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Communication from the applicant (07/04/2020) in the case of KELLY AND OTHERS v. the United Kingdom (Application No. 30054/96)

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 : 1377e réunion (juin 2020) (DH)

Communication du requérant (07/04/2020) relative à l'affaire KELLY ET AUTRES c. le Royaume-Uni (requête n° 30054/96) ***[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

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 in accordance with Rule 9(1). It is submitted following the previous submissions (and personal statement of Mairead Kelly, Chairperson of the Loughgall Truth and Justice Campaign) lodged in February 2019 and March 2020 ('the previous submissions'). This submission should be read in conjunction with the previous submissions made on the applicants' behalf.

2. 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. Rule 6 of the Rules of the Committee of Ministers ('The Rules') for the supervision of the execution of Judgments requires the Committee to examine what 'individual measures have been taken to ensure that the violation has ceased and that the injured party is put, as far as possible, in the same situation as that party enjoyed prior to the violation'. In short, no steps have been taken by the UK member state to put the applicants in a

position analogous to that in which they would have been, prior to the violation.

3. Despite the various strands of domestic litigation set out below, the UK member state has failed to act to ensure compliance with the Judgment.

4. Rule 11 exists for a purpose. It exists to ensure that in those exceptional circumstances whereby a member state blatantly ignores the requirements under a Judgment, that they can be referred back to the Court for infringement proceedings. Regrettably, this is such an exceptional case.

5. Thereafter, this submission is lodged to request that the Committee now consider the exceptional course of referring the instant Judgment back to the European Court of Human Rights for Infringement proceedings in accordance with Rule 11 by virtue of the continuing failure by the UK member state to take the individual measures required (pursuant to Rule 6) to remedy the breach of the procedural obligation under Article 2 ECHR.

6. For the reasons set out below, this submission requests that the Committee formally serve the UK member state with formal notice of infringement proceedings in accordance with Rule 11.

BACKGROUND

7. 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.

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

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

10. 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.

11. 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.

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

13. 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.

14. 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.

15. 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.

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

17. Regrettably, no date has yet been fixed for hearing of the Inquest in question. For these reasons, it is clear that no individual measures have been taken to resolve the breach of the procedural obligation under Article 2 ECHR.

18. The applicants are therefore some 19 years on from the Judgment in question and remain no closer to the remedy anticipated by the Court being provided, namely an Article 2 ECHR compliant investigation which in this case takes the form of an Inquest.

DISCLOSURE

19. In addition, the failure to fix a date for hearing of the Inquest has been further complicated and hindered by the failure to provide sufficient disclosure. Disclosure, as the Committee is aware, is also a crucial strand of the Article.2 procedural obligation identified in the Judgment.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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*

29. 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

30. As stated above, the applicants in this case are now nearly 19 years onwards and remain no closer to the remedy of an Article 2 ECHR compliant investigation by virtue of the member state's failure to put in place individual measures to ensure the fixing of a hearing date for the inquest.

31. It is worth repeating the conclusions of the ECtHR in the Judgment:

> 136. The Court finds that the proceedings for investigating the use of lethal force by the security forces have been shown in this case to disclose the following shortcomings:
>
> – a lack of independence of the investigating police officers from the security forces involved in the incident;
> – a lack of public scrutiny, and information to the victims' families of the reasons for the decision of the DPP not to prosecute any soldier;
> – the inquest procedure did not allow 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 soldiers who shot the deceased could not be required to attend the inquest as witnesses;

– the non-disclosure of witness statements prior to the witnesses' appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings;
– the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

137. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of the material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.

138. 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 applicants concerning the alleged shoot-to-kill policy.

139. The Court finds that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision.

32. As long as the present situation continues, the applicants will continue to be deprived of an Article 2 ECHR investigation, contrary to the findings of the European Court in the first instance (in 2001), and now the domestic Court (in 2018). As such, it is clear that the Judgment of the Court is being deliberately ignored, and the present set of circumstances provide no comfort or indication that an inquest hearing will be fixed in a timely manner, as mandated by Article 2 ECHR and as expressly provided for in the Judgment.

REMEDY

33. 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'.

34. Rule 11 of the Committee Rules provides for an Article 46(4) referral for infringement proceedings. It is clear from the complex factual backdrop to the instant proceedings that no steps have been taken by the member state to ensure that the individual measures required are put in place, to remedy the breach of Article 2 ECHR. Furthermore, it is clear that there is no intention in the foreseeable future nor have there been any assurances that the member state will ensure the timely listing of an inquest in accordance with Article 2. For these reasons, it is clear that the Judgment remains unactioned and will continue along this course, unless an inquest hearing is listed.

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 to the ECtHR for infringement proceedings by virtue of the UK's failure to execute the instant judgment.

36. There comes a time in which the Committee must ensure compliance with the Judgments by the ECtHR. Otherwise, the Judgment in its entirety will be rendered meaningless if the state whom deliberately violated the convention in the first instance, can continue to violate the applicant's rights by virtue of their ignorance of the Judgment duly finding the violation in question.

37. Thereafter, this submission is lodged to request that the Committee now consider the exceptional course of referring the instant Judgment back to the European Court of Human Rights for Infringement proceedings in accordance with Rule 11 by virtue of the continuing failure by the UK member state to take the individual measures required (pursuant to Rule 6) to remedy the breach of the procedural obligation under Article 2 ECHR.

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5 April 2020