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Contact: Zoe Bryanston-Cross  
Tel: 03.90.21.59.62

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Meeting: 1377bis meeting (1-3 September 2020) (DH)

Communication from an NGO (Malone House Group) (29/05/2020) in the MCKERR group of cases v. the United Kingdom (Application No. 28883/95)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1377bis réunion (1-3 septembre 2020) (DH)

Communication d'une ONG (Groupe Malone House) (29/05/2020) relative au groupe d'affaires MCKERR c. le Royaume-Uni (requête n° 28883/95) **[anglais uniquement]**

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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DGI

29 MAI 2020

SERVICE DE L'EXECUTION  
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## Malone House Group

Finding a way forward on Legacy in Northern Ireland

FAO Clare Brown  
Head of Section  
Department for the Execution of Judgments of the ECtHR  
DGI - Directorate General of Human Rights and Rule of Law  
Council of Europe  
F67075 Strasbourg  
France  
[clare.brown@coe.int](mailto:clare.brown@coe.int)

### TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

#### SUBMISSION

27 May 2020

#### *Introduction*

I write on behalf of the Malone House Group in relation to the execution of judgments from the European Court of Human Rights in the 'McKerr Group' of cases. These are due to be further discussed at the Committee of Ministers meeting on 4 June 2020. They concern the Troubles in Northern Ireland which ended, in large part, in 1998 with the Belfast Agreement and are titled Finucane, Hemsworth, Jordan, Kelly, McCaughey, McKerr, McShane and Shanaghan respectively. We are concerned here with the implementation of the measures set out in the action plan and the continuing issues.

1. I am attaching a legal opinion *In the matter of the European Convention on Human Rights Article 2 Procedural in Northern Ireland* by barrister, Dr Austen Morgan who was asked to advise on the Article 2 substantive right to life and its relationship to the implied procedural right to an effective investigation.

#### *The Malone House Group*

2. The Malone House Group is a Belfast-based, non-governmental organisation (NGO) dealing with the Legacy issues arising from the Northern Ireland conflict. Its object is

to find the best means to address the Past while preventing a re-occurrence of violence between the two communities in Northern Ireland.

3. We came into being after a 'Legacy Legislation' conference at that venue in Barnett's Demesne in south Belfast which was held on 3 March 2018. The proceedings of the conference were published later that year in book form under the title *Legacy: What to do about the Past in Northern Ireland*. It was launched in the House of Commons in July 2018 by Kate Hoey MP.
4. Over the last two years, since the conference, many articles and opinions, both individually and as a group, have been published. In pursuit of our objectives, we have also held regular meetings with government officials, both in Northern Ireland and London, and submitted responses to the consultation of the Northern Ireland Office (NIO) on its 2018 draft Legacy Bill and to the inquiries of the Northern Ireland Affairs Committee at the House of Commons. We have also held discussions with British parliamentarians and the Republic's Department for Foreign Affairs as well as spoken at consultation meetings on the NIO's draft Legacy Bill.
5. The Group grew to some extent out of, and because of, the Haass talks on Flags, Parades and the Past of 2013. The unagreed Haass Report became in many ways the source document for the Stormont House Agreement (SHA) of December 2014. It in turn became a foundation for the silently expanded draft Legacy Bill of 2018. It has now been superceded by an, as yet, unspecific revised government policy on legacy legislation which promises to narrow previously proposed arrangements (see 18 March statement by the NIO's Brandon Lewis). Cost is plainly an issue for the government, one accentuated by the current Covid crisis. Separate but related legislation, the Overseas Operations (Service Personnel and Veterans) Bill, has also been tabled in Parliament but not yet discussed.
6. We share a deep concern over the one-sided broadcast media and academic output around addressing the Past in Northern Ireland. Our views differ considerably from those expressed by other NGOs and our universities' law departments however they are not as well publicised (nor are they funded).

#### *The Stormont House Agreement (SHA)*

7. It is important to note that, despite statements to the contrary, SHA was not agreed by all the major parties, any more than the Haass report was. We have assiduously opposed its implementation in the form proposed not least on human rights grounds with its potential for destroying reputations without fair procedures. In particular we are opposed to the creation of a parallel police of the past, the Historical Investigations Unit (HIU), with its suggested powers to investigate non-crimes. The Secretariat in its most recent analysis seems to have taken as read that the HIU is both efficacious and necessary in human rights terms. That view is not widely shared, nor has it cross community support in Northern Ireland.
8. The Group is united in the view that the past should not become our future which it is in danger of doing. This common sense position is reflected in much public opinion

and expressed by many senior figures in Northern Ireland from all sides of the community.

9. I instance here the contributions of these prominent individuals who have called into question, in different ways, how government has proposed to address the past and sought to draw a line in some form, whether on prosecutions alone, or on the whole legal and investigative process: John Larkin, the NI Attorney General, Barra McGrory the former DPP, Peter Sheridan a former Deputy Chief Constable of the RUC, Dennis Bradley of the Eames Bradley Report, and the late and highly esteemed civil servant Maurice Hayes. Any informed and fair observer of Northern Ireland affairs will agree that none of these people can be reasonably described as of the unionist community. Those involved in Malone House are also drawn from both communities.
10. The Malone House Group's participants and contributors range over the academic, legal, journalistic and political worlds as well as representatives of victims and bereaved individuals themselves. Key participants are myself, Jeffrey Dudgeon MBE, a former Ulster Unionist Party Belfast City councillor, author and human rights activist, Belfast solicitor Neil Faris, Ulster University political scientist Professor Arthur Aughey, expert in government administration Bill Smith, and William Matchett a former RUC officer and current writer.
11. The conference speakers were from a range of backgrounds and political outlooks while the titles of their contributions were Brian Garrett (solicitor and arbitrator) who facilitated, Neil Faris (Solicitor): *Misconceptions on "Truth & Justice" – an Overview*; Dr Cillian McGrattan (Ulster University): *"The possibilities are endless": Republican strategy and transitional justice*; Dr. Andrew Charles (community and voluntary sector): *The Past Being the Future*; Dr Austen Morgan (barrister and historian): *The Past: Drawing a Line?*; Ken Funston (Advocacy Manager South East Fermanagh Foundation (SEFF)): *The Victim's Perspective*; Trevor Ringland (solicitor, 'One Small Step'): *Dealing with the Past – Properly or Not At All*; Danny Kinahan (former Ulster Unionist MP for South Antrim): *Getting the Legislation Right*; and Ben Lowry (Deputy Editor of the Belfast News Letter) *Mishandling of Legacy – One of the Biggest Scandals in the UK since the 2nd World War*. I would be happy to forward a number of copies of our Legacy book, if requested, but am also attaching its text and cover should that be of use.

#### *Purpose of this Submission*

12. I draw the Committee's attention to the attached detailed legal submission by London barrister Dr Austen Morgan. A further legal opinion is in the course of preparation in Belfast and will be forwarded as soon as possible, In brief summary, we feel that the Council of Europe in its various formations should review the value and purpose of these unsettled Article 2 investigations and assess what they can still achieve. The opportunity for closure comes with the government's new proposals, difficult though they may be.
13. These questions need considered:
  - Is continuance dividing communities rather than reconciling them?
  - Are the cases one-sided, with no non-state actors under investigation?
  - Can further investigation be effective given the passage of time?

- Is further investigation hugely disproportionate in costs for minimal outcome or added value?
  - Would such process in any way be helpful in every other conflicted European country not least in the Balkans?
  - Would a dogmatic, doctrinaire imposition of Article 2 (as contended for in McKerr) lead the Committee into investigation of Soviet-era crimes and policy, or further back?
  - Should not regard to cost be reasonably taken into account in any proportionate examination – bearing in mind the entirely disproportionate expenditure envisaged in Northern Ireland with legacy enquiry costs in the region of £2 billion and rising?
  - Is the context of the times, in particular in the 1970s and 1980s, really understood?
  - Is Strasbourg’s reputation jeopardised without such a dispassionate assessment.
14. We believe that the decision at the 1369th meeting of the Committee of Ministers calling on the authorities of the United Kingdom “to submit by 31 March 2020, concrete information on how they intend to conduct an Article 2-compliant investigation into Mr Finucane’s death in light of the findings of the Supreme Court judgment of 27 February 2019” takes no account of the full judgement of the court which (as the Secretariat wrote) left it to the government to decide “what form of investigation if indeed any is now feasible, is required to meet [the procedural requirement] under Article 2]”. Past enquiry costings tell us that would need some £200 million which is not now a reasonable or proportionate outcome. Broader political and financial issues, let alone the need for reconciliation must surely enter into the decision making process at this level.
15. Are we now seeing the Past being unwritten without regard to context as happens in too many legal actions, or rewritten to provide equivalence between terrorist and state actions. To many, this can only be discriminatory against the state, given who kept records and who did not. Confidence in the European Convention in the UK is consequently eroded, especially as no end to process is ever seen.
16. In the light of our submission and the accompanying legal opinion, we believe that the UK has taken all reasonable, necessary and proportionate measures within its resources to abide by the judgement in this case in particular and ask that the Committee of Ministers adopts a resolution concluding that its functions under Article 46, paragraph 2, or Article 39 paragraph 4, of the Convention have been exercised.
17. In the other cases, the likely outcome of the NIO’s current intended legislation policy will not only not satisfy many claimants but will see calls for the UK to reverse or revise its position. The Committee has it within its power however to accept that unceasing demands for re-investigation have the potential for unsettling the relative peace between our communities, and the UK’s good faith in its proposals over decades to address legacy matters. Otherwise this will become a political dispute.

18. Whatever view the Committee takes on these cases, and regardless of any new legacy institutions, it is certain that there will be continued and unremitting activity in our courts, with demands for the re-opening of many more inquests, civil suits for damages, judicial reviews, challenges on convictions, requests for further public inquiries, and indeed further Strasbourg cases.
19. It is worth noting that the leader of Sinn Féin, Mary Lou McDonald, in an interview in Dublin's *Sunday Independent* (24 May 2020) stated that the IRA campaign which killed over 2,000 innocent people was "justified". This is evidence that dealing with the past remains a deeply contended matter in Northern Ireland when the second largest party in both parts of Ireland proudly justifies colossal abuse of the Convention's right to life, itself.

#### *Article 2's purpose*

20. Meeting the Strasbourg Court's judgements on Article 2 may simply be unattainable at this stage. There has to be an end point. It is worth reminding ourselves what Article 2 says, and ask if the jurisprudence on effective investigation of deaths has not overtaken the very purpose of protecting life?
1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
  2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    - (a) in defence of any person from unlawful violence;
    - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
    - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Yours sincerely

Jeffrey Dudgeon (for the Malone House Group)

56 Mount Prospect Park  
Belfast  
BT9 7BG

Tel. 079 2125 1874

[jeffreydudgeon@hotmail.com](mailto:jeffreydudgeon@hotmail.com)

## **IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ARTICLE 2 PROCEDURAL IN NORTHERN IRELAND**

### **(McKERR GROUP OF CASES)**

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#### **OPINION BY DR AUSTEN MORGAN**

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I have been asked to advise on a human rights matter, regarding Northern Ireland ('NI') as part of the United Kingdom ('UK'). It concerns article 2 substantive (right to life), and the implied procedural right (to an effective investigation). I refer to the European court of human rights, and its case law, as simply Strasbourg (unless it is necessary to specify).

#### **Introduction**

I am a barrister in private practice, in London and Belfast, and practice from these chambers: 33 Bedford Row, London WC1R 4JH. I do a great deal of legal writing, including an updated article for Thomson Reuters on the above subject: <https://www.austenmorgan.com/wp-content/uploads/2019/07/Duty-to-undertake-effective-investigation.pdf-04.07.2019.pdf>.

I am further: the author of *Tony Blair and the IRA: the 'on the runs' scandal*, London 2016; and a contributor to Jeffrey Dudgeon, ed., *Legacy: what to do about the past in Northern Ireland?*, Belfast 2018.<sup>1</sup>

It is my view in brief that: (1) article 2 procedural, from 2001, is unfair retrospective law; (2) Strasbourg appears to have forgotten about article 2 substantive, and the fate of the right to life in NI; (3) in the line of cases, starting with *Jordan*, Strasbourg recognized only one category of victims, thereby excluding all others; (4) the overall effect of article 2 procedural in NI has been lawfare (a new concept), the continuation of the troubles through the courts – and frustrating the process of reconciliation.

It is further my view that (5) Strasbourg seems never to have appreciated that article 2 procedural, under United Kingdom ('UK') law, remains inapplicable to violent deaths (including in NI) before 2 October 2000.

#### **The Northern Ireland Troubles**

The Northern Ireland troubles – a significant period in United Kingdom /Irish relations – are dated from 1968 to 1998. The army's Operation Banner (the longest in its history) was from: 14 August 1969 to 31 July 2007.

#### *Who killed Whom?*

One may ask: who killed whom in those approximately three decades? It might be thought that Lord Saville's report, following his £200m inquiry in 1998 to 2010, into Bloody Sunday

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<sup>1</sup> Both these books are readily available from Amazon.

in Derry/Londonderry on 30 January 1972 – when soldiers killed 13 demonstrators - , would be prototypical of the conflict.<sup>2</sup> That is not so.

There are inadequate official statistics, and the best source is a private venture by journalists: David McKittrick & others, eds., *Lost Lives: the stories of the men, women and children who died because of the Northern Ireland troubles*, Edinburgh & London 2007. The authorities now use this volume of nearly seventeen hundred pages.

The *Lost Lives* statistics reveal a quite different picture (from certain historical imagery and propaganda), between 1966 and 2006 (though deaths continue) for principally NI.<sup>3</sup> A total of 3,720 persons was killed (and very many more seriously injured). Republicans were responsible for 2,152 killings (57.85 per cent). Loyalists killed 1,112, a lower attrition rate (29.89 per cent). And the state – soldiers more than police – killed 361 persons (9.7 per cent).<sup>4</sup>

These statistics are the basis for the popular rounding up of recent years: 60 per cent republican, 30 per cent loyalist and ten per cent state killings – 60/30/10. I cannot see where any party at Strasbourg, whether victim or state, has put this before the court. I know of no case where any judge has discussed the context of the NI troubles, not least regarding the role of article 2 jurisprudence in the past two decades. I am content to be corrected if I am exaggerating.

It is incontrovertibly the position that the 90 per cent terrorist killings were unlawful. There were no justifications, and no available defences. Only a handful of the ten per cent state killings was unlawful: one being: *R v Clegg* [1995] 1 AC 482. So, in an ideal situation of fairness and equality, with post-troubles prosecutions of historic cases proceeding slowly, one would expect prosecutions in NI (if not convictions), to be running, from 1998, at very roughly a 60, 30, ten proportion over such a long period.

The relatives of many soldiers and police killed<sup>5</sup> (who are too readily ignored), and do not appear at Strasbourg, have had to cope with non-prosecutions, and limited investigations, while many republican and loyalists terrorists have escaped prosecution (and no investigations of their crimes): the figure of 229 IRA prisoners released early after 1998 contrasts with the additional 228 IRA members who applied for letters from the Northern Ireland Office ('NIO') between 2000 and 2014<sup>6</sup>. These were the on the runs. And they benefited effectively from a secret government amnesty offered only to the IRA.

Prosecution for all deaths assumes of course that the Public Prosecution Service of Northern Ireland ('PPSNI'), applying its test for prosecution – comprising the evidential test and the public interest test - , presumes that all state killings are potentially unlawful; but that would be to ignore the defence of reasonable force while defending oneself or others available to soldiers and others on duty (but not to terrorists): *Da Silva v UK*, ECtHR (grand chamber), **30 March 2016** (the John Charles de Menezes case).

### *Prosecutions Today*

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<sup>2</sup> Report of the Bloody Sunday Inquiry, London, 10 vols, 15 June 2010.

<sup>3</sup> The figures include: Great Britain; and the rest of Europe.

<sup>4</sup> Table 2 on p. 1553. There are 95 others making up the 3,720 total.

<sup>5</sup> The figures are respectively 709 and 303 killed, though there are alternatives of 722 and 312.

<sup>6</sup> This story is recounted (for the first time) in: Austen Morgan, *Tony Blair and the IRA*, London 2016.



There are the following pending prosecutions of former soldiers, with the dates of PPSNI decisions to prosecute (where these have been published):

24.04.15: Dennis Hutchings (for John Patrick Cunningham in 1974);  
16.12.16: soldiers A and C (for Joe McCann in 1972);  
19.06.18: Jonathan Holden<sup>7</sup> charged first in 1988 (for Aidan McAnespie in 1988);  
14.03.19: soldier F (out of 19 suspects) (for bloody Sunday in 1972); and  
15.04.19: soldier B (for Daniel Hegarty in 1972).

That is a total of six mostly elderly, and often seriously ill, former soldiers. Most pre-date 8 August 1973, meaning there would be no early release from prison.<sup>8</sup> Dennis Hutchings, and soldiers A and C, hold official letters, stating that, following investigation, they would not be prosecuted.

There have been prosecutions of republicans and loyalists – for pre-10 April 1998 crimes – in the past two decades, but there are no comparable lists of pending terrorist prosecutions. That is why it is being said that a former soldier is 54 times – 6 multiplied by 90 divided by ten – more likely to be prosecuted than a republican or loyalist terrorist. One adds to that: the legal uncertainty regarding re-opened soldier investigations; and the absolute certainty of terrorist crimes having been committed and being unlawful.

The last prominent IRA member before the courts was Ivor Bell in 2014. Reportedly a former chief of staff, he was dismissed from the IRA in 1985 (and was unsupported by republicans). Accused of soliciting the murder of Jean McConville in 1972, he was found unfit to stand trial (having claimed he was suffering from dementia). In a trial of the facts, he was acquitted in October 2019, when the judge ruled that the Boston College tapes were inadmissible.

The only leading republican awaiting trial in NI is John Downey. In February 2014 at the Old Bailey – and charged with the four Hyde Park murders – Sweeney J ruled that it would be an abuse of process to proceed with a trial. John Downey had relied upon an official letter stating that he was not wanted in NI and Great Britain. He walked free.<sup>9</sup> John Downey is a special case. And that is why he was extradited from the Republic of Ireland more recently, on a different charge: namely the killing of two Ulster Defence Regiment soldiers near Enniskillen in August 1972. He is on bail. No date for his trial has been fixed. It is widely expected that John Downey will seek to rely upon his letter for a second time.

## **Strasbourg becomes engaged**

### *McCann*

The key case on article 2 and NI is: **McCann v UK, ECtHR (grand chamber), 27 September 1995** (the Gibraltar three from 1988). Strasbourg found there had been a (substantive) violation, by ten votes to nine. Significantly, because of the terrorist operation by the Irish republican army ('IRA'), it refused the claim for damages. (That was not to be

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<sup>7</sup> Grenadier Guards.

<sup>8</sup> Because of the Northern Ireland (Emergency Provisions) Act 1973 and the concept of scheduled offences, and under the Northern Ireland (Sentences) Act 1998.

<sup>9</sup> This needs to be qualified by a successful civil action by the daughter of one of the dead soldiers: Young v Downey [2019] EWHC 3508 (QB). A quantum hearing is forthcoming.

followed subsequently.) The dissenting opinion, including the president, Rolv Ryssdal, of Norway, at pages 57 to 65, is essential reading. Equally significantly, this case was heard during the NI troubles.

Setting out the law on article 2 in *McCann*, Strasbourg said: ‘The Court’s approach to the interpretation of Article 2...must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective...In keeping with the importance of this provision...in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.’ (paras 146 & 150)

Two submissions are apposite. First, the humanitarian concern for ‘the protection of individual human beings’. And second, the assumption (flowing from the structure of the convention) that ‘lethal force’ was used only by the state (because of the defences in article 2). Missing entirely, is any moral and legal awareness of the facts of the NI troubles, as outlined above, including the statistics on who killed whom. The UK state was arguably, in the main, applying the rule of law during the history of the troubles, the protector of the substantive right to life in NI, rather than – as is now being portrayed – the violator of the procedure of effective investigation.

Strasbourg did not fashion the procedural obligation in *McCann* (as may be seen from paras 157 to 164). True, the applicants submitted there had been an inadequate inquest (without any discussion of coronial law and practice in Gibraltar). They also were concerned only with state killings. They did this with reference to a United Nations force and firearms principles policy document. True, it was the UK which referred to such a possibility being read into article 2 (a point never noted!). Both the commission and the court refused to accept the case of the applicants, and found against them: the Gibraltar inquest had been acceptable. But then, in para 161, having introduced articles 6 and 13, the drafter of the judgment wrote: ‘[articles 2 and 1 together] require[s] by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.’ (para 161)

That was it. There was no decision in favour of the *McCann* applicants on inadequate investigation. Query the *inter alios*? Was Strasbourg saying in 1995 that all deaths should be investigated? Or did it simply think that the state had done most, if not all, of the killing?

## Article 2 Procedural

### *Strasbourg Develops the Law*

I refer to:

**Jordan v UK, ECtHR (third section), 4 May 2001;**  
**McKerr v UK, ECtHR (third section), 4 May 2001;**  
**Kelly v UK, ECtHR (third section), 4 May 2001;**  
**Shanaghan v UK, ECtHR (third section), 4 May 2001.**

These four cases were decided on the same day, the judgments – in the absence of any appeals by the UK on at least damages – becoming final on 4 August 2001. It is more logical to refer to Jordan, the first in time (in terms of application), in order to access the new law, which is common to all four cases. I accept that some refer to the McKerr cases, though it is unclear on what basis this is chosen as the lead case (possibly the date of the killings in 1982). Significantly, these cases were decided after the formal end of the NI troubles.

Strasbourg set out the law on article 2 for the first time in paras 102 to 109 of Jordan (and this may be contrasted with paras 146 to 164 of McCann, which also includes the facts). As is invariably the case, the same text appears, sometimes with deletions, but usually additions.<sup>10</sup> Paras 102 to 104 are unremarkable, and it is interesting that McCann is cited as the leading authority (to use English terminology) on article 2, substantive and procedural.

Para 105 picked up the ‘by implication’ drafting from McCann (para 161). The new text was: ‘The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases **involving State agents or bodies**, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve these purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.’

The purpose was to ‘protect the right to life’. But the drafter of the judgment seemed to suggest that was only ‘in those cases involving State agents or bodies’. So, the *inter alios* in McCann simply disappeared, without argument and reasons. If that is not correct, is it not the case that only state killers are to be held to account? But, if this is so, what is the meaning of ‘these purposes’? Strasbourg turned its mind, in very few words, from the 100 per cent of NI killings to only the 10 per cent of state killings, from the unlawful to the arguably lawful. It did so with little evident comprehension.

Paras 106 to 109 went on to spell out the elements of an investigation: independent investigators; an effective investigation, leading ‘to the identification and punishment of those responsible’ (para 107); a requirement of promptness and reasonable expedition; and a sufficient element of public scrutiny – ‘in all cases,...the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests’.

The victim’s legitimate interests? The Kelly case was brought by relatives of the eight IRA men killed by UK special forces, defending Loughgall police station in May 1987. Some were quoted subsequently arguing, in the alternative, for the arrest of their loved ones. Had they, or had they not, counselled their IRA family member when alive? Had they, or had they not, considered reporting IRA activity to the authorities? And what were the legitimate interests of the eight IRA members? To be prevented from engaging in terrorism by peaceful means only? If so, the IRA would have won, and not lost.

The perpetrators in the four Jordan cases were: Jordan, the Royal Ulster Constabulary (‘RUC’); McKerr, the RUC; Kelly, the army; and Shanaghan, this was different.

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<sup>10</sup> The cut and paste paras appear in: McKerr, paras 108-15; Kelly, paras 91-8; and Shanaghan, paras 85-92.

The judgment reports the following facts about the fourth case: ‘Patrick Shanaghan was a[n]...active member of Sinn Fein when he was killed. The Royal Ulster Constabulary (RUC) suspected him of being an IRA member and that he was involved in terrorism...The RUC warned Patrick Shanaghan twice that he was under potential threats from loyalist paramilitary groups...On 27 April 1991, Sergeant Norden of the RUC called at Mr Shanaghan’s home and informed him that he had received information to suggest that he was being targeted by loyalists...The UFF (Ulster Freedom Fighters – a loyalist organisation) later claimed responsibility for the murder in the local press.’ (paras 12, 13, 18 & 21)

Yet, in paras 85 to 92, Strasbourg simply applied the same law, which distinguished paramilitary killings as not requiring investigations. In paras 93 to 125, applying the law to the facts, and finding a violation of article 2 procedural, the judgment begins: ‘[His mother’s] complaints centred on her allegations that the RUC or other members of the security forces assisted the loyalist gunmen *inter alia* by providing information for the purposes of targeting Patrick Shanaghan and by facilitating the gunman’s task, before the event, by their dispersal of men away from the area and, after the event, by making sure that Patrick Shanaghan received no medical assistance, and taking inadequate steps to locate or apprehend the perpetrator. [] If these allegations were true, serious issues would arise as to whether Patrick Shanaghan’s right to life had been protected by law as required by Article 2 of the Convention and as to whether the degree of collusion attracted State responsibility in respect of the killing itself.’ (paras 93-4) It seems that only collusion cases are admissible? But what is the basis of that, where Strasbourg made clear it was not making any findings of fact? An allegation of collusion, without evidence, and with several possible explanations for why a person may believe something (as Mrs Shanaghan did), is, in law, normally of little consequence. But Strasbourg seems to have treated such allegations as, not just credible, but possibly or probably true.

A number of submissions is necessary. First, Strasbourg was clear that, in paras 102 to 109 of Jordan, it was making new law in May 2001. This law was, therefore, retrospective to 1982, given the facts in Kelly. It was never suggested that the RUC should have done in 1982 what the Police Service of Northern Ireland (‘PSNI’) was being required, in May 2001, to do. Yet, past actions would be judged by later standards. (Strasbourg seems not to have spotted that one police force in NI meant, when it came to independence being defined in practice in subsequent years, the involvement of mainland British police officers in all investigations became necessary.) Second, while Strasbourg made clear in the Jordan cases that it was not making findings of fact regarding the killings or even their investigations, how could it fashion a procedural obligation implied in article 2 which led the UK on a long road of enforcement by the council of ministers? Third, while one of the four cases – Shanaghan – was a terrorist killing, loyalist rather than republican, Strasbourg simply failed to address the 60, 30, 10 per cent configuration of deaths. The answer that only collusion cases were admissible, is undermined by the fact that Strasbourg was not, and was not able to judge, whether such allegations were meaningful or not. Fourth, unlike in McCann, Strasbourg awarded compensation, to the relatives, thereby guaranteeing that all future article 2 cases would have to be dealt with separately (yet the legal reasoning took a standard form and Strasbourg could have better managed its lengthy waiting list).

The law in the UK is clear on retrospectivity. Generally, unless made expressly, statute law is not retrospective, and certainly not as regards criminal liability. Article 7 of the convention (no punishment without law) recognized this as regards national law and international law

(including the general principles of law recognized by civilized nations). When it comes to case law, the UK's law of precedent is: a case may establish a principle of law (the *ratio decidendi*); if that is subsequently overruled, it is not retrospectivity – the new decision is the recognition of the correct legal principle. UK law is clear that individuals, whether citizens or officials, know what the position is, when they are being judged. It is always interesting to judge the past by present values, but should that form any part of a system of justice?

### *Later Cases*

I refer to:

**McShane v UK, ECtHR (fourth section), 28 May 2002;**  
**Finucane v UK, ECtHR (fourth section), 1 July 2003;**  
**Brecknell v UK, ECtHR (fourth section), 27 November 2007;**  
**McCaughey v UK, ECtHR (fourth section), 16 July 2013;**  
**Hemsworth v UK, ECtHR (fourth section), 16 July 2013.**

The perpetrators in these five later cases were: McShane, police and army; Finucane, loyalists; Brecknell, loyalists; McCaughey, police; and Hemsworth, police. Again, as with Shanaghan, two were victims of loyalists: Finucane and Brecknell. Collusion, in Finucane's case was escalated to: the absence of an investigation of collusion amounts to a violation. In Brecknell, collusion was based upon the hearsay testimony of a corrupt police officer (John Weir), who was a loyalist killer.

The judgment in Finucane noted: 'The applicant submitted that the RUC investigation into her husband's death was, *inter alia*, hopelessly inadequate as it failed entirely to explore the possibility of collusion and the investigating officers were hierarchically linked to those against whom allegations were made. The inquest was also strictly limited in its scope, involving no key witnesses or any persons suspected of involvement in the death and could not provide an effective part of the process of identifying or prosecuting the perpetrators of any unlawful act...As regards the alleged lack of cooperation in various investigations, she had always taken the position that an independent judicial inquiry was the appropriate solution.' (paras 61-2)

The statement of the law in these additional cases is in: McShane, paras 91-8 (as above); Finucane, paras 67-71 (with the first three paras deleted); Brecknell, paras 65-75 (with new text drawing on the Jordan cases); McCaughey, paras 90-2 (with a simplified statement); and Hemsworth, paras 44-6 (following McCaughey). Brecknell, in 2007, had the court stating: 'The obligation to carry out an effective investigation into unlawful or suspicious death is well-established in the Court's case law...' (para 65) – which was demonstrably false, given the 90 per cent of unlawful terrorist killings in NI.<sup>11</sup> Hemsworth was admitted only on the delay of an inquest, from 1998 and 2011, the court holding that the applicant had not yet exhausted domestic remedies otherwise.<sup>12</sup>

These five cases may be taken more briskly than the Jordan four. Strasbourg, referring to the Jordan cases, had, as early as 2002-03, lost sight of the complexities it had analyzed in the

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<sup>11</sup> The judgment cited *Nachova v Bulgaria*, ECtHR (grand chamber), 6 July 2005, which adopted the Jordan law, slightly modified to fit the facts of two armed police officers killing two unarmed men they were arresting.

<sup>12</sup> Para 67.

Jordan cases. The presence of loyalists in 2003 (Finucane) and 2007 (Brecknell) was not seen as problematic, the mantra of collusion simply adding to the legal obligation to investigate. This addition suggests that Strasbourg saw collusion, not just as an allegation in these two cases, but as a thematic reality. Why fault the authorities for not investigating collusion, when there is no evidence of collusion? The concept has a meaning in Irish republicanism (of moral force), and it does not readily lend itself to dispassionate investigation.

### **Strasbourg Widens the Law**

The law on article 2 procedural has been traced in the nine NI cases considered. However, elsewhere, Strasbourg widened the net confusingly.

In **Silih v Slovenia, ECtHR (grand chamber), 9 April 2009**, a medical negligence case, where the parents pursued civil and criminal remedies unsuccessfully on behalf of an adult son who died, Strasbourg revised the procedural obligation implied by the substantive article 2 one. Because of the way it had conducted article 2 cases, ‘the Court conclude[d] that the procedural obligation to carry out an effective investigation under Article 2 ha[d] evolved into a separate and autonomous duty.’ (para 159) That was it: no discussion of member states agreeing the convention and protocols, and the ECtHR applying the law to facts. If the procedural right was implied, how did it fly the article 2 nest? And what did autonomy mean?

This was a case of the court effectively amending the convention to add a new, independent right, which must appear strange to common lawyers. And it would have a surprising consequence in UK law (see below). The reason is related to the following point.<sup>13</sup>

The grand chamber in Silih also addressed its temporal jurisdiction, because the death, which had occurred on 19 May 1993, pre-dated Slovenia’s ratification of the convention, on 28 June 1994.

Strasbourg held: ‘...having regard to the principle of legal certainty, the Court’s temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended.’ (para 161) Not open-ended was explained by three points. ‘First where the death occurred before the critical date [of ratification], only procedural acts and/or omissions occurring after that date can fall with the Court’s temporal jurisdiction.’ However, the second point was the need for ‘a genuine connection between the death and the entry into force of the Convention’. This was never explained. And the third was: ‘the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.’ (paras 162-3). But why protect the underlying values of the convention, when another rule of international law determines whether the member state is bound by an international agreement or not?

Judges Bratza and Turmen dissented powerfully: ‘Divorcing the procedural obligation from the death which gave rise to it in this manner would, in our view, be tantamount to giving retroactive effect to the Convention and rendering nugatory the State’s declaration recognising the Court’s competence to receive individual applications...’. (p 60)

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<sup>13</sup> Strasbourg resorted to the UN human rights committee and the Inter-American court of human rights (paras 111-18).

In **Janowiec v Russia, ECtHR (grand chamber), 21 October 2013**, Strasbourg dealt with the Katyn forest massacre of 1940, where Polish military officers were killed, not by the Nazis as believed at the time, but by Soviet Union Russians (as indicated by an international commission in 1943). Russia did not admit responsibility until 1990. It then ratified the convention in 1998. The court decided, by 13 votes to 4, that it was not competent to consider article 2, substantive or procedural, and this because of the passage of time from 1940 to 1998. (The applicants had appealed to the grand chamber).

However, faced with the period 1940 to 1998, the court went back to Silih's case of four years' before, and the idea of temporal jurisdiction. It repeated the point: procedural acts and omissions only from ratification, here 1998. But it modified the second and third points, genuine connection and underlying values. Genuine connection was now 'a reasonably short period', not in excess of ten years, with most of the inquiry due to take place, here, after 1998. And underlying values was now, for war crimes, genocide or crimes against humanity, not before the convention having been agreed on 4 November 1950. (paras 141-51) The applicants were therefore left with a gap, 1940 to 1950. It is extraordinary that Strasbourg wrestled with the law, and yet failed to assist the applicants (save on a minor disclosure point about the discontinuation of criminal proceedings on 21 September 2004, on the alleged grounds that the Russian perpetrators in Katyn forest were all dead). (paras 210-16).

### **The Law in the United Kingdom**

The Jordan line of cases has been considered, since May 2001, in the house of lords/supreme court. The UK view, while it considers article 2 procedural, is that it does not apply to deaths in *inter alia* NI before 2 October 2000 (when the Human Rights Act 1998 came into force).

The authority for this, in the common law, is: **McKerr's Application for Judicial Review, Re [2004] UKHL** (decided 11 March 2004). Two previous cases were held to have been decided *per incuriam* retrospectively (para 23).

The supreme court has never overruled this case, which it could do: under the practice direction, judicial precedent [1966] 3 All ER 77, the house of lords decided it could 'depart from a previous decision when it appears right to do so'; under practice direction no. 1, it is recognized that the supreme court has inherited the jurisdiction of the house of lords (para 1.1.1).<sup>14</sup>

In **McCaughey's Application for Judicial Review, Re [2011] UKSC 20**, the supreme court declared – contrary to the coroner relying upon McKerr – that this inquest had to comply with article 2. Lord Rodger (dissenting) argued McKerr should be followed.<sup>15</sup> The court decided to follow instead Silih's case in Strasbourg. It is not clear why (references were made to the freestanding obligation and temporal jurisdiction).<sup>16</sup> The ratio of McCaughey seems to be that, where the UK decided to hold an inquest, then it was bound by article 2.<sup>17</sup> But that does

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<sup>14</sup> See also Constitutional Reform Act 2005 s 40.

<sup>15</sup> Former Supreme Court judge in the case, Lord Brown of Eaton-under-Heywood, subsequently affirmed this position extra-judicially (his mea culpa): Policy Exchange, vote of thanks to John Larkin QC, 12 March 2020.

<sup>16</sup> Lord Phillips stated: 'I believe that the most significant feature of the decision in Silih v Slovenia is that it makes it quite clear that the article 2 procedural obligation is not an obligation that continues indefinitely.' (para 61)

<sup>17</sup> 'The United Kingdom is not under a continuing obligation under article 2 to carry out an investigation into the deaths over 20 years ago of Martin McCaughey and Dessie Grew. But an inquest is going to be held into

not explain why it refused to recognize article 2 through the Human Rights Act 1998, but did so in terms of the UK's obligations through the council of Europe. Surely rights had been brought home by statute. The supreme court did not overrule McKerr, despite being invited to do so (paras 24-35 & 56-63). The case remains a mystery, since international obligations are one thing, and the Human Rights Act 1998 something different.

**In R (on the application of Keyu) v SoS for Foreign and Commonwealth Affairs [2015] UKSC 69**, concerning killings in Malaya in 1948, and the refusal of a contemporary statutory inquiry in the UK, Lord Neuberger applied *Janowiec v Russia* (and a critical date of 1966), to no particular effect regarding the applicants. Considering McKerr after McCaughey, he decided to leave open whether the UK had to follow Strasbourg (paras 92-8). Lord Kerr, who relied upon *Silih* detachability, left open whether McKerr should be overruled (paras 243-9). McKerr remained in legal play.<sup>18</sup>

**In the matter of Finucane's Application for Judicial Review, Re [2019] UKSC 7**, Lord Kerr gave the judgment on behalf of his four colleagues. Showing a preference for Strasbourg case law, he nevertheless left undecided the question of McKerr (para 111). The supreme court declared that there had not been an article 2 compliant inquiry (despite Sir Desmond de Silva's two-volume report<sup>19</sup>), but then went on to deny any implication for the applicants and their supporters: 'It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement. The appeal should otherwise be dismissed.' (paras 153-4) 153-4) One possibility is that the other four judges were insistent on the addition of these last two paragraphs.

## Conclusion

I will conclude with a few questions regarding Strasbourg:

first, does Strasbourg accept that, in imposing ever increasing standards on the UK for past actions/omissions (going back potentially to 1968), such retrospectivity cuts against the grain of the common law (including international law), whether located in statutes or cases?;

second, does Strasbourg accept (though it has never said so in judgments), that the right to life was in the main protected by the UK (despite the 90 of terrorist killings), and that state's

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those deaths. As a matter of international obligation it is now apparent that the United Kingdom has come under a free standing obligation under article 2 to ensure that the inquest complies with the procedural requirements of that article, at least in so far as this is possible under domestic law.' (para 51) See also para 56.

<sup>18</sup> This was the position of Sir James Eadie QC, senior crown counsel, in *Finucane* (para 111).

<sup>19</sup> Rt Hon Sir Desmond de Silva QC, *The Report of the Patrick Finucane Review*, HC 802-1 & 2, 12 December 2012 (vol 2 being 329 pages of documentary evidence). He concluded: '...there is no evidence that Ministers sought to direct the security forces to take a relaxed or permissive approach to loyalist paramilitaries; Ministers do not appear to have been aware of Brian Nelson's targeting activities prior to September 1990; and there is no evidence that Ministers had any foreknowledge of the murder of Patrick Finucane, nor that Ministers were subsequently provided with any intelligence briefing suggesting that the intelligence agencies had foreknowledge of a threat to Mr Finucane's life.' (Para 25.33) Lord Kerr's assessment of the report is at para 134 of the judgment.



putative violations of article 2 procedural (in the 10 per cent of state killings) distorts the story of human rights protection?;

three, while the Jordan line of cases, from 2001 to 2013 (and continuing?), has had a huge impact on the way the UK addresses legacy in NI (or not), has Strasbourg not selected one particular category of victims: the relatives of republican terrorists (not terrorists in general), ignoring: the relatives of soldiers and police killed, the relatives (catholic and protestant) of republican terrorists, and the relatives (protestant and catholic) of loyalist terrorists, where collusion is not alleged? And;

four, has Strasbourg not been responsible, from McCann to Jordan, via Silih and Janowiec, for the lawfare, which occupies the place where a legacy policy should be?

### *Afterword*

Two final points. First, Strasbourg may respond that it is not responsible for who seeks a human rights remedy. True. But why would the relatives of soldiers, police officers, victims of republican terrorism and victims of loyalist terrorism (not arguing collusion) have any faith in Strasbourg after the case law discussed above?

And second and finally, in Jordan, Strasbourg reached out to relatives in an unprecedented manner. The court perceived there to be a question of lack of public confidence in NI: 'The court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated *inter alia* by the submissions made by the applicant concerning the alleged shoot-to-kill policy.' (para 144)

No doubt the Strasbourg judges, being people of rational frames of mind, believed in greater openness and allaying suspicions by patient explanation. Can it be said that the article 2 procedural jurisprudence of Strasbourg has had a civilizing effect as regards UK state policy and practice, and allegations of shoot to kill and collusion etc? Have fears been allayed by all this Strasbourg-driven lawfare? The answer is incontrovertibly no, which is why Strasbourg should seek to review the contribution it has made to NI during an uneasy peace of over twenty years.

Dr Austen Morgan  
33 Bedford Row  
London  
WC1R 4JH  
[a.morgan@33bedfordrow.co.uk](mailto:a.morgan@33bedfordrow.co.uk)

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