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Communication from the applicant (02/03/2020) in the case of KELLY AND OTHERS v. the United Kingdom (Application No. 30054/96) (McKerr group)

Information made available under Rule 9.1 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 : 1369e réunion (mars 2020) (DH)

Communication du requérant (02/03/2020) relative à l'affaire KELLY ET AUTRES c. le Royaume-Uni (requête n° 30054/96) (groupe McKerr) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.1 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

Submission to the Committee of Ministers

Concerning

The supervision of the case of Kelly and Others v UK

And

The action of security forces

In

The Loughgall Ambush in Northern Ireland on

8 May 1987

Kelly and Ors v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001

SUBMISSIONS ON BEHALF OF THE FAMILIES OF THE DECEASED

1. This submission is lodged on behalf of the families of those killed by British security forces in the Loughgall Ambush of 8 May 1987 in Northern Ireland. It is submitted following the previous submission (and personal statement of Mairead Kelly, Chairperson of the Loughgall Truth and Justice Campaign) lodged in February 2019. An additional submission by the families of those deceased will also be lodged to accompany the instant submissions.

2. On 8th May 1987, 24 soldiers and 3 officers of the Royal Ulster Constabulary ("the RUC") set up an ambush to surprise an attack on Loughgall RUC station. Eight members of the IRA (Patrick Kelly, Michael Gormley, Seamus Donnelly, Patrick McKearney, James Lynagh, Eugene Kelly, Declan Arthurs, Gerard O'Callaghan) were killed. Bullets fired by the security forces also killed a ninth individual, Mr Anthony Hughes, a passing civilian. This position paper is served on behalf of the families of the deceased.

3. The substantive issue at the heart of this submission is that the UK Government have since the decision of Kelly v UK failed to take the necessary steps to ensure that the Article 2 procedural obligation is discharged in a manner compliant with the Judgment. These failures emanate from the continued obfuscation by the responding state to ensure the holding of an inquest in a timely fashion, and the delays inherent upon the continued use of public interest immunity ("PII") or national security sensitive procedures.

BACKGROUND

4. On 22nd September 1988, the Director of Public Prosecutions concluded that the evidence did not warrant any prosecution.

5. On 2nd June 1995, the original inquest was concluded.

6. On 4th May 2001, the European Court of Human Rights found that the United Kingdom had breached Article 2 by failures in the original inquests into the deaths at Loughgall: Kelly and others v United Kingdom (App. No. 30054/96). The European Court found that the proceedings had not been sufficiently independent, had lacked public scrutiny, and had not allowed for any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which might have been disclosed. The inquest had also been deficient in that the soldiers who shot the deceased could not be required to attend the inquest as witnesses; witness statements had not been disclosed; there had been long adjournments in the proceedings; and the proceedings did not commence promptly or conclude with reasonable expedition.

7. The families wrote to the Attorney General for Northern Ireland to invite him to decide that there should be a fresh inquest into the deaths of the men who were killed in May 1987. The decision as to whether to order a fresh inquest was referred to the Advocate General for Northern Ireland, pursuant to s.14(2) Coroners Act (Northern Ireland) 1959. The reasons given for this decision, as set out in the certificate itself, included the suggestion that there was relevant information, the disclosure of which may be against the interests of national security. It is inferred that all relevant material was gathered together for the Advocate General, so as to enable him to take an informed decision.

8. On 23rd September 2015, the Advocate General ordered a fresh inquest.

9. On 8th March 2018, Sir Paul Girvan allowed an application for judicial review brought by the next-of-kin of Anthony Hughes, Brigid Hughes, in respect of the ongoing delays in providing funding to the Coroner's Court to enable "legacy" inquests to proceed.

10. There are ongoing civil proceedings in respect of the deaths at Loughgall: Arthurs (and others) v Ministry of Defence. The discovery process in those proceedings is now complete. In the civil proceedings, the Ministry of Defence and PSNI have argued that some of the discovery is covered by public interest immunity. It is therefore likely that public interest immunity will also be sought in respect of material in this inquest.

11. There has only been three preliminary hearings since the grant of the fresh inquest. At the last preliminary hearing on 31 January 2020 the families of the deceased argued that the continued failure to make available the necessary disclosure and to determine the issue of PII at an early stage has frustrated the discharge of Article 2 ECHR. The continued failure to resolve this issue results in the continued infringement of the families' Article 2

ECHR rights. To that end, it is clear that in order to comply with the execution of the judgment, sufficient steps need to be taken to discharge the Article 2 ECHR obligation by ensuring the disclosure of all relevant information, and the fixing of the hearing of the inquest without any further delays.

DISCLOSURE

12. As such, the current consideration by the Committee of Ministers of the Kelly v UK case and its enforcement is both directly relevant, and highly significant for the families' respective Article 2 rights being upheld domestically.

13. There has been no disclosure to date (whether sensitive or non-sensitive) in the inquest proceedings. The lack of disclosure in the original inquest was one of the reasons why the European Court found a breach of Article 2. The European Court also expressed concerns as regards the delays in progressing the inquest. In its judgment in Brigid Hughes' application for judicial review, the High Court referred to ongoing breaches of her rights under articles 2, 3, and 8, by reason of the delay in listing this inquest. There is a need for expedition.

14. Discovery is now complete in the parallel civil proceedings. Uniquely, the relevant material was also recently provided to the Secretary of State for her consideration of whether or not a Section 14(2) certificate should issue. It is also inferred that this material was later provided to the Advocate General so as to enable him to decide whether to order a fresh inquest. In the circumstances, there is no justification for further delay to discovery in the inquest proceedings, given that the relevant material to the inquest has already been identified.

15. Insofar as the PSNI and/or Ministry of Defence holds material that is said to be sensitive (such as for reasons relating to national security), this is an issue that ought to be determined promptly. It should be remembered that a public inquiry may be required if public interest immunity undermines the effectiveness of an inquest (e.g. R (Litvinenko) v Secretary of State [2014] EWHC 194 (Admin)). Any need for a public inquiry should be identified promptly if further delay is to be avoided.

16. The Coroner was therefore respectfully invited to set a timetable for disclosure in this case at the preliminary hearing on 31 January 2020, including for any applications for non-disclosure on the grounds of public interest immunity or otherwise.

17. Specifically, it is argued that the materials already disclosed in the context of the civil proceedings should be disclosed to the families in the inquest proceedings without any further delay. In addition, the responding state have adopted a position that it is premature to consider the issues that arise from the proposed application of PII. This is plainly incorrect. The continued failure to consider PII has the knock-on effect of further delays which by extension results in the further infringement of the families' Article 2 ECHR Rights.

18. In the related civil proceedings, which cannot discharge the necessary obligations imposed on the responding state in compliance with the Judgment, the Court has so far, resisted the family's (plaintiff's) request for a hearing to consider PII and/or s.6 of the Justice and Security Act 2013. That is because the Defendants have argued that the inquest should take priority. There is an obvious risk of circularity. The argument of the same parties in the context of the inquest appears to be that PII should proceed in the civil litigation. It is therefore clear that the failure to address the issue of PII at this

early stage will result in circularity and further delays on the part of the responding state.

19. There is no reason why the full range of PII material needs to be gathered before the Coroner decides whether PII will prevent an effective inquest. A range of alleged PII material will allow the Coroner to assess whether there are issues that cannot be sensibly addressed in an inquest in light of PII claims. It should be noted that s.6 of the Justice and Security Act 2013 allows orders to be made under s.6 without the court being provided with the full material. That demonstrates how courts can assess whether a closed procedure is required without full material which would in turn work towards an Article 2 ECHR compliant mechanism, as envisaged by the Court in the handing down of the Judgment. These are in turn the steps required to ensure the execution of the Judgment in question.

20. Of fundamental importance, and indeed a cornerstone of the Judgment, is that it is important to avoid unnecessary delay. That would occur if the inquest is allowed to progress without the obvious issues being addressed that appear to arise as a consequence of the PII claim that has already been advanced.

21. However, it is also necessary that an appropriate balance be struck between the interests of national security and disclosure of sensitive documentation and the significant public interest in justice which is both transparent and publicly accessible[1], especially when the Loughgall Ambush concerns cogent allegations of the use of unlawful and lethal force by the State.

[1] Para 137, *Kelly*

22. In addition to the concern regarding delay expanded upon below, we remain concerned that the attempt by the UK Government, in providing a shield through the partial retention of coronial investigatory powers in relation to the broad brush "interests of national security", is attempting to subvert the greater public interest in transparent justice, and by doing so, attempting to further abrogate the obligations of the UK under Article 2 ECHR.

REMEDY

23. In line with our previous submissions to the Committee on behalf of the families, we submit that there are available options to which can ensure the current impasse is resolved and the appropriate remedy enforced.

24. As long as the above situation continues, our clients will continue to be deprived of an Article 2 ECHR investigation, contrary to the findings of the European Court, and now the domestic Court. As such, it is clear that the Judgment of the Court is being deliberately ignored and without any indication that it will be duly executed in accordance with the UK's respective obligations under the ECHR. As such, we request that urgent consideration is now given to the following action by the Committee of Ministers:

i. The Kelly v UK case is prioritised;
ii. The Committee of Ministers considers making an increased award of damages in light of the failure to execute the Judgment; and
iii. The case is referred back to the Court in accordance with Article 46(4) of the Convention.

Prioritisation of the Case

25. The procedure of the Committee of Ministers allows for a decision to be taken to prioritise a case. This procedure is known as the 'enhanced supervision procedure' which in essence enables priority attention to some specific cases.

Given the fact that the Kelly & Others v UK case identified systemic failings within the Coronial investigation, yet nearly 19 years on and an effective inquest has not been held requires prioritisation. The failing is incumbent upon the failure to properly resource the Inquest system and has given rise to the victims having to issue fresh domestic proceeds to seek compliance with the Article 2 ECHR procedural obligation.

26. The criteria for placing a case under the enhanced procedure is that one that so requires urgent individual measures, or that the case has revealed important structural or complex problems. This is such a case.

27. If a case is placed in the enhanced supervision procedure, the Secretariat will engage in more intensive and pro-active discussions with the respondent state which can result in expert assistance in the preparation of action plans, seminars, amongst other mechanisms to discuss the underlying issues. There is a real and immediate need to ensure that this case (and the related case) are placed upon the agenda so as to ensure that the required mechanisms are urgently taken. It is submitted that such action is required to ensure an effective resolution, and compliance with the ECtHR judgment that is now some 19 years old. As a result, the UK has been allowed to in essence breach Article 2 ECtHR continuously throughout that period without any recourse. It is clear that they are continuing to ignore the judgment of the Court (and many others of the McKerr group).

Increased Damages

28. It is a well-established principle that the ECtHR does not endorse significant damages (as just satisfaction) save for exceptional cases. However, the Court has on a number of occasions in recent years increased the ceiling where there is evidence of continuous and flagrant breaches. Such an approach is now

necessary to ensure that the respondent UK state retreats from the current position whereby it feels it can openly breach the convention with no threat of any substantial award of damages being made.

29. This approach was recognised in the decision in Vermeire, which arose out of a failure to execute the Marckx judgment and the refusal of the Belgian courts to compensate for the absence of measures by the legislature. In the Vermeire case, the Court did not understand why the Belgian courts were refusing to enforce a rule about which "there was nothing imprecise or incomplete." I n an almost identical position, there is nothing unclear about the numerous requests for the UK state to put in place the appropriate prerequisites of an Article 2 compliant inquest system.

30. Of particular significance we refer you to the judgment at:- "The freedom of choice allowed to a state as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979."

31. This is, in our submission, an identical position to the one our clients, and many others currently awaiting Inquests, are in.

Article 46(4) Referral

32. As the Committee of Ministers will be aware, in certain circumstances Article 46(4) ECHR can be triggered. This procedure is known as 'the infringement procedure', introduced by Protocol No. 14 to the Convention. The infringement procedure makes clear that where the 'The Parties to the

Convention have a collective duty to preserve the Court's authority – and thus the Convention system's credibility and effectiveness – whenever the Committee of Ministers considers that one of the High Contracting Parties refuses, expressly or through its conduct, to comply with the Court's final judgment in a case to which it is party'.

33. The current case, combined with the generic Article 2 ECHR cases concerning the jurisdiction of Northern Ireland, known as the 'McKerr Group of cases' is one such example whereby it is clear that despite the findings of the Court, insufficient steps have been taken to ensure the timely and effective compliance with the European Convention on Human Rights, to the detriment of our clients.

34. It is submitted that the Legacy inquest system and its respective compliance with Article 2 ECHR is now at an impasse with the UK Government. Despite the Judgment of the Court, and the further finding by the domestic Court, no adequate or necessary steps have been taken to ensure compliance. As Article 46(4) makes clear, if a Contracting party fails to abide by a final judgment, the Committee may serve a formal notice to refer the Court the question of whether the contracting party has failed in its respective obligation.

35. As is set out in detail above, insufficient, inadequate and non-existent steps have been taken to ensure the timely holding of an effective Article 2 Inquest and in those circumstances, we would invite the Committee to refer the case back accordingly for the failure to execute the instant judgment.

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