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Date: 06/10/2021

DH-DD(2021)979

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Meeting: 1419th meeting (December 2021) (DH)

Communication from an NGO (Malone House Group) (23/09/2021) in the case of MCKERR 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 : 1419^e réunion (décembre 2021) (DH)

Communication d'une ONG (groupe Malone House) (23/09/2021) dans l'affaire MCKERR c. 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.



MALONE HOUSE GROUP

Finding a way forward on Legacy
in Northern Ireland

DGI

23 SEP. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Convenor

Jeffrey Dudgeon MBE
Human rights activist, historian
and former Belfast City Councillor

Panel of Experts

Dr Arthur Aughey
Emeritus Professor of Politics

Neil Faris
Solicitor

Baroness Hoey of Lylehill & Rathlin
Unattached Peer and former MP

Dr William Matchett
Author and former Senior Researcher

Dr Austen Morgan
Barrister at Law

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TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

SUBMISSION

22 September 2021

Introduction

1. I write again on behalf of the Malone House Group in relation to execution of judgments from the European Court of Human Rights in the 'McKerr Group' of cases at the Committee of Ministers (CM) of the Council of Europe (COE) and the decisions at its 1398th (DH) meeting on 9-11 March 2021.
2. Here is the link to the supervision of the execution of that judgment of the Court: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a1b20e The Secretariat's notes and analysis document for that meeting on the McKerr group v. the UK (Application No. 28883/95) is at [CM/Notes/1398/H46-38](#)
3. The McKerr Group of cases (that includes Finucane) are due to be further discussed at the Committee of Ministers' 1419th meeting on 30 November to 2 December 2021. They relate to the Troubles in Northern Ireland which ended, in large part, nearly twenty five years ago in 1998 with the Belfast Agreement. We are concerned here with the Committee's decision on reopening Finucane and the analysis provided by the Secretariat on which it bases its decisions.
4. The Malone House Group (MHG) 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.

5. We came into being after a 'Legacy Legislation' conference 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. The most recent version of the MHG introduction is attached.

The MHG principles

6. Our key concern is that principles of the administration of justice for the protection of all are being ignored or over-ridden in a political campaign for 'truth and justice'. It is a shared position of MHG participants that, insofar as it may be envisaged that legacy can be delivered through the criminal justice system, the following principles must prevail:
 - Adherence to the rule of law;
 - No diminution of the principle of innocence until guilt is proven beyond reasonable doubt;
 - Any process must adhere to fair trial principles and procedures;
 - Any process must adhere to protection of reputation;
 - That where police powers are conferred these to be exercised only for the purpose of criminal investigations and thereafter reporting to the Public Prosecution Service;
 - In particular, police have no role to adjudicate and issue public reports critical of any individual as that is the function of a court or duly constituted tribunalThus the administration of justice cannot be 'victim focused' or 'victim centred' if it entails any diminution or evasion of these essential principles.

Article 2

7. I am also attaching a second or supplementary legal opinion *In the matter of the European Convention on Human Rights Article 2 Procedural in Northern Ireland* by barrister, Dr Austen Morgan. He was asked to advise on the Article 2 substantive right to life and its relationship to the implied procedural right to an effective investigation. His first such opinion is to be found at [DH-DD\(2020\)500](#). This second opinion deals with the CM decision of March 2021.
8. Attached also to this supplementary opinion, for information, is the most recent version of an article on Article 2 procedural that Dr Morgan regularly updates for Thomson Reuters' UK Insight series. It discusses both Strasbourg and UK cases.
9. Another issue touched on by Dr Morgan in his opinion is the Secretariat's analysis on matters relating to the office of the Police Ombudsman for Northern Ireland (OPONI).
10. The analysis states in relation to OPONI's powers to compel retired police officers to appear as witnesses and suspects that, "This was already raised in 2009 and 2014 but has not yet been resolved. In the most recent OPONI five yearly legislative review of its powers, published in November 2020, the PONI has repeated a recommendation to amend the legislation to provide powers to compel police officers (serving or retired), as witnesses and suspects to attend for interview and produce documents within a

reasonable time. The authorities should confirm their response to that recommendation given its potential importance to ensure that the PONI possesses the necessary means and powers to conduct effective investigations in conformity with Convention requirements.”

11. The PONI review recommendations were made in late 2020 to the Minister of Justice in the Northern Ireland Executive, Naomi Long MLA. Any decision to implement them and legislate appropriately will have to go through and be agreed by the Executive and Assembly, as justice is a devolved matter. That alone will be a very long process taking several years following public consultation. Politically it is quite likely they will not be agreed, certainly not in the extensive form proposed. Previous recommendations, as noted, failed to advance.
12. This reality is ignored in the Secretariat analysis which seems derived from the desires and demands of NGOs like the CAJ, and certain governments. It does not stand up to coherent scrutiny. The powers sought appear not to have been examined by the Secretariat and would be unique in these islands.
13. For example, the Scottish Government has recently received and accepted a report by Dame Elish Angiolini (link below) which recommends, in the area of retired police officers, a very limited change where gross misconduct is alleged. There is no mention of compelling former police officers to give evidence. In relation to the compellability of witnesses as witnesses or suspects, it seems not to be recognised in the Secretariat’s analysis that witnesses so compelled are not obliged to incriminate themselves (as per Article 6), will not necessarily answer or tell the truth, and in public inquiries – more than compliant with Article 2 – they can be given immunity from prosecution in relation to their evidence, all of which happened in the Saville inquiry on Bloody Sunday. It cost £200 million.
<https://www.gov.scot/publications/independent-review-complaints-handling-investigations-misconduct-issues-relation-policing/pages/14/>
“Recommendations in relation to former police officers
11.31 Recommendation: The Scottish Government should develop proposals for primary legislation that would allow, from the point of enactment, gross misconduct proceedings in respect of any police officer or former police officer to continue, or commence, after the individual ceases to hold the office of constable.”

Articles 6 & 8

14. There is no mention in the Secretariat analysis of other relevant and often competing Convention rights in Article 6 (fair trial) and Article 8 (respect for private life and reputation). This is a concerning omission and gives the impression that Article 2 procedural has predominance over others.
15. We note that the views of NGOs which get favourably quoted in aid of the Secretariat analysis take up seven paragraphs whereas the one NGO that takes a different view is relegated to a footnote, without explanation as to its dissent.
16. MHG asks if in this case where individual measures are to be reopened because, in part, the matter has been running for some 20 years, if this has been or will be so in other cases that have been unresolved in other countries after such a period of time. On first sight, this appears to be a decision biased against the UK. Other COE

countries in breach are not required to abase themselves with offers of limitless expenditure on inquiries whose results are of minimal value in terms of outcomes and certainly, no longer, in terms of prosecutions and prison sentences.

17. MHG believes a fresh approach needs taken by the Secretariat, one which seriously reconsiders the value and worth of reinvestigations in terms of political progress, and stability in Northern Ireland and, most importantly, reconciliation. We are particularly aware, as is the general public, that the legacy legal process has exacerbated community tensions in Northern Ireland and is having a major deleterious effect on good relations.
18. The Secretary of State for Northern Ireland's Command Paper 498 of 14 July 2021, entitled 'Addressing the Legacy of Northern Ireland's Past', proposes an end to criminal investigation of pre-1998 Troubles. We welcome its general direction of travel and hope it will go toward healing that wound by narrowing institutionalised legacy inquiries and providing instead useful outcomes for both victims and society in general.

Yours sincerely

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23 SEP. 2021

SERVICE DE L'EXECUTION
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Author and former Senior Researcher

Dr Cillian McGrattan
Lecturer in Politics

Dr Austen Morgan
Barrister at Law

Dr William Beattie Smith
Political Historian

INTRODUCTION

The Malone House Group is a Belfast-based, non-governmental organisation (NGO) dealing with 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.

We came into being after a 'Legacy Legislation' conference held on 3 March 2018 at that venue in Barnett's Demesne. 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.

Over the last three 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 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. 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 NIO's silently expanded draft Legacy Bill of 2018.

It has now been superseded by an, as yet, unspecific revised government policy on legacy legislation for NI which promises to narrow previously proposed arrangements (see 18 March 2020 statement by the Secretary of State). Cost is plainly an issue for the Government, one accentuated by the current Covid crisis and its colossal bill. Separate but related legislation, the Overseas Operations (Service Personnel and Veterans) Bill, has also been tabled in Parliament but not yet concluded. It will limit liability for military personnel only outside the UK.

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 the law departments at QUB and UU. However they are not as well publicised (nor are they funded).

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 ECHR human rights grounds, with its potential for destroying reputations without fair procedures. In particular we are opposed to the creation of a parallel police force of the past, the Historical Investigations Unit, with its suggested powers to investigate non-crimes such as 'historic police misconduct'.

Malone House 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.

We feel that the Council of Europe at Strasbourg should review the extent, value and purpose of the many unsettled Article 2 (right to life) investigations at the European Court of Human Rights (ECtHR) and assess what they can still achieve. The opportunity for closure comes with the UK Government's new proposals, prefigured by Brandon Lewis last March, difficult though they may be for some.

We have posed these questions to the Committee of Ministers of the Council of Europe (COE). That Committee decides how and when the ECtHR judgements are met. Along with a legal opinion from a London barrister on Article 2 over-interpretation our submission asks:

- Is the continuance of legacy lawfare cases 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 lead Strasbourg 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 in Northern Ireland with hundreds of deaths and bombings each year, really understood in the Committee of Ministers?
- Is Strasbourg's reputation in jeopardy without such a dispassionate reassessment?

Our submission to Strasbourg was a first for a non-nationalist group in Northern Ireland. We have also submitted to the two Legacy inquiries of the Northern Ireland Affairs Committee at the House of Commons (but not called to give evidence on either occasion) and presented a later submission to the Committee of Ministers of the COE on the flaws in the NIO's Stormont House Agreement (SHA) draft Bill and other ECHR articles.

- Article 2 legal opinion document [DH-DD\(2020\)500](#) and SHA legal opinion document [DH-DD\(2020\)705](#)

In late 2020, the Group met with the BBC, the NIO, the PSNI's Legacy Investigation Branch (LIB) and Jon Boutcher lead officer of Kenova, and continuing this strategic work in 2021 by meeting the Secretary of State, Brandon Lewis MP, the Methodist Church, the BBC and Canon David Porter, the Archbishop of Canterbury's Chief of Staff at Lambeth Palace. Since then we have spoken with others who submitted evidence to NIAC including author Padraig Yeates and John Green of the Glasnevin Trust, Professor Brice Dickson of QUB, Archbishop Alan Harper and Rev Gary Mason of 'Rethinking Conflict', Veterans' Groups leaders Robin Horsfall and Paul Young, Ulster Human Rights Watch, the NI Police Federation, and SEFF. Latterly we have had useful discussions with the Presbyterian Church in Ireland including Rev Daniel Kane, the Convener, Council for Public Affairs, Rev Tony Davidson, Convener, Peace and Reconciliation Panel and Rev Trevor Gribben, Clerk of the General Assembly, also with the Northern Ireland Human Rights Commission, its Chief Commissioner Les Allamby and Chief Executive David Russell. In many cases, the meetings have been followed by continuing correspondence and discussion, much on legal issues.

We also met with Johnny Mercer MP, the former veterans Minister when in Belfast in May. A first for MHG in terms of an academic invitation was on 2 June when QUB Human Rights Centre invited us to provide speakers for a webinar on legacy. Neil Faris and Austen Morgan gave talks on SHA 'a failed project', and ECHR Article 2 Procedural interpretations respectively, followed by questions to a mixed audience. On 2 July, after the announcement by DFA and NIO of new legacy talks, we met the NIO Permanent Secretary Madeleine Alessandri and her team to discuss legal options. Since government issued its proposals in July on ending legacy investigations we have discussed its oral history project with the NIO.

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IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

ARTICLE 2 PROCEDURAL IN NORTHERN IRELAND

DGI

23 SEP. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

SUPPLEMENTARY

OPINION

DR AUSTEN MORGAN

1. I refer to the original opinion of 25 May 2020, which I drafted on the above topic. I understand this was submitted to the Committee of Ministers of the Council of Europe, on behalf of the Malone House Group in Belfast ([DH-DD\(2020\)500](#)). That NGO urges a consideration of the Northern Ireland Troubles (1968-98), in terms of Article 2 substantive, plus Article 6 and Article 8, and not just Article 2 procedural.

Substantive opinion

2. It was my view in brief in May 2020 that: (1) Article 2 procedural, from 2001, was unfair retrospective law; (2) Strasbourg appeared to have forgotten about Article 2 substantive, and the fate of the right to life in Northern Ireland (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 had been lawfare (a new concept), which had taken the form of legal dispute continuing the conflict by other means – and frustrating the process of reconciliation between the two main communities.

3. It was 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. That is a principle of the UK's constitution.

4. I attach to this supplementary opinion the most recent version of an article that I update for Thomson Reuters, in its UK Insight series, on Article 2 procedural. This discusses Strasbourg cases but also UK cases.

Execution

5. I have now been asked to comment upon the continued supervision of the execution of the judgments in what is being called the McKerr group of cases, and in particular the document: 1398th meeting, 9-11 March 2021 (DH) - [CM/Notes/1398/H46-38](#).

6. It is my view in brief that: while it is progress that the Committee of Ministers recognized the Malone House Group; Strasbourg continues on the very course which was criticized in the substantive opinion of 25 May 2020.

7. This includes the handling of the killing of Patrick Finucane, a Catholic solicitor, on 12 February 1989, by loyalist paramilitaries (William Stobie being prosecuted unsuccessfully in 2001 and Ken Barrett pleading guilty in 2004). The Finucane case is a cause célèbre for Republicans in Northern Ireland, obscuring the fact that the IRA killed many, especially Catholic, judges and lawyers.

The Finucane case

8. I refer to: *Finucane v United Kingdom* (29178/95) [2003] EHRR 29. This is a judgment of the ECtHR of 1 July 2003. The applicant was Mrs Finucane. She complained to Strasbourg about an inadequate investigation in 1989 and afterwards. Strasbourg, it is often overlooked, did not specify a public inquiry in 2003 for the UK to meet its Article 2 procedural obligations.

9. The government, nevertheless, moved to establish a public inquiry, under a new Inquiries Act 2005. The Finucane family objected (though they were to later change their position on this legislation).

10. On 17 March 2009, the Committee of Ministers closed supervision of the execution of the judgment. There is an issue as to whether this was on the condition that the UK would continue trying to agree an inquiry.

11. On 12 December 2012, the UK government published the de Silva report: Rt Hon Desmond de Silva QC, *The Report of the Patrick Finucane Review*, 2 vols (pp 1 to 504 & 505 to 841), HC 802-I & II. The first volume was an analysis. The second volume contained original documents, being disclosed for the first time in a report. De Silva stated that he had gone further than any of his predecessors, inquiring into collusion allegations.

12. Mrs Finucane had declined to cooperate with Desmond de Silva. Instead, she effectively judicially reviewed him in Northern Ireland, by going against the Secretary of State.

13. This is the case that came to the Supreme Court on 26-27 June 2018, judgment being given on 27 February 2019: *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7

14. The date of judgment was shortly before the Supreme Court placed the following clarification on its website: “The Human Rights Act [1998] ... requires UK courts, including the Supreme Court, to “take account” of decisions of the European Court of Human Rights (which sits at Strasbourg). UK courts are not required, however, always to follow the decisions of that Court. Indeed, they can decline to do so, particularly if they consider that the Strasbourg Court has not sufficiently appreciated or accommodated particular aspects of our domestic constitutional position.”

15. The principal judgment was given by Lord Kerr (the former lord chief justice of Northern Ireland), on which all five members agreed (Lord Carnwarth took a separate point on legitimate expectation). Query whether the other four justices should not also have written separate judgments?

16. Extraordinarily, Lord Kerr seems not to have been told the full story about an Article 2 compliant investigation. This concerned Brian Nelson, a former soldier and army agent. His female army handler had the code name A/13. It is now known that A/13 had legally refused to assist (Sir) John (Lord) Stevens, an English deputy chief constable, in his three enquiry reports of 1990, 1995 and especially 2003. Yet, Lord Kerr went on to fault de Silva, for not taking evidence from A/13: paras 47-49. The 841 page report – it was argued – did not satisfy the test for an effective investigation.

17. Lord Kerr was permitted by his judicial colleagues to uncritically discuss the law on Article 2 procedural through the common law, without any reference to the Human Rights Act 1998. In fact, a point of domestic law, about the date of 2 October 2000 (when the Act came into force), was obscured by Strasbourg’s reasoning on the expansive applicability of the Convention in time and space. However, while three plus one fellow justices agreed formally with him on Strasbourg jurisprudence, they appear to have driven the decision to dismiss Mrs Finucane’s appeal.

18. The decision is recorded: “I would therefore make a declaration that there has not been an Article 2 compliant inquiry into the death of Patrick Finucane. 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.” (para 153); ‘The appeal should otherwise be dismissed.’ (para 154)

19. Few reports described Mrs Finucane as having failed in the Supreme Court. There was a great deal of news reporting of the violation of Article 2. Virtually no one heard the Supreme Court say that any question of a public inquiry was solely a matter for the executive branch of government.

The Response of Strasbourg

20. The Committee of Ministers decision on 9-11 March 2021 reads: “...decided to reopen their consideration of the individual measures in the case of Finucane in order to supervise the ongoing measures to ensure that they are adequate, sufficient and proceed in a timely manner; invited the authorities to clarify how the ongoing police and OPONI processes will proceed promptly and in line with the Convention standards given the issues raised by both of those bodies in recent statements.”

21. This statement is open to the following criticisms:

- one, there is no explanation as to why a case closed in 2009 can be re-opened suddenly in 2021. That goes against the grain of a growing mountain of judgments, seemingly being whittled down by the Committee of Ministers through supervision of execution of judgments;
- two, there is no admission that the ECtHR had not directed a public inquiry in 2003, contrary to the widespread perception that Mrs Finucane had the support of Strasbourg;
- three, there is no balanced account of the 2019 Supreme Court decision, as between a violation of Article 2 procedural, no recommendation of a public inquiry and an appeal being otherwise dismissed; and
- four, using police and police ombudsman responses uncritically to found a basis for further Strasbourg supervision.

I submit that: 20 years after the first Article 2 procedural case (in 2001); Northern Ireland shows the irreconcilable nature of some applications arising out of the Troubles (contrary to the judicial intention behind this line of case law); and that it is time for the Council of Europe to review this judicial failure to contribute constructively to creating liberal democracy, peace and reconciliation in this part of the UK.

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10 September 2021

Right to life: duty to undertake effective investigation, (2021)

Right to life: duty to undertake effective investigation

Last date of review:

3 March 2021

Last update:

General updating.

DGI

23 SEP. 2021

SERVICE DE L'EXECUTION
DES ARRETS DE LA CEDH

Authored by



Austen Morgan
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This article is concerned with the procedural obligation to investigate effectively the use of force which results in death under [art.2](#) of the 1950 European Convention on Human Rights (ECHR) (as opposed to the substantive right to life under [art.2](#)). I therefore distinguish [art.2](#) substantive from [art.2](#) procedural.

Overview of Topic

1. [Article 2\(1\)](#) of the ECHR, given further effect in domestic law through scheduling to the [Human Rights Act 1998](#) (HRA), now reads effectively (given implied amending and rules on derogation): “Everyone’s right to life shall be protected by law”.
2. [Article 2\(2\)](#) continues to read as effectively a defence: “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 the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection”.
3. [Article 2\(1\)](#) has vertical effect, with positive as well as negative obligations imposed upon the state vis-a-vis a person.
4. A strand of case law from the European Court of Human Rights in Strasbourg, predominantly emanating from events which occurred during the Troubles in Northern Ireland (1968 - 1998), established a concomitant procedural obligation on public authorities to investigate effectively where the use of force results in death. Query whether it is all deaths or only state killings? Query whether Strasbourg has even given any thought to terrorist killings? The effect of Strasbourg’s intervention has been a rewriting of history. The 90 per cent of terrorist killings (all unlawful) has been obscured by the 10 per cent of state killings, most of which were lawful by Strasbourg standards: [Da Silva v United Kingdom \(5878/08\)](#), ECtHR (Grand Chamber), 30 March 2016 (the John Charles de Menezes case).

Prelude to legal change

5. On 11 January 2000, Strasbourg decided: [Caraher v United Kingdom \(24520/94\) \(2000\) 29 E.H.R.R. CD119](#). Here, the applicant’s husband had been killed by two soldiers in Co. Armagh in 1990 (they were later acquitted of his murder). She relied upon the [art.2](#) substantive right. She lost on admissibility as no longer a victim, because she had settled a civil action in Northern Ireland for £50,000.
6. While this decision did not relate directly to the procedural obligation, *Caraher* was to be relied upon by the United Kingdom subsequently, and to inspire domestic courts to limit historical investigations on the basis of remedies obtained.

The Northern Ireland art.2 procedural obligation cases

Right to life: duty to undertake effective investigation, (2021)

7. These may be listed by date of judgment at Strasbourg, indicating the circumstances of the deaths:
 - (1) *Jordan v United Kingdom* (24746/94) (2003) 37 E.H.R.R. 2, 4 May 2001, concerning Pearse Jordan, a IRA member, who was shot by a police officer after a car chase in Belfast in November 1992;
 - (2) *McKerr v United Kingdom* (28883/95) (2002) 34 E.H.R.R. 20, 4 May 2001, concerning Gervaise McKerr (driving a car with two others), all being killed as suspected terrorists by pursuing police officers in Lurgan in November 1982;
 - (3) *Kelly v United Kingdom* (30054/96) [2001] Inquest L.R. 125, the eight IRA members killed by the SAS defending Loughall police station in May 1987;
 - (4) *Shanaghan v United Kingdom* (37715/97) [2001] Inquest L.R. 149, probably a IRA member, who was killed by loyalists while driving his van near Castlederg in August 1991;
 - (5) *McShane v United Kingdom* (43290/98) [2002] 35 E.H.R.R. 23, 28 May 2002, killed by an army vehicle during a late-night riot in Londonderry on 13 July 1996;
 - (6) *Finucane v United Kingdom* (29178/95) [2003] 37 E.H.R.R. 29, 1 July 2003, the killing of catholic solicitor Patrick Finucane in Belfast in 1989 by loyalists;
 - (7) *Brecknell v United Kingdom* (32457/04) [2007] 11 WLUK 675, 27 November 2007, one of three customers killed in a loyalist attack upon a bar in Silverbridge, Co. Armagh in 1975;
 - (8) *McCaughy v United Kingdom* (43098/09) (2014) 58 E.H.R.R. 13, 16 July 2013 (a much later case), two IRA members killed at a suspected arms dump by soldiers near Loughall in 1990. This was essentially a delayed investigation case.
 - (9) *Hemsworth v United Kingdom* (58559/09), 16 July 2013 (also a much later case), a person assaulted by police in July 1997 who died months later (in January 1998).
8. The key cases are (1) to (4), decided jointly on 4 May 2001. Strasbourg, avoiding substantive violations, fashioned a new procedural obligation. (The court did not rise to the occasion jurisprudentially on the issue of non-state actors having perpetrated the killings in cases (4), (6) and (7).) There are other cases emanating from Northern Ireland, including deaths in custody, but the above nine cases establish the procedural obligation. Strasbourg, which tried to discourage repeat cases, arguably acted counter-productively by awarding damages in each individual application (when, in the case of *McCann v United Kingdom* (A/324) (1996) 21 E.H.R.R. 97, which dealt with the shooting of unarmed IRA members planning a bombing in Gibraltar in 1988, it had reasoned that a substantive violation did not warrant an award given the intentions of the victims). Surely that applies more so to a procedural obligation, and especially the applicants in *Kelly's* case.
9. It could be argued that there is an initial legal problem with cases (1) to (4) above. Strasbourg made clear it was not making any findings of facts, about the original killings or the subsequent investigations, whether satisfactory or not. How then could it fashion a procedural obligation based upon an apparent finding of inadequacy?
10. There is a bigger legal problem with cases (1) to (4). The procedural obligation is, in the case of Northern Ireland, largely retrospective. There had been no such law during the Troubles. Subsequently, this obligation was imposed on the United Kingdom. It follows that the conduct of state agencies was to be assessed by judges using standards developed in 2001 and subsequently.

Non-UK cases developing the procedural obligation

11. It is necessary to mention two non-United Kingdom cases at Strasbourg regarding procedural [art.2](#), developing the obligation.
12. *Silih v Slovenia* (71463/01) (2009) 49 E.H.R.R. 37 is a medical negligence case, which makes the procedural obligation seemingly dependent upon a violation of the substantive right (para.194).
13. *Janowiec v Russia* (55508/07) (2014) 58 E.H.R.R. 30 (concerning the Katyn forest killings in Poland during the second world war, by the Soviet Union and not Germany); in this case, the court came up with a three-stage test permitting retrospectivity of up to ten years - drawing upon *Silih's* case (plus *Varnava v Turkey* (16064/90) (2010) 50 E.H.R.R. 21) - namely:
 - first, “a “genuine connection” with the death as the triggering event consisting of ... a reasonably short period of time between the death as the triggering event and the entry into force of the Convention (not in excess of 10 years)”;
 - second, “a requirement that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention” or
 - third, “in extraordinary situations which did not meet the “genuine connection” test but raised a need to

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ensure that the guarantees and the underlying values of the Convention are protected, for such cases as war crimes, genocide or crimes against humanity. Although the present case potentially fell within this latter category, the “Convention values” clause could not be applied to events which occurred prior to the adoption of the Convention in 1950” (headnote).

14. The killings had taken place in 1940, in Poland. In 1943, an international commission exhumed bodies, blaming the Soviet Union correctly. Russia, the successor state, accepted responsibility in 1990, and conducted a criminal investigation until 2004. No one was left alive to prosecute. Russia ratified the European Convention on Human Rights in May 1998. According to the headnote: “The events capable of triggering an obligation to investigate took place in 1940, more than 10 years before the Convention came into existence [on 4 November 1950] and the “Convention values” standard could not be applied. The [Russian] Government’s objection *ratione temporis* was upheld and the Court was not competent to examine the complaint under [art.2](#).”
15. This is truly extraordinary jurisprudence. In international law, a state is bound by what it agrees to, under the law of treaties. In *Janowiec’s* case, without being any help to the applicants, Strasbourg invented a “genuine connection” test, creating international obligations 10 years before they were agreed, and also a “Conventions values” test, which started in 1950 - a date of signing not of ratification.

Article 2 in UK law

16. The Strasbourg case law has been considered by the House of Lords/Supreme Court in the following leading cases:
 - (1) *R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 A.C. 653, a prisoner in custody killed by another, Lord Bingham deciding on 16 October 2003 to follow Jordan’s case in Strasbourg;
 - (2) *R. (on the application of Green) v Police Complaints Authority* [2004] UKHL 6; [2004] 1 W.L.R. 725, a cyclist hit by a police car, Lord Bingham deciding on 26 February 2004 to dismiss an appeal concerning disclosure of police investigation material;
 - (3) *R. (on the application of Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; [2004] 2 A.C. 182, a prisoner committing suicide, Lord Bingham deciding again on 11 March 2004 to follow Jordan’s case in Strasbourg;
 - (4) *McKerr’s Application for Judicial Review, Re* [2004] UKHL 12; [2004] 1 W.L.R. 807, the McKerr above in Strasbourg (who had been awarded £10,000 damages there), with Lord Nicholls deciding also on 11 March 2004 that the [Human Rights Act 1998](#) did not apply to deaths before 2 October 2000, when it entered into force; (*R (Amin)* and *R (Middleton)*) were held in McKerr’s case to have been decided *per incuriam* the question of retrospectivity (para 23);
 - (5) *Jordan v Lord Chancellor* [2007] UKHL 14; [2007] 2 A.C. 226 (being the Jordan and McCaughey in Strasbourg above), where Lord Bingham applied McKerr’s case, the second appeal being allowed regarding police disclosure to a coroner;
 - (6) *R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29; [2011] 1 A.C. 1, a British soldier dying of hyperthermia off an army base in Iraq, where Lord Phillips (with a court of nine) held on 30 June 2010 (on the assumption that human rights law applied in Iraq in this case, which it did not) then do, that, on these assumed facts, the possibility of a substantive violation of [art.2](#) triggered the procedural obligation;
 - (7) *McCaughey’s Application for Judicial Review, Re* [2011] UKSC 20; [2012] 1 A.C. 725 (being the McCaughey in Strasbourg above again), where the Supreme Court held that, once the UK decided to hold an inquest, then the [art.2](#) procedural obligation might apply. The domestic court arguably responded too precipitately to Silih’s case in Strasbourg (which was remember a medical negligence case), before the international court further considered temporal jurisdiction in Varnava’s case and Janowiec’s case;
 - (8) *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] A.C. 1355, regarding a refusal to hold a statutory inquiry into the killing of 24 persons by the British army in Malaya in 1948, where Lord Neuberger held on 25 November 2015 that, as regards the [art.2](#) procedural obligation, Strasbourg jurisprudence now permitted retrospectivity (if there was a continuing breach) of up to ten years, between the date of death and 1966, when the UK first permitted individual petition. Lord Neuberger, considering McKerr’s case after McCaughey’s case, decided to leave open whether the UK had to follow Strasbourg (para 98). Lord Kerr, however, explained his thinking: Silih’s case detached the procedural duty from [art.2](#) for the first time (paras 247-9). But he left open whether

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- *McKerr's* case should be overruled;
 - (9) In the matter of *Finucane's Application for Judicial Review*, Re [2019] UKSC 7; [2019] 2 WLUK 382, concerning the death of Geraldine Finucane's husband Patrick in 1989. The family remained critical of the 2012 report by the late Sir Desmond de Silva QC. They wanted a public inquiry. Lord Kerr (on behalf of the court) went further than Strasbourg, which had settled the case with the United Kingdom. He picked holes in the de Silva report. But he concluded with this arguably anti-climactic statement: "I would therefore make a declaration that there has not been an [article 2](#) compliant inquiry into the death of Patrick Finucane. 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).
17. It remains the position that *McKerr's* case in the House of Lords in 2004, is good law as regards the [art.2](#) procedural obligation under the [Human Rights Act 1998](#) (i.e., that it does not apply to deaths which occurred before the legislation came into force). It has not been overruled, especially not in *McCaughey's* case. And *Finucane's* case has not changed that position, despite the de Silva report being found to be non [art.2](#) compliant.
18. *Smith's* case and *Keyu's* case are (originally) English and United Kingdom law respectively, and both attempt to deal with updating Strasbourg jurisprudence. The former arguably limits the right (relating procedure to substance), while the latter clearly extends retrospectivity.

Conclusion

19. A number of points needs to be made by way of conclusion to this unsatisfactory and confusing jurisprudence, of effective investigation of deaths occasioned by state agencies:
- first, the range of deaths is very wide, from alleged medical negligence in a hospital to dealing with a historic insurgency in Northern Ireland;
 - second, Strasbourg has invented retrospective obligations, and been creative about widening state obligations beyond the legal range of the convention;
 - third, there is a real problem as to whether domestic courts may access Strasbourg jurisprudence through the common law (as Lord Kerr did in *Finucane's* 2019 case), or whether the [Human Rights Act 1998](#), from parliament, supercedes that; and
 - fourth, there is a clear line of House of Lords/Supreme Court cases stating that [art.2](#) procedural does not apply to any deaths, including in Northern Ireland, before 2 October 2000.

Legislation

Key Acts

[Human Rights Act 1998](#)

Key Subordinate Legislation

None.

Key Quasi-Legislation

None.

Key European Union Legislation

[European Convention on Human Rights](#)

Key Cases

Caraher v United Kingdom (24520/94) (2000) 29 E.H.R.R. CD119

Jordan v United Kingdom (24746/94) (2003) 37 E.H.R.R. 2

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McKerr v United Kingdom (28883/95) (2002) 34 E.H.R.R. 20

Kelly v United Kingdom (30054/96) [2001] Inquest L.R. 125

Shanaghan v United Kingdom (37715/97) [2001] Inquest L.R. 149

McShane v United Kingdom (43290/98) (2002) 35 E.H.R.R. 23

Finucane v United Kingdom (29178/95) (2003) 37 E.H.R.R. 29

McCaughey v United Kingdom (43098/09) (2014) 58 E.H.R.R. 13

McCann v United Kingdom (A/324) (1996) 21 E.H.R.R. 97

Silih v Slovenia (71463/01) (2009) 49 E.H.R.R. 37

Janowiec v Russia (55508/07) (2014) 58 E.H.R.R. 30

Varnava v Turkey (16064/90) (2010) 50 E.H.R.R. 21

R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 A.C. 653

R. (on the application of Green) v Police Complaints Authority [2004] UKHL 6; [2004] 1 W.L.R. 725

R. (on the application of Middleton) v HM Coroner for Western Somerset [2004] UKHL 10; [2004] 2 A.C. 182

McKerr's Application for Judicial Review, Re [2004] UKHL 12; [2004] 1 W.L.R. 807

Jordan v Lord Chancellor [2007] UKHL 14; [2007] 2 A.C. 226

R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner [2010] UKSC 29; [2011] 1 A.C. 1

McCaughey's Application for Judicial Review, Re [2011] UKSC 20; [2012] 1 A.C. 725

R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] A.C. 1355

Finucane's Application for Judicial Review, Re [2019] UKSC 7; [2019] 2 W.L.R. 382

Reading

Key Texts

None.

Further Reading

None.