in March 2014, the Court notes that relevant documents were not readily available in the applicant Government's archives. The applicant Government would have had to carry out extensive research among a broad range of potentially relevant documents in the United Kingdom's national archives. In sum, the Court doubts whether it can be said that the applicant Government could reasonably have "acquired knowledge" of the documents containing the facts relied on in their revision request before the RTE broadcast of 4 June 2014.

95. Having regard to the above considerations, the Court considers that the applicant Government have submitted the request for revision within the six-month time-limit laid down in Rule 80 § 1 of the Rules of Court.

2. Whether there are facts "which by [their] nature might have a decisive influence" on the judgment of 18 January 1978

96. According to the applicant Government, the documents submitted disclosed new facts, namely that Dr L. had misled the Commission on the question whether the effects of the five techniques were severe and long-lasting and the extent to which the respondent Government at the time had deliberately withheld information about the five techniques from the Commission and the Court. In their view, the new facts might have had a decisive influence as they related to the long-term effects of the five techniques, an element which was central to the Court's assessment under Article 3 of the Convention. Had the Court known the new facts at the time it would in all probability have come to the conclusion that the application of the five techniques amounted to torture and not "only" to inhuman and degrading treatment.

97. The respondent Government contested every aspect of that assertion. In their view, the documents did not disclose any new facts. Regarding the first ground for revision, the documents did not support the conclusion that

Dr L. had misled the Commission. The documents submitted in support of the second ground for revision were not relevant as the respondent Government had conceded in the original proceedings that the five techniques had been an administrative practice authorised at a "high level". Furthermore, they noted that the applicant Government were not seeking to correct a clear error of fact in the original judgment but were asking the Court to vary the grounds on which the finding of a violation had been based. In any case, there was no indication that the Court would have come to another conclusion. It followed from the original judgment that the Court had wished to reserve the epithet "torture" for the most serious cases.

(a) The scope of the revision request

98. As a preliminary point, the Court will deal with one particular aspect of the present referral request: the applicant Government are not seeking to modify the Court's finding that the use of the five techniques amounted to a violation of Article 3 of the Convention. However, they assert that the new facts require a modification of the reasons on which that finding is based to the effect that the use of the five techniques is to be qualified not "only" as inhuman and degrading treatment but as torture within the meaning of Article 3.

99. The English version of Rule 80 § 1 ("... 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 [the] party...") contains no indication on how to resolve the question of which parts of a judgment revision may address, while some support for a restrictive approach could be found in the French version ("En cas de découverte d'un fait qui, par sa nature, aurait pu exercer une influence décisive sur l'issue d'une affaire déjà tranchée et qui, à l'époque de l'arrêt, était inconnu de la Cour et ne pouvait raisonnablement être connu d'une partie ...").

100. In the Court's case-law a few examples can be found in which the revision procedure has been used to modify the reasoning of the original judgment. For instance, in *Adamczuk v. Poland* (revision) (no. 30523/07, §§ 83-85, 15 June 2010) the Court corrected the erroneous statement contained in the original judgment that the Government had not expressed a view on just satisfaction and added a summary of their comments, without however amending the award of just satisfaction. In *Naumoski v. the former Yugoslav Republic of Macedonia* (revision) (no. 25248/05, §§ 8-11, 5 December 2013), the Court corrected an error concerning the date of the Supreme Court's decision, noted explicitly that the error had been part of the reasons which led to the conclusion that the length of the proceedings had been unreasonable, and amended the reasoning while confirming the conclusion of the original judgment that the duration of the proceedings had been excessive.

101. Of relevance in the present case is that it concerns a violation of Article 3 of the Convention which prohibits distinct forms of conduct, namely subjecting a person to torture or to inhuman treatment (or punishment) or to degrading treatment (or punishment). According to the Court's well-established case-law the distinction between the notion of torture and that of inhuman and degrading treatment would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see, among other authorities, *Selmouni*, cited above, § 96; *Egmez*, cited above, § 77; *Gäfgen v. Germany* [GC], no. 22978/05, § 90 ECHR 2010; and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 197, ECHR 2012). In many cases where the Court finds a violation of Article 3 it specifies whether the treatment at issue was degrading or inhuman or whether it amounted to torture (see, for example, *Selmouni*, cited above, §§ 99-105, and *Gäfgen*, cited above, §§ 101-08).

102. The Court observes that the operative part of the original judgment contains two separate points concerning the findings under Article 3 in respect of the five techniques, namely that their use in August and October 1971 constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3 of the Convention, and that the said use did not constitute a practice of torture within the meaning of Article 3 (see paragraph 16 above).

103. The Court therefore considers that the revision sought by the applicant Government relates to an important finding in the original judgment set out in its operative part. The Court is satisfied that these are matters which can be the subject of a revision request.

(b) Whether the documents submitted by the applicant Government demonstrate new facts

104. The main point in dispute between the parties is whether the documents submitted by the applicant Government demonstrate any new facts and, if so, whether they might by their nature have had a decisive influence on the Court's findings in the original judgment. The Court will examine these points in turn.

105. Before undertaking this analysis, the Court points out the following specific feature of the present request for revision. Certain important facts relating to the five techniques, namely that they were authorised at a high level, that they consisted in a combination of measures and caused both physical and mental suffering to the detainees subjected to them, were not contested in the original proceedings and are not in dispute now. The documents submitted in support of the applicant Government's revision request allegedly demonstrate that Dr L. misled the Commission about certain aspects of the five techniques, in particular their severe and long-term effects and the extent to which the then respondent Government

withheld information in respect of the five techniques. The applicant Government claim that the alleged new facts had an impact on the Commission's establishment of key facts in the original proceedings and by implication on the Court's legal assessment. Their argument is in essence that, had the Commission been aware of the documents now submitted, it would have assessed the evidence before it differently and would consequently have come to a different establishment of the facts regarding in particular the long-term effects of the five techniques. The Court, for its part, would have come to a different legal assessment, namely qualification of the use of the five techniques not only as a practice of inhuman and degrading treatment but as a practice of torture.

106. Where, as in the present case, documents are submitted in support of a revision request, the Court has to assess whether they provide sufficient prima facie evidence in support of the party's version of the events (see *Pardo v. France* (revision – merits), 29 April 1997, § 15 *Reports of Judgments and Decisions* 1997-III, cited above, § 15).

107. In order to make that assessment the Court will have regard to the conduct of the original proceedings before the Commission and the Court and in particular to the manner in which the facts of the case were established. It notes that the Commission established the facts having regard to illustrative cases (see § 93 of the original judgment). Two of these, Mr P.S. and Mr P.C. (referred to as T 6 and T 13 in the report of the Commission), concerned men who had been subjected to the five techniques. The Commission's delegates heard these two men as witnesses, and also Dr L. and Dr M. (referred to as Doctors 5 and 1) as well as Professors Daly and Baastians. Dr L. first gave evidence in June 1974. On that occasion he was questioned in particular about the cases of the two men and the effects the use of the five techniques had had on them. At a further hearing, in January 1975, he was questioned extensively about his professional background and experience, about the general effects of the five techniques, including whether or not they were severe and long-term. He was also questioned in relation to the amounts received by victims of the five techniques by way of settlements in domestic compensation proceedings.

(i) The documents submitted in support of the first ground for revision

108. Turning to the documents submitted by the applicant Government in support of the first ground for revision, the Court observes that they all relate to compensation proceedings which the victims of the five techniques had brought before the domestic courts in Northern Ireland at the material time.

109. Only one contains direct proof of Dr L.'s medical views on one of the men who had been subjected to the five techniques, namely his report of June 1975 on Mr S.K. (see paragraph 23 above). The Court notes, firstly,

that the report post-dates the hearings of Dr L. by the Commission which took place in June 1974 and January 1975. Secondly, the medical report relates to Mr S.K., who was not, however, one of the two illustrative cases on which Dr L. had given evidence to the Commission. Thirdly, it can be seen from the report that Mr S.K. had a serious medical pre-condition, namely angina pectoris, and that Dr L. considered that in view of that condition the five techniques should not have been applied at all. The fact that Dr L. had, some time after he had given evidence before the Commission, observed serious and long-term effects of the five techniques in the case of one man with a specific health condition does not in the Court's view suffice as prima facie evidence that the statements he made in respect of the general effects of those techniques were misleading or were made in bad faith.

110. The other documents contain counsel's advice to the respondent Government in the domestic compensation proceedings and in particular on the desirability of concluding settlements in these cases. One of these documents (see paragraph 22 above) refers to Dr L.'s views on three men, Mr S.K., Mr B.T. and Mr W.S. It transpires from this document that Dr L. had examined these men in April 1974, some two and a half years after they had been subjected to the five techniques and shortly before he was heard for the first time by the Commission in June 1974. It is true that, according to this document, Dr L. had observed serious mental effects in these men after a considerable lapse of time. Again, none of the men referred to had been among the illustrative cases, and the Court has doubts whether the document contains sufficient prima facie evidence that Dr L. gave misleading evidence on the question of whether the five techniques generally produced serious and long-term effects. It attaches importance to the indication contained in another document submitted by the applicant Government, namely that at the material time there was no consolidated scientific knowledge on this question (see paragraph 111).

111. The remaining documents (see paragraphs 24-26 above) do not refer to Dr L.'s opinions but more generally to medical opinion pertaining at the time concerning the long-term effects of the five techniques. Only one, the document "Civil actions in Northern Ireland against the Ministry of Defence: Interrogation in Depth cases" (see paragraph 24 above), bears a date, namely 5 October 1974, and can therefore be said to reflect the position of medical opinion which existed before Dr L. was heard by the Commission for the second time in January 1975. The Court notes that although the document attests to there being a growing disposition in medical opinion to acknowledge the possibility that the five techniques might produce long-term psychiatric effects, it also points out that there was no certainty at the time whether or not this was the case. It only refers to "one or two cases where the very serious psychiatric effects of the deep interrogation are likely to be sufficiently proven."

112. The last document concerns Mr P.S., one of the two illustrative cases. It refers to a considerably higher assessment of damages in the domestic proceedings on account of lasting psychiatric damage (see paragraph 26 above). The Court, apart from repeating that this document is not referring to Dr L.'s opinion, observes that the Commission and the Court were aware of the domestic proceedings and of the settlements concluded in those proceedings, including the amounts awarded in compensation (§ 107 of the original judgment). As follows from the questions put to Dr L. when he was heard by the Commission (see paragraph 12 above), the high amounts of damages awarded were regarded as an indicator of the seriousness of the effects of the five techniques.

113. In conclusion, the Court has doubts as to whether the documents submitted by the applicant Government contain sufficient prima facie evidence of the alleged new fact, namely that Dr L. misled the Commission as to the serious and long-term effects of the five techniques.

(ii) The documents submitted in support of the second ground for revision

114. Turning to the documents submitted by the applicant Government in support of the second ground for revision, the Court observes that they are all internal Government papers. Some demonstrate that the use of the five techniques constituted an administrative practice which had been authorised at ministerial level, not only at a "high level" as admitted by the respondent Government in the original proceedings (see paragraphs 29 and 43 above). Others give indications why the then respondent Government were anxious to conclude settlements in the domestic cases, namely precisely to avoid embarrassment and damage to the reputation of those who had authorised the use of the five techniques and the Government in general and also to prevent disclosure of sensitive Government papers (see paragraphs 30, 31, 33 and 38 above). Furthermore, some documents shed light on the litigation strategy adopted by the respondent Government in the original proceedings, in particular their wish to protract the proceedings (see paragraph 35 above) and the reasons for their opposition to the Commission hearing witnesses in respect of the five techniques, in particular to avoid their cross-examination (see paragraphs 36-40 above). The remaining documents may be seen as providing some further background relating to the use of the five techniques (see paragraphs 32 and 34 above) and the then United Kingdom's general attitude towards the Convention proceedings (see paragraphs 41-42 above).

115. The Court accepts that a number of documents submitted in support of the second ground demonstrate that the then Government of the United Kingdom were prepared to admit that the use of the five techniques had been authorised at "high level" to avoid any detailed inquiry into the issue and that they were opposed to the hearing of witnesses in respect of the five techniques in order to avoid exposing ministers involved. However, while

the documents shed more light on the attitude of the then respondent Government, the Court does not find that the relevant facts as such, which the applicant Government qualify as the withholding of information about the five techniques by the United Kingdom, were "unknown" to the Court at the time of the original proceedings.

116. Both the Commission and the Court were well aware of the United Kingdom's general attitude regarding the establishment of facts in respect of the five techniques. The Commission noted that it had not been able to hear oral evidence from members of the security forces and that the respondent Government had stated at the hearing of witnesses in January 1975 that they had instructed all of their witnesses not to reply to any questions regarding the five techniques (see paragraph 13 above, as regards the establishment of facts by the Commission). The Court referred to the report of the Commission, noting that it had pointed out in various places that the respondent Government had not always afforded it the assistance desirable, and went on to say that it regretted this attitude (§ 148 of the original judgment).

117. As regards the question of authorisation of the use of the five techniques, the Court noted in the original proceedings that the respondent Government had conceded from the start that the use of the five techniques had been authorised at a "high level" and that they had been taught to members of the RUC at a seminar held in April 1971 (see § 97 of the original judgment). Furthermore, the Court held that there had been a practice (see § 166 of the original judgment).

118. The Court concludes that the documents submitted in support of the second ground do not demonstrate facts that were "unknown" to the Court when the original judgment was delivered.

(c) Whether the alleged new facts were of "decisive influence"

119. Even assuming that the documents submitted in support of the first ground for revision demonstrate the facts alleged by the applicant Government, namely that Dr L. misled the Commission regarding the effects of the five techniques, the Court considers that the revision request cannot succeed for the reasons set out below.

120. The Court reiterates that in order to establish whether the facts on which a request for revision is based "might by [their] nature have a decisive influence" they have to be considered in relation to the decision of the Court whose revision is sought (see *Pardo* (*revision – admissibility*), cited above, § 22). Once this is shown, in order to revise the original judgment it must be further established that these facts actually had a decisive influence on it (ibid, §§ 21 and 24, and *Pardo* (*revision – merits*), cited above, §§ 14 and 23; see also *Gustafsson* (*revision*), cited above, § 27; *Hertzog and Others*, cited above, §§ 15 and 20-25; and *Cernescu and Manolache*, cited above, §§ 11 and 16-22).

121. In order for revision to be granted, it must be shown that there was an error of fact and there must be a causal link between the erroneously established fact and a conclusion which the Court has drawn. In other words, it must be clear from the reasoning contained in the original judgment that the Court would not have come to a specific conclusion had it been aware of the true state of facts. Typical examples are cases in which, after the judgment has become final, the Court is informed that the applicant had died while the proceedings were pending. Where there are heirs the Court revises its judgments in respect of Article 41 of the Convention and orders that the sum awarded be paid to them (see, among many others, *Tanişma v. Turkey* (revision), no. 32219/05, 27 June 2017). Where there are no relatives wishing to pursue the examination of the case, the Court, on the Government's revision request, strikes the application out of its list, considering that it is no longer justified to continue its examination (see, among others, *Eremiášová and Pechová v. the Czech Republic* (*revision*), no. 23994/04, 20 June 2013). Other examples are cases in which the Court is informed that, at the time of the delivery of the original judgment, the applicants had no longer been the owners of part of the property at issue (see *Hertzog and Others*, cited above, §§ 20-25) or had obtained restitution of their property (see *Cernescu and Manolache*, cited above, §§ 16-22) or that the applicant's inheritance title to the property had been annulled (see *Stoicescu,* cited above, §§ 55-60). Depending on the circumstances of the case, such facts are considered to be decisive for the applicant's victim status or for the award of just satisfaction. Further examples are cases in which the Court had not made an award of just satisfaction in the original judgment erroneously considering that no claim had been made, while in fact the applicant had duly submitted such a claim. Here the Court revises the judgment and makes an award under Article 41 of the Convention (see *Sabri Taş v. Turkey* (revision), no. 21179/02), §§ 6-12, 25 April 2006; see, as similar cases, *Baumann v. Austria* (revision), no. 76809/01, §§ 10-17, 9 June 2005, and *Fonyódi v. Hungary* (revision), no. 30799/04, §§ 6-9, 7 April 2009).

122. The Court reiterates that legal certainty constitutes one of the fundamental elements of the rule of law which requires, *inter alia*, that where a court has finally determined an issue, its ruling should not be called into question (see *Harkins v. the United Kingdom* (dec.) [GC], no. 71537/14, § 54, ECHR 2017). Subjecting requests for revision to strict scrutiny, the Court will only proceed to the revision of a judgment where it can be demonstrated that a particular statement or conclusion was the result of a factual error. In such a situation, the interest in correcting an evidently wrong or erroneous finding exceptionally outweighs the interest in legal certainty underlying the finality of the judgment. In contrast, where doubts remain as to whether or not a new fact actually did have a decisive influence

on the original judgment, legal certainty must prevail and the final judgment must stand.

123. The Court must therefore examine whether there is a basis in the reasoning of the original judgment that warrants the conclusion that the Court would have qualified the use of the five techniques as amounting to a practice of torture within the meaning of Article 3 had it been aware of the facts alleged by the applicant Government, assuming, as stated above, that they are sufficiently demonstrated by the documents submitted.

124. Another consideration is worth pointing out in the present case, namely the long lapse of time between the delivery of the original judgment and the submission of the revision request owing to the fact that the documents on which the revision request relies were classified for thirty years and only came to light following comprehensive research carried out in the United Kingdom's archives. During that lengthy period the Court's case-law on the notion of torture has evolved. Most notably, in *Selmouni* (cited above, § 94 and §§ 100-105), the Court, dismissing the Government's argument relying on the judgment in *Ireland v. the United Kindgom* (that is, the original judgment) that the ill-treatment inflicted on the applicant did not amount to torture, stated that "certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future". Furthermore, while the effect of the treatment on the victim was already at the time of the original judgment one of the elements to be considered in the assessment whether a given treatment amounted to ill-treatment falling within the scope of Article 3, explicit references to the relevance of long-term effects of treatment when distinguishing between torture and inhuman treatment only appear in the Court's subsequent case-law (see, for instance *Egmez,* cited above, § 78, and *Gäfgen*, cited above, § 103).

125. The Court therefore has to be careful when examining whether the alleged new facts had a decisive influence on the original judgment. Having regard both to the wording of Rule 80 and to the purpose of revision proceedings, a request for revision is not meant to allow a party to seek a review in the light of the Court's subsequent case-law (compare *Harkins,* cited above, § 56, ECHR 2017, in which the Court found that a development in its case-law could not of itself be considered as "relevant new information" for the purpose of Article 35 § 2(b) of the Convention). Consequently, the Court has to make its assessment in the light of the case-law on Article 3 of the Convention as it stood at the time.

126. As under the system in place at the time of the original proceedings it fell to the Commission to establish the relevant facts, the Court will also consider the findings of the Commission. The following elements are to be taken into account: in its report the Commission had noted that the psychiatrists disagreed considerably on the after-effects of the use of the five techniques, and the prognosis for recovery. It noted that two of them,

Professors Daly and Bastiaans, considered that "both witnesses would continue for a long time to have considerable disability shown by bouts of depression, insomnia and a generally neurotic condition resembling that found in victims of Nazi persecution." It went on to note as follows "Two others, Drs 5 and 1 [that is Dr L. and Dr M.] considered that the acute psychiatric symptoms developed by the witnesses during the interrogation had been minor and that their persistence was the result of everyday life in Northern Ireland for an ex-detainee carrying out his work travelling to different localities. In no sense could the witnesses' experiences be compared to those of the victims of Nazi persecution". The Commission found that on the basis of this evidence it was unable to establish the exact degree of the psychiatric after-effects which the use of the five techniques might have had on the witnesses or generally on persons subjected to them. It was nevertheless satisfied that some after-effects resulting from the application of the techniques could not be excluded (for the full text see paragraph 13 above under "(ii) Mental effects").

127. When expressing its opinion on the five techniques the Commission stated as follows "It is this character of the combined use of the five techniques which, in the opinion of the Commission, renders them in breach of Art. 3 of the Convention in the form not only of inhuman and degrading treatment, but also of torture within the meaning of that provision." It then went on to say "Indeed, the systematic application of the techniques for the purpose of inducing a person to give information shows a clear resemblance to those methods of systematic torture which have been know over the ages. Although the five techniques – also called 'disorientation' or 'sensory deprivation' techniques – might not necessarily cause any severe after-effects the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions" (see at paragraph 13 above, point "4. Opinion of the Commission" *in fine*).

128. The Court therefore underlines that in the Commission's view Dr L. was not the only expert who considered that the after-effects of the application of the five techniques were rather minor and did not produce long-term effects. Nonetheless, it did not exclude the possibility that they might produce some after-effects and, in any case, the uncertainty in this respect did not prevent the Commission from concluding that the use of the five techniques amounted to torture within the meaning of Article 3 of the Convention.

129. Turning to the original judgment, the Court notes that it relied on the establishment of the facts by the Commission and other documents before it (see § 93 of the original judgment in respect of ill-treatment in general, and § 104 in respect of the five techniques).

130. As to the legal assessment, the original judgment set out the general principle that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, and that the assessment of this minimum is relative, depending on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (§ 162 of the original judgment).

131. The reasoning of the original judgment as regards the application of these principles to the five techniques is rather succinct (§§ 165-68). It starts by noting that the respondent Government did not contest the Commission's opinion that the use of the five techniques constituted a practice not only of inhuman and degrading treatment but also of torture (§ 165).

132. Noting that "the five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation", the original judgment confirms the Commission's view that the use of the five techniques amounted to a practice of inhuman and degrading treatment. However, the original judgment then states that the distinction between torture and inhuman and degrading treatment derives principally from a difference in the intensity of the suffering inflicted and considers that "it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering" (§ 167).

133. The conclusion of the original judgment in respect of the five techniques reads as follows: "Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3" (§ 167 *in fine* and 168).

134. The Court observes in particular that the original judgment does not mention the issue of possible long-term effects of the use of the five techniques in its legal assessment. It is therefore difficult to argue that the original judgment attached any particular importance to the uncertainty as to their long-term effects, which pertained according to the Commission's establishment of the facts, let alone considered this to be a decisive element for coming to another conclusion than the Commission.

135. Moreover, it follows from the reasoning of the original judgment that the difference between the notions of "torture" and "inhuman and degrading treatment" is a question of degree depending on the intensity of

the suffering inflicted. Necessarily, like the assessment of whether a given treatment reaches the minimum level of severity required to bring it within the scope of Article 3, the assessment of this difference in degree must depend on a number of elements. Without an indication in the original judgment that, had it been shown that the five techniques could have severe long-term psychiatric effects, this one element would have led the Court to the conclusion that the use of the five techniques occasioned such "very serious and cruel suffering" that they had to be qualified as a practice of torture, the Court cannot conclude that the alleged new facts might have had a decisive influence on the original judgment.

3. Conclusion

136. The Court expresses doubts whether the documents submitted by the applicant Government in support of the first ground of revision contain sufficient prima facie evidence of the alleged new fact and considers that the documents submitted in support of the second ground did not demonstrate facts which were "unknown" to the Court when it delivered the original judgment.

137. Even assuming that the documents submitted in support of the first ground for revision demonstrate the fact alleged, namely that Dr L. misled the Commission as regards the effects of the five techniques, the Court considers that it cannot be said that it might have had a decisive influence on the Court's finding in the original judgment that the use of the five techniques constituted a practice of inhuman and degrading treatment in breach of Article 3 of the Convention but did not constitute a practice of torture within the meaning of that provision. The applicant Government's request for revision must therefore be dismissed.

FOR THESE REASONS, THE COURT

Dismisses, by six votes to one, the request for revision.

Done in English, and notified in writing on 20 March 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Registrar

Helena Jäderblom
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge O'Leary is annexed to this judgment.

H.J.
J.S.P.

DISSENTING OPINION OF JUDGE O'LEARY

1. Pursuant to Rule 80, the Court was requested to revise its judgment in *Ireland v. the United Kingdom* insofar as the latter found that, while use of the five techniques on persons interned in Northern Ireland in 1971 violated Article 3 of the Convention, it constituted inhuman and degrading treatment but not torture.[1]

2. The five techniques, which consisted of wall-standing, hooding, exposure to noise, sleep deprivation and deprivation of food and drink, forcibly applied over an unknown period of four to seven days for an unspecified number of hours at any given time and with probable recourse to physical violence during their application in at least some cases, are described in detail in the Commission's report, the original judgment and the majority judgment on the revision request (hereafter the "revision judgment").[2]

3. The revision request is composed of two interrelated limbs. Firstly, the new material uncovered is said to reveal that the United Kingdom had possession of material, including but not only medical reports, revealing that the five techniques could have substantial, severe and long-lasting effects on those on whom it was inflicted (the "medical evidence" limb). It is claimed that this body of evidence, which was built up contemporaneously in the domestic proceedings for damages instituted by the 14 detainees, contradicted that which had been provided to the Commission by the respondent Government and was never shared with the Commission, the Court or the applicant State. Secondly, the archive material is said to demonstrate on a more general level that, at the relevant time, the authorities of the respondent State adopted and implemented a clear policy of obstruction and non-disclosure, withholding key information from the Commission and subsequently the Court about the authorisation, teaching, implementation and effects of the five techniques (the "non-disclosure" limb).

4. For the reasons explained below, I endorse the revision judgment regarding compliance with the six-month time-limit established by Rule 80 (§§ 82-95 of the revision judgment) as well as confirmation that the revision request may seek to vary the grounds on which the original judgment found a violation of Article 3 (§§ 98-103 of the revision judgment).

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[1] Application n° 5310/71, 18 January 1978, Series A no. 25, hereafter the "original judgment".

[2] See pp. 389-402 of the Commission Report; § 96 and §§ 165-168 of the original judgment, and §§ 13-14 of the revision judgment. In the Compton Report, which was presented as evidence to the Commission, it was stated that periods totalling nine to 43.5 hours were spent at the wall in the required posture but that records for the August detainees were mostly discontinued during the course of their detention (Commission Report pp. 247-248). On the question of probable recourse to physical violence in some cases, see p. 413 of the Commission Report. In §§ 105, 169 and 170 of the original judgment, although it procured no new or additional evidence *proprio motu*, the Court found that, except in relation to one of the two illustrative cases (T 6), there was no evidence to support a finding of a breach of Article 3 over and above that resulting from use of the five techniques in relation to the other 13 men. The 14 detainees are designated by their initials in the revision judgment and, accordingly, in this separate opinion. Their names are, however, in the public domain.

5. In contrast, I respectfully disagree with the decision of the majority to reject the second limb of the revision request on the grounds that the non-disclosure limb is based on facts which were known to the Court at the time of the original judgment (§§ 114-118 of the revision judgment) and to reject the first limb in relation to the medical evidence on the grounds that the latter did not fulfil the Rule 80 "decisive influence" criterion (§§ 119-135 of the revision judgment).

6. As can be seen from §§ 132-135 of the revision judgment, the majority have based themselves almost exclusively on two paragraphs of the original judgment − §§ 167 and 168 − where the Court concluded that the five techniques constituted inhuman and degrading treatment but not torture. On the basis of an unduly narrow approach to the original judgment, the proceedings which led to it and the revision request itself, the majority consider that:

> "*Without an indication in the original judgment that*, had it been shown that the five techniques could have severe long-term psychiatric effects, *this one element* would have led the Court to the conclusion that the use of the five techniques occasioned such 'very serious and cruel suffering' that they had to be qualified as a practice of torture, the Court cannot conclude that the new facts might have had a decisive influence on the original judgment."[3]

7. In addition, although at the heart of the reasoning of the Commission and the Court, as reflected in the original judgment, was the finding of an administrative practice in relation to the treatment of 14 detainees, the majority restrict their legal analysis further by concentrating exclusively on the two detainees chosen as illustrative cases and heard by the Commission to the exclusion of new evidence in relation to the remaining cases. The thrust and extensive detail in the revision request appears to have been ignored; as have the nature and scope of the original proceedings and of the original judgment. Furthermore, the implications which this judgment might have for other interstate cases or applications in which the Court proceeds by way of illustrative or sample cases appear not to have been considered.

8. The revision request was about non-disclosure – of a specific and of a general nature − by a High Contracting Party and its alleged failure to cooperate with the Convention organs. It sought to demonstrate the purpose, nature and extent of such non-disclosure which had been alleged or suspected during the original proceedings but which had not been amenable to proof and to establish the effect on the legal reasoning of the Court, and indeed the Commission, which proof of such a policy might or would have had.

In the coming sections I seek to place the revision request in context (A.), highlight aspects of the original proceedings, Commission Report and judgment which are relevant to the request (B.), outline applicable case-law

[3] §135 of the revision judgment (emphasis added).

which was passed over in silence by the majority (C.) and briefly touch on the functioning of Rule 80 (D.). The critique of the core of the revision judgment is contained in section E. While sections A and B are case specific, sections C and E raise issues which go beyond the case of *Ireland v. the United Kingdom*.

A. Preliminary remarks

9. Some preliminary remarks are, in my view, necessary in order to properly delimit the legal questions to which the revision request gave rise and to clarify the context in which it did so.

10. Firstly, the Chamber was not called on to decide whether, were a complaint under Article 3 relating to administration of the five techniques now to arise, this Court or a national court charged with the same question would qualify that practice as one of torture. An answer to that question seems already to have been provided in different cases which have arisen before courts in the United Kingdom. Thus, in 2006, in *A. and others v. Secretary of State for the Home Department*, Lord Bingham, having cited the 1999 judgment of this Court in *Selmouni*, stated:

> "It may well be that the conduct complained of in *Ireland v. the United Kingdom* [...] would now be held to fall within the definition in Article 1 of the Torture Convention."[4]

More recently, in 2017, in *McKenna*, *re judicial review* − proceedings brought in Northern Ireland by some of the 14 detainees subject to the five techniques in 1971 or by their surviving family members, referred to in § 18 of the revision judgment − McGuire J. stated as follows:

> "[...] it seems likely to the [High Court of Justice in Northern Ireland] that if the events here at issue were to be replicated today the outcome would probably be that *the ECtHR would accept the description of torture in respect of these events as accurate. [...] These points support a conclusion that the sort of activity with which this case is concerned has a larger dimension than an ordinary criminal offence and would amount to the negation of the very foundations of the Convention*."5

Moreover, that an administrative practice consisting of the forcible application of the five techniques would now be recognised by the Court as constituting torture seems to be the inference which the majority wishes the reader to draw from § 124 of the revision judgment, where reference is also made to *Selmouni* and to the Court's evolving case-law on torture. It was not for the Court in the present case to apply retrospectively Article 3 case-law on what is now considered to constitute torture. A request for

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[4] See *A and others* (no. 2) [2006] 2 AC 221, § 53, citing § 101 of *Selmouni v. France* [GC], n° 25803/94, 28 July 1999.

[5] *McKenna, re judicial review* [2017] *NIQB* 96, §§ 252-254 (emphasis added), citing both *A and others* and *Selmouni*. On 6th February 2018, when the present case was deliberated, no information was forthcoming regarding whether the High Court judgment in *McKenna* would be appealed.

revision is not a means for a party to seek a review of an original judgment in the light of the Court's subsequent case-law nor, as the respondent Government rightly pointed out, a form of appeal.[6]

11. Nevertheless, the Chamber could and should have had recourse to cases relating to Article 3 which had already been examined by the Commission and the Court by 1978, not least interstate applications (see further §§ 38-40 below). Yet this case-law was ignored. Given the nature of the revision request, it should also have referred to Convention articles and established case-law on the duty of Contracting Parties to cooperate with the Convention institutions and on the respective roles of those institutions at the relevant time as regards the establishment of facts (see further §§ 41-49 below).

12. Secondly, when balancing respect for legal certainty with the public interest in the revision of erroneous judgments a forty year time lapse between the original and revision judgments might seem to tip the scales firmly in favour of the former. However, the "thirty years rule" meant the new evidence relied on was only ever going to be accessible many years after the original judgment, following declassification.[7]

The task which confronted the Chamber in the present case was to assess whether the admittedly strict procedural and substantive conditions which flow from Rule 80 had been met in this case, while keeping in mind the Court's overall task pursuant to Article 19 of the Convention, namely to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. It will be remembered that, when deciding in the original judgment to re-examine the uncontested finding of torture, the Court attached considerable importance to this latter responsibility assigned to it under the Convention system.[8]

13. Thirdly, there may be a temptation to view the revision request as two Council of Europe Member States pitted against each other 40 to 47 years after the fact. However, this would be to lose sight of the fact that the system of international protection in the Convention is founded upon the concept of a "collective guarantee" of the rights and freedoms contained in it. An interstate case is:

> "not the exercise of a right of action to enforce the applicant state's rights *but an action against an alleged violation of the public order of Europe*."[9]

This was recognised by both Governments in the original proceedings, both of which regarded the case as one of "importance and lasting

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[6] See § 125 of the revision judgment and the reference to *Harkins v. the United Kingdom* (dec.) [GC] n° 71537/14, § 56, ECHR 2017.
[7] § 94 of the revision judgment.
[8] §§ 154-155 of the original judgment.
[9] *Austria v. Italy*, no. 788/60, admissibility decision of 11 January 1961. See also *Cyprus v. Turkey* [GC], n° 25781/94, 10 May 2001, § 78 on the Convention "as an instrument of European public order".

influence".[10] A request to revise an inter-state judgment of this nature should have been viewed in the same light. Whatever the political context, past or present, the Court's response had to be both solid and juridical as its reasoning may have consequences beyond the original case here at issue and beyond requests under Rule 80.

Furthermore, given the close ties which bind the peoples of the United Kingdom and Ireland – the geographic, historic, linguistic, economic, political and family ties whose strength, depth and complexity only those who live on the two islands can perhaps fully appreciate – it is safe to presume that the decision to introduce the present request was not one taken lightly. The mutual cooperation and respect which both applicant and respondent States have striven for in recent years and which has been evident in their cooperation during the course of the revision proceedings and, more importantly, in the peace and reconciliation process at the heart of the Good Friday Agreement, should not go unmentioned.

14. In brief, although the case is, by its nature, a difficult one, the legal questions before the Court were relatively simple. On the one hand, did the applicant Government put forward, in a timely manner, new facts unknown to them, to the Commission and to the Court at the relevant time. On the other hand, had those facts been known at that time, might or would they have had a decisive influence on the Court's finding in its original judgment. The judges were being asked to put themselves in the shoes of their judicial predecessors. Looking at the original proceedings as a whole, the Commission's Report and the Court's method and reasoning, all of which *led* to the conclusion in §§ 167 and 168 of the original judgment, might or would a majority of the Court have confirmed the Commission's unanimous decision and found a practice of torture had they known what the Court knows today?

B. The original proceedings and the original judgment

15. In a revision procedure, in order to establish whether the new facts submitted by an applicant party disclose "facts which might by their nature have a decisive influence" those facts have to be considered in relation to the original judgment whose revision is sought. Procedure, reasoning and conclusions must all be examined. This is the methodology outlined in the *Pardo* revision case, to which the majority refers, and applied in numerous others.[11]

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[10] See the submissions of the United Kingdom Government, reproduced in the Commission Report, p. 339. See also the submissions of the Irish Government, Transcript of proceedings on 14 March 1975, p. 131: "[…] long after the tragic events which the people of Northern Ireland are now experiencing will have come to an end, this case will be read and studied. Its influence will be immense and lasting [and] will set standards, not just in relation to the five techniques, but also in relation to the behaviour of security forces […]".

[11] See, *inter alia*, *Pardo v. France* (revision – admissibility), n° 13416/87, 10 July 1996, § 22, Reports of Judgments and Decisions 1996-111; *Gustafsson v. Sweden* (revision - merits), n° 15573/89, 30 July 1998, § 27, Reports 1998-V (which connects the Court's reasoning and its conclusions); *Stoicescu v. Romania* (revision),

16. Extracts from the Commission Report and the original judgment are reproduced in the revision judgment. However, were *Pardo* to have really been applied, the "scene-setting" paragraphs of the revision judgment (§§ 14-16) should have highlighted several important elements of the original judgment which should in turn have fed into the reasoning of the majority on revision.

1. Time-line of the original proceedings

17. It is necessary to restate the time-line of the original proceedings given the reasoning in parts of the revision judgment.[12]

18. Those proceedings commenced on 16 December 1971 when the applicant Government lodged its application with the Commission; deemed partially admissible on 1 October 1972. The proceedings before the Commission involved written and oral submissions from the two States Parties, as well as the taking of evidence at a series of hearings held in Strasbourg, Sola Air Base in Norway and London.[13] In the Report transmitted to the Committee of Ministers on 9 February 1976, the Commission found, unanimously, that administration of the five techniques constituted torture in breach of Article 3 of the Convention.[14] The then respondent Government did not contest this decision or the findings of fact on which it was based.[15]

19. The applicant Government lodged its application with the Court on 10 March 1976. Written memorials were lodged with the Court between 2 August 1976 and 15 December 1976.[16] A first set of oral hearings was held on 7-9 February 1977. By order of 11 February 1977, the Court decided that it had jurisdiction to pronounce on the uncontested Article 3 violation and stated "the Court considers that it is already in possession of sufficient information and materials to enable it to make such a pronouncement".[17] The second set of Court hearings was held from 19-22 April 1977. On 18 January 1978, the Court found, by 13 votes to 4,

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n° 31551/96, 21 September 2004, § 38 (which explicitly refers to the relevance of procedure); *Hertzog and others v. Romania* (revision), n° 34011/02, 14 April 2009, § 15 and *Cernescu and Manolache v. Romania* (revision), n° 28607/04, 30 November 2010, § 11.

[12] See, for example, §§ 109 – 113 of the revision judgment, where the majority concede the *prima facie* relevance of the new facts submitted under the medical evidence limb while undermining this finding through the expression of a series of "doubts". The unfounded nature of the latter is discussed further below.

[13] See pp. 5-6 of the Commission Report.

[14] See, in particular, pp. 398-399 of the Commission's Report.

[15] See §§ 147 and 152 of the original judgment. See further *Ireland v. the United Kingdom*, Series B: Pleadings, Oral Arguments and documents, no. 23-11, at p.345, where the respondent Government recognised: «the full gravity of the adverse conclusions of the Commission under Article 3. We have chosen not to put those conclusions in issue before the Court either as regards the 'five techniques' or as regards the adverse conclusions under Article 3. We fully accept their value and importance in setting the international standards of acceptable conduct required by Article 3 of the Convention». This fact, combined with the undertaking not to reintroduce the five techniques, led the United Kingdom to argue that questions relating to the five techniques were moot (§ 152 of the original judgment).

[16] § 6 of the original judgment.

[17] § 8 of the original judgment.

that use of the five techniques constituted inhuman treatment in breach of Article 3 but not torture.[18] The original proceedings thus lasted from December 1971 until January 1978.

2. Obtainment and assessment of evidence and establishment of facts

20. The procedure followed for the purposes of ascertaining the facts was one decided by the Commission and accepted by the parties. The choice of illustrative cases was for the purposes of procedural economy.[19] In relation to the Article 3 complaint which is the subject of the revision request, the applicant Government had referred to the Commission eight cases of persons subjected to the five techniques at the unidentified interrogation centre in August 1971 and a further case – it would appear to be that of T 22 – subject to them in October 1971.[20] The Commission examined the cases of T 6 and T 13 as "illustrative" cases, heard those two detainees and based itself on specific medical reports in their regard.[21] However, it also received written observations and evidence from the two Governments, their oral submissions and, in relation to the Article 3 complaints one hundred witnesses were heard. Medical evidence of both a specific and a general nature was provided.[22]

21. Although the respondent Government initially contested the existence of an administrative practice, they later conceded this point but relied on this concession to contend that how the practice had arisen was not important.[23] The level of authorisation was never disclosed.

22. At the evidential hearings before the Commission there was a stark conflict between the evidence adduced by the applicant and respondent Governments regarding the *effects* of the five techniques.[24] Two of the

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[18] Ibid., §§ 160-168 and operative parts 3 and 4. See also § 56 of the judgment in *McKenna*, cited above.

[19] Commission Report, pp. 224-225. See also the Commission Report in *Cyprus v. Turkey*, n° 6780/74 and 6950/75, 10 July 1976, § 77; §§ 111 and 339 of the judgment in *Cyprus v. Turkey*, n° 25781/94, where it was stated that resort to illustrative cases was justified by time constraints and the Commission's assessment of the relevance of additional witness testimony, and later *Georgia v. Russia* n° 1 [GC], n° 13255/07, 3 July 2014, § 128.

[20] § 103 of the original judgment. The case of T 22 was examined in conjunction with a group referred to as the "41 cases" – see § 106 of the original judgment, where it is indicated that the Commission found in relation to T 22 that there was a strong indication that the course of events was similar to that found in the illustrative case(s).

[21] T 6 (referred to in the revision judgment as Mr. P.S), and T 13 (referred to as Mr. P.C) gave evidence to the Commission on 26-27 and 27 November 1973. At p. 232 of the Commission Report it is indicated that 13 witnesses relating to the 8 illustrative cases referred by the applicant Government were heard and that two doctors gave evidence in relation to 6 of those cases. On p. 242 of the Report it is explained that the Commission heard evidence in one additional illustrative case – choosing a substitute case proposed by the applicant Government – but it decided not to hear oral evidence in further illustrative cases.

[22] §§ 146 and 161 of the original judgment and §§ 11-13 and § 107 of the revision judgment.

[23] See the Commission Report, p.275, and the respondent Government's Attorney General: "How that administrative practice may have arisen is not a matter which is of any importance so far as these proceedings are concerned. […] The questions of official tolerance, of orders and so on, would be material if we made no such concession."

[24] Medical evidence was provided by Professor Daly, a professor of psychiatry and Clinical Director of the Southern Health Board Psychiatric Service, who had worked with the Royal Air Force and Professor Bastiaans, a professor of psychiatry at the University of Leiden, who had treated Nazi death camp survivors, who were called by the applicant Government. Dr. L. was the only expert witness employed by the respondent Government. He

experts called on behalf of the applicant Government gave evidence that the effects were likely to be substantial, severe and long-term. Dr. L., on behalf of the respondent Government, testified that although the internees had suffered acute psychiatric symptoms *during* the interrogation, the psychiatric effects of the five techniques were minor and short-term; diminishing and not severe.[25] The verbatim report of the hearings before the Commission reveal, in addition, that Dr. L. stated that there was no good evidence as to whether the five techniques would in fact cause long-term effects, that in his view they would probably not, but that his view about the long-term effects was no more than an informed guess as he had not been given access to information about how the five techniques had actually been administered. Properly administered, the five techniques should not, in the view of Dr. L., have produced lasting damage.[26] When questioned about the quantum of damages settled in the context of the domestic proceedings involving the 14 detainees, he denied that the sums in question bore out the view of the other expert witnesses in terms of the nature and effects of the five techniques. Further, questioned by one of the Commission delegates about whether the recommendation to the Crown in those civil cases was the same as that to the Commission, Dr. L. replied:

> "Yes, exactly the same as here. These reports are the ones that are sent to the Crown."[27]

23. It would appear from the verbatim record and transcript of the Commission hearings that the medical experts called by both sides had not examined all the detainees subject to the five techniques. Dr. O'Malley had examined only two of them and he had done so in the immediate aftermath of the interrogation. Dr. L., in contrast, examined more, but not all, of the 14 men and his examinations took place at different intervals over a much longer period of time.[28]

24. The Commission found that the expert psychiatric evidence «disagreed considerably» on the after-effects of the five techniques and the prognosis for recovery.[29] Where the allegations of ill-treatment were in

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was a consultant psychiatrist to the British army and was questioned by the Commission on 15 June 1974 and 18 January 1975. He also acted as medico-legal expert for the defence in the civil cases brought at domestic level. A consultant psychiatrist and neurologist called by the Commission, Dr. O'Malley, had examined two of the internees (Mr. P.C. and Mr. P.S.) in Crumlin Road prison when they were released in August 1971 and he examined Mr. P.S. a second time in August 1972.

[25] See, in particular, pp. 398-402 of the Commission Report.

[26] In *McKenna*, cited above, the taking of evidence in the original proceedings is described in the following terms: "The overall issues were subjected to careful consideration and evidence taking, albeit on a limited scale. Ultimately, the UK Government conceded the administrative practice point but the issue of the impact of deep interrogation on the mental health of the individual who was the subject of it was contested".

[27] Transcript 12-15 June 1974, at p. 438.

[28] In the material submitted in the context of the revision proceedings reference is made to medical examinations of Messrs. S.K., B.T. and W.S.

[29] Commission Report, p. 398.

dispute, the Commission thus treated as "the most important objective evidence" the medical findings which were not contested as such.[30]

25. After the case was referred, the Court explained its approach to evidence as follows:

> "[the Court] examines the material before it, whether originating from the Commission, the Parties or other sources and, if necessary, obtains material *proprio motu*".[31]

26. In places the Court overturned the Commission's findings of fact, without taking new evidence and without explaining on what basis it did so.[32] Where questions arose relating to evidence of individual violations of Article 3 or a practice violating that article in other interrogation centres such as Girdwood Park or Ballykinler, the Court indicated as follows:

> "The Court would be empowered to obtain, if necessary *proprio motu*, additional evidence (Rule 38 of the Rules of Court). However, such a course would oblige the Court to select a series of further 'illustrative' cases and to hear a substantial number of further witnesses, *failing which it might as well, as the delegates of the Commission emphasised, arrive at extremely tenuous conclusions*. It is not essential to re-open the investigation in this way in the present case. ... the findings made in connection with the five techniques [...] henceforth embodied in a binding judgment of the Court, provide a far from negligible guarantee against a return to the serious errors of former times. In these circumstances, *the interests protected by the Convention do not compel the Court to undertake lengthy researches that would delay the Court's decision*."[33]

27. In § 105 of the revision judgment it is stated that:

> "*Certain important facts* relating to the five techniques, namely that they were authorised at a high level, that they consisted in a combination of measures and caused both physical and mental suffering to the detainees subjected to them, were not contested in the original proceedings and are not in dispute now."

What the revision judgment does not highlight, however, are other important facts relating to the five techniques which the Commission had emphasised were lacking due to what it described as an "embargo" on evidence imposed by the respondent party[34]: for example, it was known that the techniques were taught orally at a seminar organised by the English intelligence centre in April 1971 but they were never committed to writing or authorised in any official document; no evidence was forthcoming on how they were administered; the detainees were brought to an undisclosed location or locations; the interrogation records were not made available to the Commission or the Court; the Commission delegates were not able to hear oral evidence from members of the security forces in relation to the allegations concerning the interrogation centres; witnesses present at those centres were not made available; those witnesses for the respondent

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[30] See § 93 of the original judgment.
[31] § 161 of the original judgment.
[32] Contrast the approach in *Cyprus v. Turkey* (judgment).
[33] § 184 of the original judgment.
[34] See variously pp. 107 et seq., pp. 153 et seq. and pp. 396-398 of the Commission Report.

Government heard at Sola were instructed not to reply to any questions regarding the five techniques and their use; the instruction to security force witnesses not to answer questions on the use of the five techniques was justified in terms of the need to protect their safety; while the respondent Government conceded the practice had been authorised at a "high level", it did not disclose at what level and by whom; when the political witnesses called by the respondent Government (principal advisers to that government) were interviewed in London by Commission delegates on 20 February 1975, the representatives of the parties were not allowed to cross-examine them and were instead obliged to leave the room.[35] The material available to the Commission and the Court at the relevant time was determined by the above.

3. Duty to cooperate

28. In the original proceedings, the applicant Government maintained that the respondent Government had failed on several occasions in their duty to furnish the necessary facilities for the effective conduct of the investigation. In relation, for example, to the evidence submitted to the Commission on the subject of the five techniques and that compiled in the context of domestic proceedings for damages introduced by the 14 detainees, it stated:

> "In cases where proceedings had been instituted against the respondent Government, the facts must have been investigated and evidence obtained. Nevertheless, this evidence had not been made available to the Commission."[36]

29. The Court noted that it was not being asked to give a separate ruling on this issue, observed that the Commission had also indicated a lack of desirable assistance from the respondent Government but simply stated:

> "The Court *regrets this attitude* [...]; it must stress the fundamental importance of the principle, enshrined in Article 28, sub-paragraph (a) *in fine*, that the Contracting States have a duty to cooperate with the Convention institutions."[37]

30. Crucially, however, the question of the conduct of the parties re-emerged in the specific context of the standard of proof to be applied and the evidence on which to base the decision whether there had been a violation of Article 3 and, if so, what type of violation. The applicant Government had argued that the Commission standard – beyond reasonable doubt – could or would prove excessively rigid in the context of the proceedings in the particular case. In their view, the system of Convention enforcement would prove ineffectual if, where there is a *prima facie* case of violation of Article 3, the risk of a finding of such a violation was not borne

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[35] See variously pp. 117-122 and p. 275 of the Commission Report; §§ 97 and 146 of the original judgment.
[36] Commission Report, pp. 333-334.
[37] § 148 of the original judgment (emphasis added).

by a State which fails in its obligation to assist the Commission in establishing the truth.[38] The Court confirmed the Commission standard as the correct one for assessing the evidence but added the following important caveat at § 161 of the original judgment:

> "[S]uch proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similarly unrebutted presumptions of fact. *In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.*"[39]

C. Revision requests

31. Pursuant to Rule 80, the relevant criteria for the examination of a revision request are as follows:

- Discovery of a fact which might by its nature have a decisive influence.[40]
- That fact was unknown to the Court at the time of the original judgment.
- That fact could not reasonably have been known to the applicant Government at that time.
- The applicant Government must request the Court to revise the original judgment within a period of six months after it acquired knowledge of the fact.

32. The Court has consistently held that inasmuch as revision calls into question the final character of judgments, the possibility for revision, which is not provided in the Convention but was introduced in the Rules of Court, is an exceptional procedure.[41]

33. The type of cases in which the Court has thus far received revision requests are outlined in §§ 91-93, 100, 120-121 of the revision judgment.

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[38] See § 161 of the original judgment.

[39] *Idem* (emphasis added). On conduct and inferences see the minority judges: Evrigenis - "The evidence which, despite a wall of absolute silence put up by the respondent Government, the Commission was able to gather about the short- or long-term psychiatric effects which the practice in question caused to the victims (…) confirms this conclusion (of torture)"; Matscher, who commented that, the respondent Government had been very unforthcoming during the enquiry such that "an unfettered assessment of the evidence does not operate in their favour"; Zekia, who noted that withholding of evidence and a non-cooperative attitude by a respondent State no doubt might cause the Commission to draw adverse inferences, and reference to the sad lack of cooperation shown by the respondent Government to the Commission and its delegates observed by O'Donoghue, who also noted, with regret, that there was "nothing even approaching disapproval by the Court at the non-cooperative attitude of the respondent Government".

[40] While Rule 80 refers explicitly to "a fact which *might by its nature have a decisive influence*", when the substance of the request is being examined the Court has decided that it "will examine whether the evidence adduced by the applicant in the revision proceedings *would actually have had a decisive influence* on the judgment". See, for example, the *Pardo* judgments, § 10 (admissibility) and § 23 (merits) (emphasis added), or *Gustafsson* (revision – merits), §§ 27 and 32). Between §§ 120, 123, 125 and 135 of the revision judgment, the majority waiver between "would" and "might".

[41] § 78 of the revision judgment. While *Pardo* (revision - admissibility), § 21, concentrated on strict scrutiny as regards admissibility, an approach reflected in the context in which Rule 80 is relied on in the Grand Chamber's recent decision in *Harkins*, §§ 53-54, *Gustafsson* (revision – merits), § 25, extended strict scrutiny to admissibility and merits.

The present case, which did not lend itself to a formalistic application of this largely inapposite case-law,[42] has several distinctive features.

34. Firstly, knowledge of the facts on which the revision request was based only having been acquired in 2014, re-composition of the Plenary which had handed down the original judgment, as envisaged by Rule 80 § 3, was not possible.

35. Secondly, the revision request was not seeking to rely on "a fact". It relied instead on a series of facts, documents, medical reports and inter-ministerial statements and comments. The revision judgment found, unanimously, that the 6-month time-limit was complied with in the present case precisely because a body of sufficient and obtainable evidence had to be built up over time.[43]

36. Thirdly, the case was not standard revision fare. It sought to revise the original judgment in the first interstate application which proceeded to judgment stage. Interstate applications are rare and sensitive. Rule 80 has never been applied to a case such as this because this situation has never procedurally presented itself. The fact that there was no precedent in which the Court, on foot of a revision request, varied the grounds on which a violation of the Convention had been found, was no reason, contrary to the position of the respondent Government, to exclude that possibility.[44]

D. Relevant general principles derived from the Court's case-law

37. It is striking to what extent the revision judgment largely ignores or avoids case-law of relevance to the key legal questions before it.

1. On the notion of an administrative practice

38. Central to the original proceedings, the original judgment and the standard and means of proof applied was the fact that recourse to the five techniques was found to constitute an administrative practice. The latter has two components – repetition of the impugned acts and official tolerance. The first component was defined by the Court in *Ireland v. the United Kingdom*, applying the previous Commission decision in the *Greek case*, as:

> "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[45]

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[42] For a sense of why see Judge Maruste, dissenting in *McGinley and Egan v. the United Kingdom* (revision) (nos. 21825/93 and 23414/94, judgment of 28 January 2000): "allowance must always be made for exceptions on a case-by-case basis (…), the more so where the application of a procedural rule may jeopardise the exercise of a substantive right".

[43] See §§ 82-95 of the revision judgment.

[44] See §§ 98-103 of the revision judgment.

[45] § 159 of the original judgment and, previously, the *Greek* case [no. 3321/67, D*enmark v. Greece*; no. 3322/67, *Norway v. Greece*; no. 3323/67, *Sweden v. Greece*; no. 3344 *Netherlands v. Greece*] (Report of 18 November

39. As regards the second component, official tolerance, the Commission and Court had made clear that though acts of torture and ill-treatment are illegal, they may be tolerated by the superiors of those immediately responsible who may be cognisant of the impugned acts but may take no action or by the higher authorities of the State who are not entitled to claim a lack of awareness of the existence of such a practice.[46]

40. Where the acts complained of are found to constitute an administrative practice, there are procedural and substantive consequences. Firstly, exhaustion rules are suspended as the Commission or the Court are not being asked to give a decision on each of the cases put forward as proof or illustration of that practice. Evidence in relation to those cases is viewed, however, as part of an overall assessment.[47] Secondly, from a substantive point of view, the level of authorisation of the practice is considered central to the assessment of any violation and its seriousness.[48] The higher the body authorising or tolerating the acts, the more serious the violation.

2. On the respective roles of the Commission and the Court regarding fact-finding

41. Under the Convention system prior to 1 November 1998, pursuant to Articles 28 § 1 and 31, the establishment and verification of the facts were primarily a matter for the Commission, in the light of all the material before it. While the Court held that it was not bound by the Commission's findings of fact and it remained free to make its own appreciation in the light of all the material before it, it was only in exceptional circumstances that it would exercise its powers in this area. Such exceptional circumstances might arise in particular if the Court, following a careful examination of the evidence on which the Commission had based its conclusion, found that the facts had not been proved beyond reasonable doubt.[49] In this connection, citing *Ireland v. the United Kingdom*, the Court has often added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences.[50] It has also stressed that it is acutely aware of its own

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1969) 12 Yearbook 186], § 28. See, soon after, *France, Norway, Denmark, Sweden and the Netherlands v. Turkey*, n° 9940-9944/82, Commission decision of 6 December 1983, § 19, or, more recently, *Georgia v. Russia* n° 1, § 123.

[46] § 159 of the original judgment; pp. 384-387 of the Commission Report. Once again, see also § 29 of the Report in the *Greek* case.

[47] § 159 of the original judgment; later relied on in, for example, *France, Norway, Denmark, Sweden, Netherlands v. Turkey*, n[os] 9940-9944/82, admissibility decision of the Commission of 6 December 1983, § 22. See also the judgments in *Cyprus v. Turkey*, § 115 or *Georgia v. Russia n° 1*, § 125.

[48] Commission Report, p. 385.

[49] See *Stocké v. Germany*, n° 11755/85, 19 March 1991, § 53; *Cruz Varas and others v. Sweden*, judgment of 20 March 1991, Series A no. 201, p. 29, § 74; *Kraska v. Switzerland*, judgment of 19 April 1993, Series A n° 254-B, § 22, or *Aydin v. Turkey*, n° 23178/94, 25 September 1997, §§ 70-73.

[50] See *Aydın v. Turkey*, judgment of 25 September 1997, Reports 1997-VI, pp. 1888–89, § 73. See also the detailed reasons provided by the Court to explain on other occasions why it would not overturn the Commission's decision and the circumstances which led it to conclude that the establishment of the facts by the Commission was based on the appropriate evidentiary requirement: *Mente and others v. Turkey*, n° 23186/94, 28 November 1997, §§ 66-69;

shortcomings as a first-instance tribunal of fact, particularly when faced with factual accounts of events which are contradictory and conflicting, where it lacked detailed and direct familiarity with the conditions pertaining, where witnesses failed to appear or to give evidence when they did and where a detailed investigation at domestic level is lacking.[51]

3. On the relevance of the duty to disclose generally, in revision and in interstate cases

42. Having stressed the fundamental importance of the duty on Contracting States, pursuant to Article 28 of the Convention (now Article 38) to cooperate with the Convention institutions, the Court emphasised in the original judgment that "the conduct of the Parties when evidence is being obtained has to be taken into account".[52]

43. While the revision request could not be determined with reference to evolving case-law on the notion of torture (see paragraph 11 above), the duty on States parties to cooperate with the Court and to disclose relevant evidence, enshrined in the Convention itself, was well-established when the first interstate judgment was handed down. The Rules of Court, which now detail the duty to cooperate fully, merely codify what already applied in 1976-1978, as the original judgment in *Ireland v. the United Kingdom* testifies.[53]

44. In the context of Article 3 complaints by detainees, numerous examples of the inferences drawn by the Court from the conduct of respondent States when evidence is being obtained and their failure to disclose or cooperate are available. *Ireland v. the United Kingdom* is consistently cited in support of this "inferences to be drawn"/"conduct of the parties" standard.[54] Take for example *Timurtas v. Turkey*:

> "[...] the Court would emphasise that Convention proceedings do not in all cases lend themselves to rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation). [...] States should furnish all necessary facilities to make possible a proper and effective examination of applications [...]. It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may

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Selçuk and Asker, n° 23184/89, 24 April 1998, Reports 1998-II, §§ 53-57 or *Kurt*, n° 24276/94, 25 May 1998, Reports 1998-III, §§ 94-99.

[51] See, for example, *Denizci and others v. Cyprus*, n[os] 25316-25321/94 and 27202/95, 23 May 2001, § 315 *et seq.*

[52] § 161 of the original judgment.

[53] See Rules 44A, 44B and 44C. See also, prior to *Ireland v. the United Kingdom*, Part V of the Commission Report in the *Greek* case, p. 503.

[54] Hudoc research indicates this "inferences" paragraph appears in 1 Ukrainian case, 12 Turkish cases and 152 Russian cases. See also, at the relevant time, the Commission Report on the *Greek case*, § 34, where it took into account the respondent Government's refusal to give the Commission delegates access to individuals who might have given direct evidence of torture or ill-treatment and *Artico v. Italy*, n° 6694/74, 13 May 1980, Series A. no. 37, §§ 29-30. See subsequently, *Tanrikulu v. Turkey* [GC], no. 23763/94, 8 July 1999, §§ 69-70.

> not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (former Article 28 § 1 (a)), but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect, the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161)."[55]

45. In *Ahmet Ozkan and others v. Turkey* the Court made clear that States must produce all relevant evidence and not just documents whose existence is known to the Court and the Commission such that they can be explicitly requested:

> "It is true that it cannot be said that the Government failed to react with the required diligence in submitting documents once they were explicitly identified and requested by the Commission. However, the Court also considers that *the Government's passive attitude in producing documents which were in their possession and which were unquestionably of fundamental importance for elucidating disputed facts, and the Government's failure to submit these documents of their own motion* at a much earlier stage in the proceedings, was at best very unhelpful."[56]

46. The reason why a duty of disclosure is so important in Article 3 cases relating to detainees and allegations of torture or ill-treatment had already been explained in the *Greek case* and was reiterated by the Commission in *Ireland v. the United Kingdom*. According to the Commission in the former case, "since torture and ill-treatment are alleged to occur in places under the control of the police or military authorities, evidence tending to show the truth or falsity of such allegations lies peculiarly within the knowledge or control of these authorities". Furthermore, any "judicial remedies prescribed would tend to be rendered ineffective by the difficulty of securing probative evidence and administrative inquiries would either not be instituted or, if they were, would likely to be half-hearted and incomplete".[57]

What has always been key is whether the refusal to provide information at all, completely or on time prevented the Convention institutions from examining the case or precluded the establishment of the facts.[58] If the information concerns the very core of the case the Court has expected sufficient explanations for the failure to disclose it.[59] The disclosure of

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[55] N° 23531/94, ECHR 2000-VI, § 66. See also *Akkum and others v. Turkey*, n° 21894/93, 24 March 2005, § 211; *Khadisov and Tsechoyev v. Russia*, n° 21519/02, 5 February 2009, §§ 176-177; *Shakhgiriyeva and others v. Russia*, n° 27251/03, 8 January 2009, § 134; *Medova v. Russia*, n° 25385/04, 15 January 2009, § 76; *Utsayeva and others v. Russia*, no. 29133/03, 29 May 2008, § 149, or *Lisnyy and others v. Ukraine and Russia*, n° 5355/15, 5 July 2016, §§ 25-26.

[56] *Ahmet Ozkan and others v. Turkey*, no. 21689/93, 6 April 2004, § 481 (emphasis added). The Court found substantive violations of Articles 2 and 3 but not a separate violation of Article 38 in the circumstances of that case.

[57] §§ 25-26 and 31 of the Commission's Report in the *Greek* cases. See also pp. 384-388 of the Commission Report.

[58] See, for example, *Karov v. Bulgaria*, n° 45964/99, 16 November 2006, § 97 and *Giuliani and Gaggio v. Italy* [GC], n° 23458/02, 24 March 2011, §§ 341-344.

[59] See, for example, *Hadrabova v. Czech Republic*, n° 42165/02 and n° 466/03, 25 September 2007, where this question was examined in the context of abuse of the right to individual petition.

medical evidence regarding the physical and mental condition of detainees has regularly been at issue.[60] The point is that the proper functioning of the Court, or the proper conduct of the proceedings before it, must not be impeded and the Court must be in a position to rule on the matter in full knowledge of the facts.[61]

47. The consequences of non-disclosure have also been central in many of the revision requests which the Court has accepted. In *Pennino v. Italy*, for example, cited in § 92 of the revision judgment, the Court made clear that "parties are obliged to bring to the attention of the Court all relevant facts which have been produced in the domestic legal context, in particular where those facts are decisive for the outcome of the case".[62] *Gardean and S.C. Grup*, *Cernescu and Manolache* and *Hertzog* are examples of the same.[63]

48. The duties to disclose and cooperate have been no less relevant in inter-state cases, both before and after the original judgment.[64] In *Georgia v. Russia*, the Court reiterated the standard of proof "beyond reasonable doubt" laid down in interstate cases, explicitly relying on *Ireland v. the United Kingdom*, and explained:

> "it has never been [the Court's] purpose to borrow the approach of the national legal systems that use that standard in criminal cases. The Court's role is to rule not on guilt under criminal law or on civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the High Contracting Parties of their engagements to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake."[65]

It then reiterated that in cases in which there are conflicting accounts of the events, the Court is inevitably confronted when establishing the facts

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[60] See, for example, *Taş v. Turkey*, no. 24396/94, 14 November 2000, § 54; *Orhan v. Turkey*, no. 25656/94, 18 June 2002, §§ 266-275; *Süheyla Aydin v. Turkey,*no. 25660/94, 24 May 2005, § 143; *Trubnikov v. Russia*, n° 49790/99, 5 July 2005, §§ 50-52 and 57; *Nevmerzhitsky v. Ukraine*, n° 54825/00, ECHR 2005-II (extracts), §§ 76-77, where the respondent State had refused to provide "detailed information and to comment on the conditions of the applicant's detention in the isolation cell and his general conditions of detention, his medical treatment and the medical assistance provided to him".

[61] See, for a recent example, with multiple references, *Albertina Carvalho v. Portugal*, n° 23603/14, 4 July 2017, §§ 27-33.

[62] *Pennino v. Italy* (revision), n° 43892/04, 8 July 2014, § 19.

[63] *Gardean*, §§ 11, 15, 18 and 20; *Cernescu and Manolache*, §§ 7, 11 and 13 and *Hertzog*, §§ 11, 15 and 17.

[64] See, for example, the *Greek* case, Annex VII and p. 197, § 34 of the Report; and *Cyprus v. Turkey*, n° 8007/77, Commission Report 4 October 1983, pp. 11 et seq.

[65] § 94, *Georgia v. Russia* n° 1.

with the same difficulties as those faced by any first-instance court. When the respondent Government have exclusive access to information capable of corroborating or refuting the applicant Government's allegations, lack of co-operation by the former without a satisfactory explanation may give rise to the drawing of inferences as to the well-founded nature of the applicant Government's allegations. Where a failure to disclose is established, a strong presumption works in favour of the applicant Government, particularly when findings or inferences of fact are the result of investigations which are serious, consistent and corroborated by other sources.[66] While the cases just referred to post-date the original judgment, all reflect the principle of effective cooperation enshrined in the Convention in Article 38, previously Article 28. Respect for that principle is considered intrinsic to the effective operation of applications under Articles 33 and 34, previously Articles 24 and 25.

49. Did the duty to disclose relevant and available information and cooperate with the Convention institutions in the gathering of evidence and the establishment of facts cease because the respondent State did not contest the Commission finding of torture? The revision judgment appears to be at least partly premised on this idea. However, the Court made clear that it had jurisdiction to reopen the uncontested findings. As such, the United Kingdom's no contest cannot have been the basis for it or the Court, which had decided to reopen a central question and exercise its jurisdiction, to ignore principles of fundamental importance to the authority of the Court and the exercise by it of its Article 19 tasks.

E. Examination of the revision judgment

50. The terms of Rule 80 are clear: the fact(s) relied on must have been unknown to the Court at the time of the original judgment, could not reasonably have been known to the applicant Government at that time and the latter must have acquired knowledge of those facts in the six months prior to lodging their request to revise.

1. First limb relating to the medical evidence

(a) Medical evidence - new facts?

51. When accepting that the 6-month time-limit had been complied with, the chamber concluded unanimously that the documents containing the new facts on which the applicant Government relied could not have been known to it until the RTÉ broadcast on 4 June 2014 (§§ 86-90 and §§ 93-95 of the revision judgment). In § 89 of the revision judgment, the following is clearly stated (emphasis added):

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[66] Ibid, §§ 104, 128 and 130.

> "This requirement relates to situations in which *the new fact forming the basis for the revision request* could already have been known to the party before the delivery of the original judgment, *not, as in the present case, long after the conclusion of the original proceedings.*"[67]

52. After examining the documents submitted in relation to the medical evidence limb, the majority concede that they provide sufficient *prima facie* evidence in support of the applicant Government's position.[68] This conclusion meant that the medical evidence limb would be examined with reference to whether the documents now available and the new facts they disclose might have had a decisive influence on the original judgment.

53. However, when reaching this conclusion on the *prima facie* sufficiency of the evidence the majority went to some length to explain its "doubts" regarding the new facts and evidence relied on. According to the majority: the "new" facts regarding Dr. L's medical evidence post-dated the Commission hearings (§109); the new medical evidence related to a Mr. S.K. who was not, however, one of the two illustrative cases on which Dr. L had given evidence to the Commission (§ 109); the new evidence in relation to Mr. S.K., who died soon after he was examined by Dr. L. in 1975, is irrelevant as it simply proves his prior ill-health, is not proof of generalized long-term effects and does not reveal that statements made in respect of the effects of the five techniques were misleading or made in bad faith (§ 109), and new evidence detailing medical examinations of other detainees which indicated that the interrogation method had had long-term serious effects and the discussions which took place leading to settlements of domestic proceedings for damages is deemed irrelevant or to have been known (§§ 110-111).

54. I respectfully disagree with my colleagues' analysis of the original case and of the material submitted under the medical evidence limb in support of the revision request. Firstly, it is true that the evidence of Dr. L. and others indicating recognition of the long-term, serious, psychiatric effects of the five techniques post-date the Commission hearings. However, the original proceedings commenced on 10 December 1971, when the application was lodged with the Commission, and terminated on 18 January 1978, when the original judgment was handed down. As such, the Commission hearings cannot be taken as the sole point of reference, particularly given the extensive written and oral submissions subsequently made before the Court in 1976-1977 (see §§ 17-19 above). Reference to the conflict of expert opinion on the seriousness of the psychiatric after-effects of the five techniques pepper the parties' submissions to the Commission,

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[67] See also § 93 of the revision judgment, which emphasises that the present revision request relates to knowledge of new facts acquired after delivery of the original judgment.

[68] §§ 108-113 of the revision judgment. It has to be assumed from §§ 89 and 94 of the revision judgment on the 6-month time-limit and §§ 108 – 113 on the medical evidence limb that the majority also conceded that the new facts relied on in relation to this first limb were unknown to the Court at the time of the original judgment. This is not explicitly stated.

the Commission's analysis and that of the Court in the original case.[69] The medical evidence submitted by Dr. L., insisting on their minor, short-term effects, formed part of the case submitted to the Court and had been the basis for the Commission stating that it could not take a clearer position on long-term effects. It was central to the Court's assessment of the intensity of the detainees' suffering. Dr. L.'s evidence to the Commission was never amended or supplemented with reference to the different medical evidence compiled by him and others and relied on in domestic proceedings which were progressing in parallel to the Convention proceedings before both the Commission and Court.

55. Secondly, while it is also true that the new medical evidence related to examinations of Messrs. S.K., B.T. and W.S. and that none of these men were one of the two illustrative cases *heard* by the Commission, all were amongst the 14 detainees subjected to the five techniques. As is clearly stated in §§ 11-13 of the revision judgment and as outlined in §§ 20-24 above, medical evidence of a specific nature in relation to T 6 and T 13 and of a general nature regarding the effects of the five techniques was before the Commission and the Court. Furthermore, it is here the revision judgment begins to stray far from the terms and scope of the original judgment. The latter found an administrative practice in relation to 14 detainees in breach of Article 3 of the Convention. It did not find a breach merely in relation to two illustrative cases. Reference to illustrative cases had, moreover, been a method preferred by the Commission for reasons of procedural economy. Medical evidence both general and specific in relation to the effects of the five techniques and any of the 14 detainees remained relevant because that is where the conflict of evidence lay. Furthermore, 11 of the 14 detainees had been the subject of the Compton Report which was the only item of direct evidence filed by the respondent Government. In addition, while an interstate case where an administrative practice is at issue does not involve the Court giving a ruling on individual violations of Convention rights, individual cases that have been brought to its attention can and must be examined as evidence of a possible practice.[70] As the Court clearly stated in a revision context in *Pennino* and other cases, referred to above, parties are obliged to bring to the attention of the Court all relevant facts which have been produced in the domestic legal order. As outlined in the duty of disclosure case-law (see §§ 42-48 above), active assistance and cooperation are a prerequisite for the Convention institutions to exercise their jurisdiction effectively. The majority's approach to illustrative cases should be a cause for concern in future and pending interstate cases and beyond.[71]

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[69] See variously, p. 273 and p. 398 of the Commission Report and §§ 93 and 160 of the original judgment.
[70] See *Georgia v. Russia* n° 1, § 128, citing *Ireland v. the United Kingdom*, § 157 *in fine*.
[71] On reliance on illustrative cases and questions of procedural equality between the parties see the judgment in *Cyprus v. Turkey*, §§ 105-106 and 339.

56. Thirdly, according to the majority, Mr. S.K.'s state of health was such that medical evidence in relation to him should be treated as irrelevant in the assessment of the overall effects of the five techniques. However, the assessment of treatment with reference to Article 3 is, according to the case-law, in the nature of things, relative. It depends on circumstances, duration, physical and mental effects and, in some cases, sex, age and *state of health* (see § 131 of the revision judgment and § 162 of the original). The majority picks and chooses which of the factors listed it considers relevant, for what purpose and when it will accord them relevance. In this part of the revision judgment the state of health of a detainee is not considered relevant for the assessment of the long-term effects of the five techniques while later, in §§ 134-135, the relevance of long-term effects for the overall assessment of the treatment inflicted is downgraded or excluded. However, if the factors listed in § 162 of the original judgment and relied on in Article 3 case-law ever since are relevant to assessing whether the Article 3 minimum threshold is crossed, they are and were also relevant in the overall assessment of the impugned treatment.[72] Mr. S.K.'s state of health was recorded in the medical entry records at the Ballykelly interrogation centre but the five techniques were administered in any event. In addition, it is erroneous to reduce the applicant Government's argument to one of bad faith on the part of Dr. L. or to the treatment of one of the detainees, Mr. S.K. As stated previously, the applicant State makes very clear that Dr. L.'s evidence fits, in its view, into a larger overall pattern and attitude adopted by the respondent Government in the original proceedings.

57. Finally, while the documents relating to settlement of the domestic proceedings may not be determinative, they are illustrative of the nature and effect of the new facts alleged, namely that the seriousness and duration of the mental and physical effects of the five techniques after they were no longer applied was something presented differently before the Commission and the Court on the one hand and in the context of domestic proceedings on the other. Evidence in relation to the serious and long-term effects of the five techniques was being reported in relation to detainees other than Mr. S.K. (Messrs. B.T. and W.S. for example) in the period covered by the original proceedings up until the Court's original judgment. This new evidence is noted in para. 111 of the revision judgment but is again dismissed as "none of the men referred to had been among the illustrative cases". For the reasons outlined in § 55 above, this reasoning does not hold water. Moreover, in the proceedings before the Commission, the applicant Government had criticised the fact that while the respondent Government had received all of the evidence on which the complaints were based, it had filed no rebutting evidence in relation to several of the illustrative cases and

[72] The majority concede this in § 135 of the revision judgment but require an explicit indication in the original judgment that the question of long-term psychiatric effects would have been the one decisive element leading the Court to confirm the Commission's position. See further below on the question of decisive influence.

had refused to submit the facts investigated and the evidence obtained in those domestic proceedings. Some of that undisclosed material is now before the Court.

58. Given the fact-finding procedure established in the original proceedings, the conduct of those proceedings and the manner in which they fed into the reasoning adopted in the original judgment, the doubts expressed in §§ 109-113 of the revision judgment are both unfounded and surprising.

(b) Medical evidence - decisive influence

59. The revision judgment establishes the relevant test as follows:

> "it must be clear from the reasoning contained in the original judgment that the Court would not have come to a specific conclusion had it been aware of the true state of facts."[73]

As highlighted previously, with reference to established revision case-law (see § 15 above), procedure, reasoning and conclusions are all relevant when assessing whether this test is met.

60. The revision judgment emphasises two points which the revision request never sought to call into question. Firstly, the distinction between inhuman and degrading treatment and torture derives from the intensity of the suffering inflicted. Secondly, the assessment of the different degree of the intensity in suffering must depend on a number of elements.[74] However, according to the majority, since the original judgment did not explicitly mention the issue of possible long-term effects in the legal assessment, it was difficult to attach any particular importance to uncertainty as to the long-term effects of the five techniques, let alone afford this element decisive influence. Without an indication in the original judgment to the effect that, had severe long-term psychiatric effects been proved, this one element would have led the Court to decide differently, then the majority finds that it cannot conclude that the new facts relied on might have had a decisive influence (§§ 134-135 of the revision judgment).

61. The effect of this reasoning is to ignore the path which led to the key paragraphs of the original judgment on torture, to diminish in stature both the content and effect of the original judgment as a consequence, to devalue the evidence which was available to the Commission and Court at the relevant time and to ignore, once again, the terms and content of the revision request. Moreover, the "decisive influence" criterion in Rule 80 is adapted to suggest that the new element(s) on which the applicant Government sought to rely had to constitute the one or a decisive element in its legal definition of torture.

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[73] § 121 of the revision judgment.
[74] Ibid., §§ 132 and 135.

62. Medical evidence played an important, indeed central, role in *Ireland v. the United Kingdom*.[75] The Commission made clear that it regarded it, where not contested, as the most important objective evidence. It examined that evidence and its value for the establishment of the facts before it examined evidence from members of the security forces and the case witnesses. The revision judgment concedes that the effects of the treatment on the victim was one of the elements considered at the time of the original judgment in assessing whether the treatment fell within the scope of Article 3 but it argues that the relevance of the long-term effects of a treatment when distinguishing inhuman and degrading treatment and torture only emerged years later.[76] However handy or superficially convincing this reasoning might at first sight appear, an examination of the original proceedings, the original judgment and indeed the dissents reveals it is mistaken. The dissenting judges, all of whom were present in the deliberations, highlighted the modern and systematic nature of the treatment administered, as well as the centrality to the judicial discussion of the treatment's purpose and effects:

> "the [Commission and Court] definitions of torture concentrate on the effects of the acts in question on the victim."[77]

Furthermore, the nature of non-physical torture and the effects of severe psychological pressure were not new to the Convention institutions, which had already examined such features in the *Greek case*.[78]

63. We now know that medical evidence on the long-term psychiatric effects of the five techniques was available but not disclosed to either the Commission, before its report was published, or to the Court, for two years when the case was pending before it (see §§ 21-27 and §§ 109-112 of the revision judgment).

The revision request did not seek to question the legal definition of torture established by the Court in 1978. It did not seek to establish that, had the Court in 1978 had available to it what the Court in 2018 now has available to it, it would have altered its legal definition of torture or the special stigma attached to torture. Instead the revision request sought to establish that, when applying that legal definition in the circumstances of this case the Court would not have departed from the Commission's factual assessment as to the effects of the five techniques and the intensity of the suffering endured as a result of their administration. Newly available

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[75] See further MacDonald, R. St. J., Matscher, F. and Petzold, H (eds.), The European System for the Protection of Human Rights, Martinus Nijhoff, 1993, p. 694. One of the editors was one of the dissenting judges in *Ireland v. the United Kingdom*.

[76] See § 124 of the revision judgment, citing *Egmez v. Cyprus*, n° 30873/96, § 78, 21 December 2000.

[77] See the dissent of Judge Evrigenis.

[78] See part V of the Commission Report on allegations of non-physical torture or ill-treatment in the *Greek* cases, p. 461 *et seq.* See also, dissenting in the original judgment, Judge O'Donoghue: "one is not bound to regard torture as only present in a mediaeval dungeon where the appliances of rack and thumbscrew or similar devices were employed. Indeed in the present-day world there can be little doubt that *torture may be inflicted in the mental sphere*".

evidence on the effects which the five techniques had on detainees as well as extensive evidence on the extent, nature and purpose of non-disclosure would have made it very difficult, if not impossible, to displace the Commission's unanimous finding of torture in the circumstances of this case. It is now clear, for example, that the non-attendance of certain witnesses or the refusal of others to answer questions was not only or primarily to protect their security. There is no doubt that the Court in 1978 was, pursuant to Article 55 of the Convention, "master of its own procedure and of its own rules and had complete freedom in assessing not only the admissibility and the relevance but also the probative value of each item of evidence before it".[79] However, this jurisdiction would have also extended to assessing the impact of evidence not placed before it, probing why that evidence had not been disclosed and deciding how, once disclosed, it completed the overall picture on the long term physical and mental effects of the five techniques.

The decision not to categorise the treatment inflicted as torture was based on the Court's assessment of the degree of intensity of the suffering inflicted. However, the majority appear to limit that assessment to the mental and physical suffering *during* the interrogation itself, excluding the relevance of physical and mental after effects. I respectfully disagree with their analysis of the original judgment in this regard. Questions relating to the severity of effects and intensity of suffering were clearly assessed with reference to the medical evidence made available. There was a conflict of evidence on the long-term effects of the five techniques simply because, as we now know, not all evidence was disclosed.[80]

2. Second limb relating to the non-disclosure evidence

(a) Non-disclosure evidence - new facts?

64. Were the new facts disclosed in support of the second limb unknown to the applicant Government and to the Court at the time of the original judgment?

65. As regards the applicant Government, the revision judgment does not directly address this point. Again, one can deduce from §§ 89, 93-94 of the revision judgment on the 6-month time-limit that if the applicant Government acquired knowledge of the "new facts" or of the documents containing those new facts in June 2014, they could not have known of them in January 1978. The use of "alleged new facts" and "potentially disclosing new facts" in the revision judgment appears to be a means to undermine at this early stage in the judgment the probative force (or

[79] § 210 of the original judgment.

[80] See also § 135 of the revision judgment in this regard: «the assessment of this difference in degree [which depended on the suffering inflicted] must depend on a number of elements» namely, the circumstances of the case, the duration of the treatment, its physical and mental effects, sex, age and state of health.

"newness") of what is deemed admissible for having complied with the six-month time bar.

66. As regards the Court, the revision judgment concludes that the facts revealed in the documents relied on in support of the non-disclosure limb were known to the Court when the original judgment was delivered in January 1978 (§ 118 of the revision judgment). In brief, the majority appear to conclude that the documents uncovered may be new but that the facts they reveal are not. Furthermore, according to the majority, what the applicant Government may have alleged but did not know – and could not prove – in 1978, the Court knew when the original judgment was delivered.

67. The conclusion of the majority in § 118 of the revision judgment is striking. Because the Court in 1978 "regretted" the attitude of the respondent Government (see § 148 of the original judgment) and, implicitly, because the respondent Government did not contest the Commission's finding of torture, the non-disclosure limb crumbles. Here too, I respectfully disagree with my colleagues. The documents containing the new facts or materials are summarised in §§ 22-43 of the revision judgment. They speak for themselves. Suffice it to point out that several documents reveal that knowledge and authorisation of the five techniques was at ministerial level. As indicated in the Greek case (see § 40 above), that level of authorisation would have been central to the assessment of the seriousness of any breach flowing from the existence or exercise of an administrative practice. The documents also reveal that one government minister referred, at a time when the case was pending before the Court, to "the decision to use torture in Northern Ireland" (§ 43 of the revision judgment). A Secretary of State for defence quickly suggested a more suitable, neutral choice of language – preferring "the decision to use interrogation in depth" (ibidem). In terms of an overall assessment of the circumstances surrounding Operation Demetrius and administration of the five techniques, both these documents, while not determinative, are new and highly relevant. Notes on Foreign and Commonwealth Office documents indicate the view of one official – "We have always said that S'bg should not be allowed to affect what is right and necessary in NI" (§ 41). Other material indicates that the Standing Order for the running of the interrogation centre at an undisclosed location were for the Attorney General's information only. The majority prefers to view the documents detailed in §§ 22-43 of the revision judgment in terms of the respondent Government's litigation strategy (see § 114 of the revision judgment) despite repeated references to the possibility of damaging allegations of or findings against Her Majesty's Government (HMG), or individual members of it, for conspiracy (see the material reproduced at §§ 31, 33 and 38 of the revision judgment). Despite being faced with this new material, and despite the inferences standard established in the *Greek* and *Ireland v. the United Kingdom* cases working generally to the

disadvantage of the obstructing party,[81] the majority concludes that the relevant facts were "not unknown to the Court" in 1978.

68. Whether or not knowledge of these documents and their contents might or would have been regarded as capable of having a decisive influence at the relevant time, I have difficulty understanding how the Court could have known of facts in 1978 which, in § 89 of the revision judgment it recognises were contained in documents, previously classified, which could only have been known to the applicant State long after the conclusion of the original proceedings. To dismiss the non-disclosure core of the revision request for the reasons outlined in §§ 114-118 bears little relation to the original proceedings, to how the Commission obtained, assessed and established the facts, to the obstacles encountered on the way, or indeed to the reasoning followed by the Court in 1978 en route to the conclusion in §§ 167 and 168 of the original judgment on which the majority now exclusively rely.

69. I referred previously to the judgment in *McKenna*, a judgment handed down by the High Court of Justice in Northern Ireland in October 2017. That case concerned the procedural limb of Articles 2 and 3 and the need or absence of an effective investigation in relation to the treatment of the 14 detainees. It was lodged before that court following the discovery and on the basis of the archival material now before this Court. While the object of the two proceedings is distinct, the material examined is similar or identical. In relation to the archival material, McGuire J. stated that it was necessary to treat it "with some circumspection" as:

> "there could be no serious argument that the court is obtaining a full, as against a partial, picture of events. Self-evidently, there will have been, and perhaps still are, many other documents which the court has not seen."

In addition, he considered that it ought also to keep in mind that many of the documents the domestic court was looking at arose from a different era.[82] Despite this very wise and legitimate circumspection, having considered the factual background in some detail, together with the extensive documentary material with which the High Court was provided, and before addressing the law, McGuire J. stated that "there is evidence which supports the view that informed authorisation in advance was given by one, if not two, Cabinet Ministers, as well as by the Northern Ireland Minister for Home Affairs".[83] The state of knowledge of the authoriser was, he said, a subject which had been "largely finessed in the official line" at the time of the original proceedings.[84] Furthermore, it is stated that, after the interrogation in depth of twelve of the detainees but before administration of

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[81] For an extensive analysis of the relevant case-law see P. Leach et al., *International Human Rights and Fact-Finding*, Human Rights and Social Justice Institute, London Metropolitan University, 2009.
[82] §§ 139-141 *McKenna*, cited above.
[83] § 177 *McKenna*, cited above.
[84] *Ibid*, § 142.

the techniques to two others in October 1971, the Minister for State was both briefed on the interrogation and watched a demonstration of the five techniques.[85]

As indicated previously, the legal questions before the High Court of Justice in *McKenna* and this Court under Rule 80 are different. Nevertheless, the assessment by the two courts of the archival material now available and of the facts contained therein differs markedly.[86] In short, it is difficult to understand how this Court *knew* as established facts in 1978 what others suspected but were previously unable to prove until the archive material had been declassified, found and compiled.

(b) Non-disclosure evidence - decisive influence

70. In my view, the Chamber could and should have examined both limbs of the revision request under the decisive influence criterion. When doing so, it might have been possible to argue that, no matter what new facts or evidence are now before us – evidence not disclosed to the Commission or Court between 1971 and 1978 – none of it would have changed the decision of the Court in 1978 to overturn the unanimous finding of torture by the Commission and find instead a violation due to inhuman and degrading treatment. The 1978 Court, the revision judgment would thus have said, decided to use the occasion offered by the referral of the *Ireland v. the United Kingdom* case to ensure that there were gradations of treatment causing suffering covered by Article 3 and that torture corresponded to the gravest form. It might also have been possible to recognize openly, in 2018, that the Court in 1978 had been unwilling to find the United Kingdom, a founding father of the Convention system, responsible for a violation to which a special stigma attached.

71. However, even such an approach, characterised by "realpolitik", would be open to challenge. The Court had declared in the original judgment that it proceeded on the basis of "all the material before it, whether originating from the Commission, the Parties or other sources, and, if necessary, obtains material *proprio motu*" (§ 161 of the original judgment). We know that it did not obtain material *proprio motu* and we now know that the material before both it and the Commission was incomplete in several important and one crucial respects. As stated previously, the revision request did not seek to alter the Court's 1978 legal definition of torture. Rather it sought to establish that new evidence regarding the nature and intensity of the suffering which the five techniques inflicted, combined with the inferences which the Court clearly stated it would draw from non-disclosure and obstruction – of which it now has

[85] *Ibid*, § 153. At the relevant time when this occurred, the Comption inquiry was ongoing.

[86] See also *McKenna*, §§ 260-261, where the *Brecknell* doctrine is applied, meaning the new archive material was said to come within the description of plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator.

evidence – might or would have had a decisive influence. At the very least, if furnished with the new evidence now before the Court, it seems inevitable that, before overturning the uncontested, unanimous decision of its fact-finding body, which had seen and cross-examined the witnesses and tested the probative value of the evidence before it over years, the Court in 1978 would have had to obtain new evidence *proprio motu*. Otherwise, as it stated in § 184 of the original judgment, it risked arriving at "extremely tenuous conclusions".[87]

72. Furthermore, it should not be forgotten that the Court's decision to exercise its jurisdiction in relation to the uncontested finding of torture was motivated by the fact that its judgments "elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19) (art. 19)".[88] It is difficult to see how a Court, faced with the extensive material now available to the revision Chamber, would consider that ignoring that material and the obstruction it reveals would serve to contribute to the observance by the obstructing party, or any other Contracting Party, of the engagements undertaken by them.

73. The judgment in *Ireland v. the United Kingdom* established the first definition of torture under Article 3 of the Convention and remains a landmark in that regard. However, it was also the first interstate case to proceed to judgment. The majority in the present case did not consider whether a court then in its infancy could have afforded to be cavalier when it came to the duty of Contracting Parties to cooperate with the Convention organs in order to ensure the effective functioning of the Convention system. As the Court made clear in *Georgia v. Russia* nº 1, the specificity of its task under Article 19 of the Convention conditions its approach to the issues of evidence and proof in interstate cases, but also to that of non-disclosure and obstruction.[89] A Court which is called on to intervene in political and highly sensitive inter-state cases knows the threat to the certainty and authority of its own rulings – the values which the principle of legal certainty also seeks to protect – of turning a blind eye on a policy of extensive non-disclosure and obstruction.

F. Concluding remarks

74. The majority has opted for an extremely narrow version of what the Court was dealing with in 1976-1978 and has excluded or severely

[87] See also the respondent Government in its submissions to the Court on why the latter should not disturb the Commission's findings of fact (pp. 78 and 93 of the verbatim reports of the April 1977 hearings): "it is only by a detailed examination of the facts of each case, which involves the hearing of oral evidence, tested by cross-examination, and the opportunity for the tribunal to see the demeanour of the witnesses and to assess their truthfulness, that a conclusion can be come to as to whether the allegations in the case are true or false, or have some basis or are exaggerated".

[88] § 154 of the original judgment.

[89] §§ 94-95, 99-110, *Georgia v. Russia* n° 1.

narrowed the relevance of the Commission and Court proceedings which led to the two concluding paragraphs of the original judgment on which almost exclusive reliance is placed. Inadvertently, in order to dismiss the revision request, the reasoning preferred by the majority diminishes in places the content and stature of the original judgment.

The principle of legal certainty is recognised, correctly, as being of fundamental importance. However, it appears to have been used in the instant case in three peculiar ways. Firstly, the majority proceeded on the basis that only absolute certainty as to the alternative outcome sought – a finding of torture given the new material disclosed – would suffice to overturn the original judgment. It is never made clear from whence this standard proceeds.[90] Secondly, the "decisive influence" criterion in Rule 80 is adapted. According to the majority, for the conditions under Rule 80 to have been met, it had to be demonstrated that proof that the long-term effects of the five techniques would have been *the one or decisive element* which would have led the original Court to a finding of torture. There is a remarkable degree of judicial acrobacy in § 135 of the revision judgment in this regard. Thirdly, there is an underlying supposition that the absolute certainty referred to above would also have had to be accompanied by a (near) unanimous finding of torture. Yet, in sensitive cases in particular the Plenary or Grand Chamber is often divided. The question, in reality, was whether the material now disclosed would, if known at the relevant time, have led five of the 13 majority judges to cross the floor. The majority have sought certainty where only probability can apply.

75. For the reasons outlined above, I consider that it would. Both limbs of the revision request reveal new facts which were unknown both to the Court and to the applicant State when the original judgment was handed down. Those new facts reveal (i) that medical expertise was available to the respondent Government pointing to the long-term serious mental effects of the five techniques, such that in reality there was no conflict of evidence on this crucial point which related to the intensity of the suffering endured, and (ii) the existence, nature, extent and purpose of a policy of non-disclosure and obstruction by the respondent State. Also for the reasons outlined above, I consider that those new facts might or would have had a decisive influence when the Court considered whether it should confirm or overturn the unanimous Commission finding of torture. It should not be forgotten that this was a finding which the respondent State, much to its credit, had not contested at that time.

76. In 1978, the Court decided not to draw certain inferences from what was alleged but could not then be proved as being the conduct of the respondent State. In 2018, a majority of the chamber has decided to ignore the bigger picture now available to it on the grounds that the principle of

[90] § 122 of the revision judgment.

legal certainty must prevail. However, it is difficult to see in what way legal certainty was endangered in a case where a violation of Article 3 had in any event been found, where the respondent State did not contest the Commission finding of torture and where the revision request sought not to call into question the legal principles established but rather their application in the circumstances, now properly demonstrated, of the original case.

77. In my view, it was the Court and the Convention system and not the respondent State which was primarily under scrutiny in the context of this revision request. I regret that my colleagues in Chamber were not able or willing to see this. Revision must remain exceptional and requests should, where appropriate, be defeated by the very legitimate and fundamental principle of legal certainty. However, in the present case it is difficult to avoid the impression that it is the Court which has sought to shelter itself behind that principle. By doing so it risked damaging the authority of the case-law which that principle seeks to safeguard and overlooking its own responsibilities pursuant to Article 19 of the Convention.[91] I can only conclude with regret − in a similar vein to my predecessor in the original case – that there is much in the general approach of the original and revision judgments that must discourage Member States from invoking Article 33 of the Convention and, regrettably, much to encourage future respondent States with reference to which that article may be invoked.

[91] §§ 154-155 of the original judgment.