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Meeting: 1318th meeting (June 2018) (DH)

Item reference: Action plan (29/03/2018)

Communication from the United Kingdom concerning the case of MCKERR v. the United Kingdom
(Application No. 28883/95)

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Réunion : 1318^e réunion (juin 2018) (DH)

Référence du point : Plan d'action

Communication du Royaume-Uni concernant l'affaire MCKERR c. le Royaume-Uni (Requête n° 28883/95)
(anglais uniquement)

29 MARS 2018

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Execution of Judgments of the European Court of Human Rights
CONSOLIDATED ACTION PLAN

MCKERR GROUP OF CASES V THE UNITED KINGDOM

Application number: 28883/95 McKerr, judgment final on 04/08/01

Application number: 37715/97 Shanaghan, judgment final on 04/08/01

Application number: 24746/94 Hugh Jordan, judgment final on 04/08/01

Application number: 30054/96 Kelly and others, judgment final on 04/08/01

Application number: 43290/98 McShane, judgment final on 28/08/02

Application number: 29178/95 Finucane, judgment final on 01/10/03

Application number 58559/09, Hemsworth, judgment final on 16 October 2013

Application number 43098/09, McCaughey and others, judgment final on 16
October 2013

Information submitted by the United Kingdom Government on 29 March 2018

CASE SUMMARY

In the *McKerr Group* of cases and the *Hemsworth* and *McCaughey and Others* cases the European Court of Human Rights ("the Court") found a number of delays into holding inquests which were excessive and incompatible with the State's obligations under Article 2 to ensure the effectiveness of investigations into suspicious deaths. Causes of delay included periods of inactivity; the quality and timeliness of disclosure of material; lack of contact with families of victims; prosecutorial decision-making; and delays stemming from legal actions necessary to clarify coronial law and practice.

The Court held that there had been a violation of the procedural requirements of Article 2 of the Convention by reason of excessive investigative delay. The Court commented that the Government must take measures to ensure that, in these and similar cases where inquests are pending, the procedural requirements of Article 2 are complied with expeditiously.

This consolidated action plan will describe events that have taken place since the previous action plan was submitted on 18 August 2017.

GENERAL MEASURES

Stormont House Agreement¹

The Stormont House Agreement, which was agreed in December 2014, includes measures to address a number of issues relating to Northern Ireland's troubled past, including that of the legacy inquest process (para 31 of the Agreement) and provision for a new body, the Historical Investigations Unit (HIU), to take forward investigations into outstanding troubles-related deaths. The UK Government has indicated £150m of additional funding will be available for the Stormont House Agreement measures for dealing with the past.

The HIU, once established, will be an independent body. Officers investigating criminal allegations will have the powers and privileges of a police constable. The HIU will also provide dedicated family support staff and the next of kin will be involved in the process from the beginning and will be provided with support. The HIU will consider all cases that fall within its remit based on the current policy position. There are in the region of 1700 HET and OPONI cases outstanding. Oversight will be provided by the Northern Ireland Policing Board, and the HIU will be structurally and operationally independent from the police. This independence is intended to address the criticisms that had previously been made of the roles of the HET and OPONI.

The UK Government will make full disclosure to the HIU. To enable full disclosure, legislation in the UK Parliament is required, which will also prevent any damaging onward disclosure of information by the HIU.

Fresh Start Agreement

On 17 November 2015 the 'Fresh Start' Agreement was reached, following ten weeks of talks between the UK and Irish Governments and the Northern Ireland political parties. Unfortunately, although a great deal of progress was made during the negotiations on addressing Northern Ireland's past, it was not possible to achieve final agreement on those matters at that time.

However, over the course of the political negotiations, substantial areas of common ground were developed on the legacy institutions, including on a range of issues where progress has previously proved impossible. Contentious questions were worked through by all the parties in the spirit of moving things forward for families and victims.

Even on the difficult question of how best to balance disclosure to families with the Government's national security duties, a number of options were suggested and constructively considered. While that issue was not resolved during the talks, all of the participants to the talks agreed on the need for further progress in order for Northern Ireland to be able to deal with the past and to deliver better outcomes for victims and survivors.

¹ <https://www.gov.uk/government/publications/the-stormont-house-agreement>

Developments since the Fresh Start Agreement

Since the Fresh Start Agreement the Secretary of State carried out a process of engagement to ensure that the views of victims are taken into account and that they could contribute, as those most affected, to the discussion on dealing with the past. As a consequence of that engagement the Secretary of State concluded that there was a desire for a public phase to enable discussion on the detailed proposals for addressing the past. On 9 September 2016, the Secretary of State announced an intention to move forward with a public phase. During the autumn of 2016 and 2017, further meetings took place with political parties and victims groups, in advance of the planned public phase.

Following the resignation of the former deputy First Minister of Northern Ireland, Martin McGuinness, on 9 January 2017, a Northern Ireland Assembly election was held on 2 March 2017. Consequently, no further progress was made with political parties during the election campaign period.

Following the Northern Ireland Assembly election on 2 March 2017, the Secretary of State for Northern Ireland engaged in intensive talks with the political parties and the Irish Government to re-establish an inclusive devolved administration at Stormont. Whilst progress was made on a number of issues including legacy, significant gaps remained between the parties, and unfortunately, they were unable to form a devolved government by the deadline of 27 March 2017.

The Secretary of State for Northern Ireland invited the political parties to participate in a further phase of intensive roundtable talks at Stormont Castle starting on 03 April 2017 to help resolve the key outstanding issues.

On 18 April 2017, the Prime Minister announced the UK Government's intention to hold a general election on 8 June 2017. On 19 April 2017 the Secretary of State stated that the parties would have a final opportunity to reach agreement, building on the discussions which had taken place over the previous six weeks. The Northern Ireland (Ministerial Appointments and Regional Rates) Act, which received Royal Assent on 27 April 2017, made provision to allow an Executive to form from any point until 4pm on 29 June 2017. On the same day, it was agreed that formal talks to establish an Executive would be paused until after the UK General Election on 08 June 2017. Parliament was dissolved on 3 May 2017. Following the UK General Election, talks resumed on 12 June 2017 aimed at enabling the formation of an Executive before the deadline of 4pm on 29 June 2017.

In a statement on 29 June 2017, the Secretary of State set out that while differences remained between the parties, progress had been made and that it was still possible for a resolution to be achieved. He urged the parties to continue focusing their efforts on this.

On 3 July 2017 the Secretary of State advised the UK Parliament that whilst some further progress had been made, gaps remained between the parties on a defined number of issues. The following day the Secretary of State made a further statement advising that despite the progress made by the parties to restore

devolved government in Northern Ireland, gaps on the remaining issues could not be resolved quickly enough to enable an Executive to be formed in the immediate term.

On 16 July 2017 the Secretary of State laid a Written Ministerial Statement in the UK Parliament that provided details on an interim measure to keep Northern Ireland's finances functioning in the continued absence of devolved government. The Secretary of State made clear his intention to press ahead with a further intensive talks process later in August 2017 with the overriding priority to reach agreement on restoring an inclusive power-sharing Executive.

On 2 November 2017 the Secretary of State made a further statement to Parliament to advise that, whilst important progress had been made during that phase of talks, the parties had not yet reached an agreement and that the government would bring forward a budget Bill to protect the delivery of public services in Northern Ireland.

In a statement to Parliament on 20 February 2018 the Secretary of State provided an update on the political situation and efforts to bring about the re-establishment of inclusive devolved government in Northern Ireland. She said that it had become possible to identify a basis for a possible agreement, but that unfortunately the most recent phase of talks had concluded without such an agreement being finalised and endorsed by both main political parties in Northern Ireland. She committed to exploring whether the basis for political agreement still existed and providing clarity on a budget for Northern Ireland for the next financial year. The Government's General Election 2017 Manifesto included a commitment to continue to seek the implementation of the legacy bodies in the Stormont House Agreement as the best way to address Northern Ireland's past and provide better outcomes for victims and survivors. The Secretary of State believes that the next phase is to consult publicly on proposals to address the past and move Northern Ireland forward, including details of how the new legacy structures would work in practice. In her statement to Parliament on 20 February 2018 the Secretary of State reiterated the Government's commitment to consult on the implementation of the bodies set out in the Stormont House Agreement, and to support the reform of inquests. She committed to proceeding towards a full consultation as soon as possible. to enable all those with an interest to express their view.

The consultation will provide everyone with an interest the opportunity to see the proposed way forward and contribute to the discussion on the issues. A public phase has the potential to build greater confidence in the new bodies, particularly among the wide constituency of victims of the Troubles.

The Government hopes that, post-consultation, it will be in a position to introduce legislation and have the new legacy institutions up and running as quickly as possible and in a way that can command support and confidence from across the community.

The Government is committed to making progress on this issue, and in parallel will continue to support reforms to the legacy inquest system to ensure the UK complies with its international obligations.

The Role of the Police Ombudsman and HIU

Once established, the HIU will carry out Article 2 compliant investigations into Troubles-related deaths, including cases transferring from the police Legacy Investigation Branch and the Police Ombudsman's Historical Investigations Directorate. Pending the establishment of the HIU, OPONI will continue to progress historical cases. Once established, these cases will transfer to the HIU.

Cross-Agency Working Group

The Representatives from the operational level Cross-Agency Working Group to reduce legacy delay are heavily involved in implementing the Stormont House Agreement in respect of establishing the HIU and realising improvements to the legacy inquest system (see below).

Legacy Inquests

The projected time frame remains five years for completion of the 53 outstanding legacy inquest caseload provided the required resources and co-operation arrangements are in place as envisaged under the Lord Chief's Justice's reform proposals. The 53 legacy cases involving 94 deaths are at various stages of investigation, which will result in a number of inquest hearings. Findings are awaited in four cases and three cases are at hearing. The Coroner has announced that the hearing of the incidents referred to as 'Ballymurphy' involving ten deaths is to commence in September 2018.

The Coroners Service has engaged a Coroner's Investigator on secondment to support the coronial investigations into legacy inquests and is in the process of recruiting two permanent Investigators. The intention would also be to have a Case Progression Officer/single point of contact in PSNI, MoD and PPS to strengthen disclosure arrangements, address issues of sequencing and delay and improve communications when appropriate resources are in place.

The Coroners Service is working with justice partners and the MoD to ensure more effective disclosure, sharing of information, case management and support for witnesses.

In March 2016, the NI Executive was asked by the Department of Justice to consider a proposed bid for funding for an initial phase of work which would aim to complete up to 16 legacy cases within a period of 19 months. Since then the Department of Justice has provided a revised funding bid for legacy inquests as part of the overall funding package for dealing with the Past to the parties to inform the political talks in Northern Ireland. .

Hughes judgment

Brigid Hughes initiated a judicial review (JR) to challenge decisions in relation to funding for legacy inquests and the resulting breach of her human rights under Article 2, Rule 3 ECHR and common law. The Applicant's husband, Anthony

Hughes, was caught up in the cross-fire between the security services and members of the IRA on 8 May 1987 during a suspected IRA attack on Loughall RUC station. In March 2014, the Ministry of Defence issued an apology Mrs Hughes and acknowledged that her husband was innocent of any wrongdoing.

The judicial review judgment was handed down on 8 March 2018. The judge, Girvan LJ, arrived at 13 conclusions, including that the relevant parties should work together to reduce delays in legacy inquests and make decisions regarding provision of additional funds. A significant aspect of the judgment is that funding considerations for legacy inquests should not be dependent on securing agreement on the wider legacy agenda. The Department of Justice and Executive Office are discussing the approach and structure of a refreshed bid for legacy inquest funding, which would then be considered by the UK Government.

Review and update of coronial law in Northern Ireland

The requirement for the review and update of Coronial Law in Northern Ireland was reflected in the CSNI review report. A scoping study for a review of the Coroners legislation has been completed.

INDIVIDUAL MEASURES

The individual measures in progress have been affected by the Stormont House Agreement dated 23 December 2014.²

Specific Cases

McKerr

This case is subject to on-going preparation for inquest in relation to disclosure of documents and other materials that date back to 1976. As disclosure is not yet complete to the Coroner, the case is not yet at a stage where it can be listed for inquest. McKerr is materially linked to a number of other cases and the disclosure exercise involves several thousands of pages held by the Police Service of Northern Ireland (PSNI) and other departments and agencies. PSNI initial disclosure was, some time ago, separated into 13 tranches because of the volume of material involved. Disclosure within Tranche 1-Tranche 12 remains to be perfected, though several tranches have been disseminated to families and other properly interested persons. Tranche 13 consists of a substantial volume of documents in respect of which the Coroner has issued directions and a small amount of this material has also been furnished to families and other properly interested persons. Directions and queries have also issued to PSNI in relation to the disclosure of further information deemed to be potentially relevant to the Coroner's investigation, some

² See: <https://www.gov.uk/government/publications/the-stormont-house-agreement>

of which relates to the need to cross-reference identified information against additional cases in respect of ascertaining and analysing similar fact evidence.

The Coroner has also requested the disclosure of documents from across a number of government departments and agencies, including the Ministry of Defence (MOD), the Security Service, the Cabinet Office, the Northern Ireland Office, the Attorney General's Office, the Home Office the DPP and the Office of the Police Ombudsman. As a result approximately 100 lever arch folders of materials have been provided for consideration by the Coroner's legal team and the majority of those documents have been duly considered and deemed potentially relevant.. Additionally, a list of priority materials was drawn up and sent to all agencies concerned in April 2016 in ease of early disclosure of a small body of highly relevant material. The Coroner's office has been provided with a number of folders of non-sensitive material for onward disclosure to the legal representatives of the families and other interested persons and the review of other non-sensitive material is nearing completion. The review of sensitive information for onward disclosure will then commence. To capture all potentially relevant material, departments and agencies, including the PSNI, have been directed to provide further specified disclosure and answer a number of outstanding queries. Until the Coroner is furnished with all material necessary and same is made available in appropriate form to families and other properly interested persons, it is not possible to advance a realistically achievable timeframe for hearing. However, PSNI resource is currently directed at a number of other Legacy inquests which have come to hearing or are listed for hearing at the direction of the Coroner's Service. Further dissemination of material to families is linked to an ongoing PII process. Final hearings on Public Interest Immunity (PII) are unlikely to take place until the PII exercise is fully complete and a Coroner has been assigned to these inquests.. Meantime, work is ongoing in terms of the collation and analysis of material provided to the Coroner to date, alongside internal cross-referencing and the preparation of relevant chronologies and witness lists. Additional investigative assistance is required to advance this case more expeditiously to hearing.

Shanaghan

An inquest was carried out following the incident in August 1991 and there has been no referral from the Attorney General for a fresh inquest.

In relation to the Office of the Police Ombudsman for Northern Ireland (OPONI) investigation, the Shanaghan family and their CAJ representatives are in contact with the Ombudsman's office. There is an active ongoing investigation in relation to a complaint about police misconduct. This case is a component of the OPONI Operation Greenwich investigation which, subject to consideration by the Public Prosecution Service, is nearing completion. It is anticipated a public statement by the Police Ombudsman will be available in respect of this investigation before the end of 2017. The Police Ombudsman has kept the families up to date.

Political agreement on the draft legislation which would establish the HIU is nearing completion; when this legislation is enacted this death may fall within the remit of the HIU.

Jordan

The first inquest was completed on 26 October 2012. Following various Judicial Reviews, a comprehensive Court of Appeal judgment, handed down on 17 November 2014, quashed the Coroner's findings from 2012 and ordered a new inquest. The Lord Chief Justice assigned a High Court Judge to sit as a Coroner to hear the new inquest, which commenced on 22 February 2016. The Inquest has been heard and findings were delivered on 5 December 2016. Mrs Teresa Jordan sought Leave to apply for Judicial Review in respect of the findings and decisions of the Coroner; the Leave Application was heard on 22 June 2017. Judgment was delivered on the 20 October 2017 when leave was refused; this refusal of leave was appealed and subsequently heard in the Court of Appeal on 20 March 2018.

A Court of Appeal judgment on the issue of delay and damages was delivered on 22 September 2015 (following the resumption of a part heard hearing in June 2015). An amended partial judgment was handed down on 12th May 2017, which precludes the applicant from bringing proceedings for delay for a breach of the Article 2 promptness requirement until the conclusion of the inquest. Mrs Jordan sought leave to appeal this decision to the Supreme Court; leave was granted on the 17 December 2017 and the appeal is listed for hearing on 23 October 2018. At a review hearing on 9 March 2018, the Court of Appeal decided not to list a hearing in relation to the remaining arguments on delay and damages until the outcome of the substantive appeal is determined.

Kelly and Others

An inquest took place following the incident on 8 May 1987, and in 2011 there was an HET investigation. The Committee on the Administration of Justice wrote on behalf of the families to the Attorney General for NI inviting him to decide whether there should be fresh inquests into the deaths. The Attorney General wrote to the Secretary of State on 29 January 2014 with regard to information relating to Loughgall. In September 2014 the Secretary of State issued a certificate under s.14(2) of the Coroner's Act (Northern Ireland) 1959; the Secretary of State had determined that information existed which was relevant to the question of whether fresh inquests should be opened and which may, if it was disclosed, be against the interests of national security. The issue of the certificate meant that the decision in respect of a fresh inquest became a matter for the Advocate General. This division of responsibility between the Attorney General and Advocate General was set out in the Justice (NI) Act 2002³ and the Coroners (NI) Act 1959⁴.

In March 2015, one of the families was granted leave to judicially review the Secretary of State's decision to certify the case; this was subsequently withdrawn following the announcement of the Advocate General's decision on 23 September 2015 that new inquests into the Loughgall deaths are justified. The case was subject to review by Lord Justice Weir in January 2016, as part of the review into Legacy Inquests. The Court heard that the PSNI and MOD have commenced the

³ <http://www.legislation.gov.uk/ukpga/2002/26/section/22>

⁴ <http://www.legislation.gov.uk/apni/1959/15/section/14>

collation of materials in preparation for the disclosure exercise. In relation to the HET review, this case will automatically come under the remit of the HIU proposed under the Stormont House Agreement (see below).

In relation to the OPONI investigation, OPONI has received a number of complaints associated with the incident at Loughgall. If the investigation is not complete by the time the HIU is established, the deaths would come within the remit of the new unit.

Hemsworth

The inquest, sitting with a jury, took place on 16 May 2011. It made findings as to the cause of death and those likely to be responsible, as a result of which the coroner referred the matter to the Public Prosecution Service (PPS) to look into whether any prosecutions should be pursued. The inquest findings were not challenged by the family; however, the case was referred to OPONI in relation to police conduct. Investigation of this OPONI referral is now complete. OPONI published a public statement in relation to the circumstances surrounding the death of Mr Hemsworth on 24th November 2016.

No further action is required in respect of this case and the Department of Justice considers that supervision is no longer required on the individual measures of this case.

McCaughey and Grew

The inquest, also sitting with a jury, was held between 12 March and 2 May 2012. It gave a narrative verdict, many aspects of which next of kin sought to challenge through judicial review. Following refusal to grant leave for hearing on a number of grounds by the Judicial Review court, the Court of Appeal granted leave for hearing. In April 2015, the Judicial Review Court delivered judgment *ex tempore* in which the Coroner's decisions and inquest findings were upheld. The next of kin filed an appeal against the decision, which was heard in the Court of Appeal on 26 and 27 April. The Court delivered judgment on 10 March 2017, dismissing the Judicial Review challenge. On 17 March 2017, the Court of Appeal refused an application by the Families to appeal the decision to the Supreme Court; the families have renewed their application for leave to the Supreme Court. The Supreme Court refused permission to appeal on the 14 December 2017.

Just satisfaction:

The just satisfaction awards have been paid in line with the judgments; evidence has previously been supplied.

State of execution of judgment:

The Government will provide another updated action plan as soon as there are developments to report and by December 2018 at the latest.