The Stormont House Agreement and Dealing with the Past

Inquests and the Failure by the State to discharge its international legal obligations and comply with the Lord Chief Justice's Concept Plan

Niall Murphy Solicitor and Partner, KRW Law LLP

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1. INTRODUCTION

Since the Good Friday Agreement there has been momentous political change resulting in relative political stability. One of the key components of the 1998 Peace Agreement was the establishment of measures to deal with the legacy of the Conflict. Central to what could be loosely described as "Legacy Negotiations" was the agreement by the British Government to set up a number of Inquiries into some of the most contentious killings throughout the Conflict including Bloody Sunday, Pat Finucane, Rosemary Nelson, Billy Wright and Robert Hamill.

At the same time as the Agreement there were concluding a series of six test cases to the European Court of Human Rights (ECtHR). These cases, sometimes known as the "McKerr" group of cases were Jordan[1], Kelly and others[2], McKerr[3], Shanaghan[4], McShane[5], and Finucane[6].

The court held that in cases involving the use of lethal force by agents of the state an effective investigation in compliance with the requirements of Article 2 must be carried out and set out the minimum requirements for this. Such investigations must be

- initiated by the State,
- independent,
- effective,
- sufficiently open to public scrutiny,
- involve the next of kin to the extent necessary to safeguard their legitimate interests,
- prompt and carried out with reasonable expedition

[1] Hugh Jordan v. the United Kingdom (application number 24746/94) [2001] ECHR 327
[2] Kelly & Others v. the United Kingdom (application number 30054/96 [2001] ECHR 328
[3] McKerr v. the United Kingdom (application number 28883/95) [2001] ECHR 329
[4] Shanaghan v the United Kingdom (application number 37715/97) [2001] ECHR 330
[5] McShane v. United Kingdom (application number 43290/98) [2002] ECHR 469
[6] Finucane v. the United Kingdom (application no. 29178/95) [2003] ECHR328

All of these cases led to findings that the British Government was in breach of Article 2 ECHR in that the procedural duty to investigate, that protects Article 2 , had not been complied with. For example, in Finucane, the court found:

"84. The Court finds that the proceedings following the death of Patrick Finucane failed to provide a prompt and effective investigation into the allegations of collusion by security personnel. There has consequently been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and there has been, in this respect, a violation of that provision."

2. THE ECHR VIEW OF LEGACY INQUESTS: '*Structurally Incapable*.'

As such, by virtue of these cases, it was established law, under the ECHR that the government has obligations to take reasonable steps to protect life and not to take life and where the state is implicated there is a procedural obligation to carry out an effective and independent investigation into a death. One of the mechanisms, proactively proposed by the British Government to discharge this ongoing legal obligations in relation to unresolved contentious killings, is the Coronial System, and the use of Inquests.

Very few of the legacy inquests have been completed, with a mere 11 inquests out of a total of 96 deaths in 55 officially recognised legacy cases having been completed. Indeed, there has been an emerging paradigm in recent years, with the devolution of responsibility for criminal justice to the local assembly that our locally appointed Attorney General, John Larkin QC, has received and considered applications under section 14 of the Coroners Act (Northern Ireland) 1959 to order the reopening of Inquests into controversial killings[7].

On the face of it, this may be argued to provide an article 2 compliant mechanism for families seeking the truth. It is a participative mechanism, as families are fully engaged and represented, it does provide for the crucial element of truth recovery by means of discovery, it permits a degree of accountability with the compellability of witnesses, for cross examination, however there are severe problems with regards to our Coronial system.

[7] For example, on the grounds where fresh evidence has emerged. Of the 55 legacy inquests, extant in the Coroners Court system, 35 of these have been referred to the Coroner by the Attorney General, pursuant to his consideration of representations received that a fresh Inquest would be 'advisable' in the circumstances of a particular case.

It is a fact that there are only 3 full time Coroners in the jurisdiction with approximately 3,800 reported deaths annually. The average number of inquests held annually is 152 (an average of one per week per coroner), yet Legacy inquests are "*lengthy and resource intensive*"[8]

The issues which afflict the ability of the Coronial system to discharge the State's obligations under article 2. A lack of resources is aggravated by the insouciant disregard by agencies of the State's engagement with the Coroners Court, with what is considered by relatives to be an approach to achieve as much delay as possible[9].

Systemic delays on the part of State agencies such as the Police Service of Northern Ireland (PSNI) and the Northern Ireland Office (NIO), and a regime of opacity in relation to redacting documents combine to eviscerate the inquest system of the capability to effectively and thoroughly investigate deaths of individuals at the hands of security services.

The State's intention of delay achieved through a range of discrete mechanisms, such as

- refusal to comply with deadlines for disclosure,
- disclosure on a piecemeal incremental disjointed disordered fashion,
- the over sensitivity of classification of documents which in turn creates delay in applications for unwarranted redactions and public interest immunity certificates.

Indeed there are other intrinsic issues afflicting disclosure such as independence.

The legal capacity of the Coronial system to discharge the State's article 2 obligations was severely criticized, on 16th July 2013, when the European Court dealt with the cases of Hemsworth v the UK and McCaughey and Grew v the UK[10], which ruled that the delays cannot be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, and that the investigation was ineffective for the purpose of Article 2 of the Convention. Indeed the Judgement recorded that;

"The fact that it was necessary to postpone the applicants' inquest so frequently and for such long periods pending clarifying judicial review actions demonstrates to the Court that the inquest process itself was not structurally capable at the relevant time of providing the

[8] Affidavit of Rosalind Johnston, solicitor for the Coroners for Northern Ireland. This affidavit, dated 17 December 2012, was filed and served in the judicial review proceedings concerning KRW Law's client, Teresa Slane.

[9] 'Delay, delay, delay': Northern Ireland Troubles inquests still outstandinghttp://www.theguardian.com/uk-news/2014/apr/13/delay-northern-ireland-troubles-inquests-outstanding

[10] McCaughey v. United Kingdom no. 43098/09, Eur. Ct. H.R., 16 July 2013
Plaintiffs: Brigid McCaughey obo Martin McCaughey; Pat Grew and Letitia Quinn obo Dessie Grew
Defendant: The United Kingdom

applicants with access to an effective investigation which would commence promptly and be conducted with due expedition."

The Bulgarian Judge Kalaydieva went even further in her concurring judgement with regards to State Agents benefitting from virtual impunity:

*'After decades of being faced with demonstrated reluctance and what would appear to be an attempted obstruction of justice'... '**The period of demonstrated, if not deliberate, systemic refusals and failures** to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Articles 2 and 3 seem as a matter of principle to **make it possible for at least some agents of the state to benefit from virtual impunity as a result of the passage of time'** page* 38.

Structural deficiencies and legislative anomalies in addition to inordinate delay include:

- the inability of inquests in Northern Ireland to issue verdicts of lawful or unlawful killing falls short of international standards;
- protracted delays and litigation involving the PSNI and MOD in relation to disclosure to next-of-kin of material that is submitted to be relevant;
- the failure to effectively investigate the broad circumstances of the death to allay suspicion or rumour, for example details of witnesses involvement in other lethal force incidents;
- the failure to secure attendance of security force personnel at the hearing.

The impasse which had developed in the Coronial system had reached what was considered to be legal brick wall, by November 2014.

On 6th November 2014, **EU Human Rights Commissioner, Nils Muižnieks** attended a Conference at the Ulster Hall, taking the opportunity to consult widely with civic society whilst here. His interventions at the time were crucial to then to be agreed Stormont House Agreement, with the British Government reminded that their actions, or inaction, was being closely monitored by the European authorities.

Commissioner Muižnieks made some very cogent remarks at that time

"Article two, the right to life, is one of the core rights," he told the BBC.

"It involves not only the state's responsibility to protect people from unlawful death, but also the responsibility to investigate effectively the circumstances of the death and punish those responsible. It is an absolute obligation."

"I'm concerned. I think far too long a period has passed before people have received justice and information about the fate of their loved ones and about the fate of these cases," Mr Muižnieks said.

"It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'.

"The UK government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations.

"Until now there has been virtual impunity for the state actors involved and I think the government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results.

"The issue of impunity is a very, very serious one and the UK government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general."

3. Coronial Powers and Institutional Capacity.

A week later, on 17th November 2014, the Lord Chief Justice Sir Declan Morgan QC, in a Court of Appeal ruling concerning judicial review litigation in respect of the Pearse Jordan[11] inquest (examined by the European Court in *Jordan v United Kingdom*) scathingly criticised the current state of coronial law and the utter lack of reform in this field:

"*The absence of adequate powers for Coroners and procedures suitable for investigation and hearings has resulted in the inquests becoming an adversarial battleground instead of a*

[11] *Re Jordan's applications for judicial review* [2014] NICA 76 http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2014/[2014]%20NICA%2076/j_j_MOR9446Final.htm

Coroner led inquiry. ***If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040***."

The commentary of the Commissioner and the LCJ in November may have had an impact on the then negotiations for the upcoming Stormont House Agreement, which was signed on 23rd December 2014.[12]

> *"Legacy inquests will continue as a separate process to the HIU. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements."*

International attention and criticism continued in July 2015[13] with the report of the United Nations Human Rights Committee, which concluded;

The State party should:

(a) Ensure, as a matter of particular urgency, that independent, impartial, prompt and effective investigations, including those proposed under the Stormont House Agreement, are conducted to ensure a full, transparent and credible account of the circumstances surrounding events in Northern Ireland with a view to identifying, prosecuting and punishing perpetrators of human rights violations, in particular the right to life, and providing appropriate remedies for victims;

(b) Ensure, given the passage of time, the establishment and full operation of the Historical Inquiries Unit as soon as possible; guarantee its independence in a statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases and ensure its access to all documentation and material relevant for its investigations;

(c) Ensure that the Legacy Investigation Branch and the Coroner's court in Northern Ireland are adequately resourced and are well-positioned to effectively review outstanding legacy cases;

(d) Reconsider its position on the broad mandate of the executive to suppress the publication of Inquiry reports under the Inquiries Act 2005;

(e) Consider launching an official inquiry into the murder of Pat Finucane.

On assumption of the Presidency of the Coroners Court on 1st November 2015, the Lord Chief Justice immediately appointed Lord Justice of Appeal Sir Reg Weir QC, to conduct an in depth review of all 55 pending Legacy inquests. This series of publicly heard Case Management

[12] https://www.gov.uk/government/publications/the-stormont-house-agreement

[13] Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland. The Committee considered the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/7) at its 3168th and 3169th meetings (CCPR/C/SR. 3168 and 3169), held on 1 and 2 July 2015. At its 3193rd meeting (CCPR/C/SR.3193), held on 21 July 2015, it adopted the following concluding observations.

reviews was conducted in back to back daily sessions, from Monday 18th January until Friday 29th January, during which the presiding Judge was unambiguous in where he considered the responsibility for the delays and failures to comply with disclosure requests lay[14].

In an unprecedented and much welcomed and appreciated move, the Lord Chief Justice, along with Weir LJ, personally met with the families of those affected by the delays in the Inquest system, on Friday 12th February 2016, to present the conclusions of a report prepared by |Lord Justice Weir, and the way forward to be proposed to Department of Justice.

He said that the failure to deal with legacy inquests has *"cast a long shadow over the entire justice system"* but that all inquests into controversial killings could be completed within five years if the Government provides enough resources[15].

He went on to say[16]

"It is clear that the existing Coroners Service is not adequately resourced to carry the weight of these cases and so we will need to establish a new, dedicated Legacy Inquest Unit as a matter of urgency. My ambition is to start listing cases from September onwards but this will be predicated on the availability of resource."

Sir Declan added:

"I sincerely believe that if we are now in a position to make meaningful progress on this long-standing issue, and that if we do, it will provide a signal of hope to all victims and survivors that the remaining issues involved in dealing with the past can finally be resolved."

On 9th March 2016[17], the Lord Chief Justice outlined his specific plans at a Conference convened by the Commission for Victims and Survivors at the Titanic Centre, in Belfast, wherein he stated:

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[14] Please see attached hereto, a detailed analysis of that commentary with regards to the 3 week series of case reviews conducted by Weir LJ, as delineated at the launch of a legal opinion commissioned by GUE/NGL on the effect of the proposed repeal of the Human Rights Act by the British Government which was presented during a conference organised by Martina Anderson on the proposed effect of 'BREXIT' on human rights, economic and social rights in the Irish context. 'BREXIT – Rights and Wrongs. Conference at Balmoral Hotel, Belfast Friday 29th January 2016.

[15] http://www.irishnews.com/news/northernirelandnews/2016/02/12/news/legacy-inquests-could-be-completed-in-five-years-says-lord-chief-justice-416917/

[16] http://www.u.tv/News/2016/02/12/Lord-Chief-Justice-calls-for-legacy-inquest-unit-53977

[17] A video clip of the Lord Chief Justice expressing his disappointment can be viewed here (http://www.bbc.co.uk/news/uk-northern-ireland-37277655) and in these related video links (http://www.bbc.co.uk/news/uk-northern-ireland-36208777).

"I am satisfied that the plan I have developed represents the best way forward for these cases and satisfies the criteria that need to be met in order to discharge the UK Government's Article 2 obligations.

In order to implement that plan, however, I will of course need to be provided with the necessary resources, and there will be cost implications for a number of other organisations which are required to support the work of the Coroner.

I have set a timescale of five years for completion of the existing legacy cases which are before the coroner, from the point at which resources are provided."

He concluded his remarks by setting a very specific time scale for a decision to be made with regards to his receipt of resources for the detailed business plan for a dedicated Legacy Inquest Unit which accounts for the required extra investigators, lawyers and administrators as well as the creation of an electronic system to manage the vast amounts of documents.

"There remains time before the Assembly elections for the Executive to take a decision to put forward a bid to the Secretary of State for the draw-down of funding to allow legacy inquests to proceed. If this request elicited a positive response, we would aim to have a Legacy Inquest Unit established within a matter of months and for some legacy hearings to begin in September.

If there is no response before the election, we will almost certainly not be able to achieve a September start date, which would be extremely disappointing. We might at best be able to get one or two cases on before Christmas, but we would be unable to achieve the step change that is required to deal with all of these cases in an Article 2 compliant way.

The rate of progress before I became President is evidence that the status quo is not an option."

It is a disgrace and I regret to say, an unprecedented undermining of the Rule of Law by the Executive arm of Government, that with despite the Lord Chief Justice's Concept Plan, having been presented to the Department of Justice since March of this year, no decision on the requisite funding has been made and as such, the unacceptable status quo does persist.

The intended timescale, proposed to families in January cannot now materialise, which has caused further anguish and distress, but also compounds and aggravates the State's insouciant and consistent failure to satisfy its obligations under the Convention and the series of ECtHR judgments which it is in persistent breach of.

"We have people today who are suffering a great deal, we need resources and we need progress on the past in order to enable the present"

Baroness Nuala O'Loan[18]

On 25th April 2106, the presiding Judge with management responsibility for the Coroners Court, Mr Justice Colton wrote a letter to families advising;

"We are still waiting for the Executive's decision on the DOJ proposal and so it remains unclear when we will be in a position to implement the plan the Lord Chief Justice had put forward for dealing with the outstanding legacy caseload"

4. *POLITICAL URGENCY?*

On Tuesday 3rd May 2016 it was claimed First Minister Arlene Foster blocked the funding request from being included on the executive's discussion agenda. During a BBC election debate[19] she said she had wanted more time to discuss the proposal with the Lord Chief Justice.

Within a month comments made by Permanent Secretary Nick Perry at his appearance at the first meeting of the new Justice Committee on Wednesday 1st June 2016 demonstrated an acknowledgement of the urgency.

Alex Attwood Is it the intention of the Justice Minister to re-table the Executive paper on the funding of inquests in light of what I would describe as the "exasperation" of the LCJ that the necessary funding has not been made available?

Nick Perry "the Minister has already had an introductory meeting with the LCJ and a number of issues were discussed. I accept that clarity on funding would be helpful."

AA given the scale of the preparatory work that the LCJ's office has done do you acknowledge that additional funding is essential?

NP I acknowledge that the matter cannot be taken beyond a certain point within the existing funding envelope. The way ahead is ultimately a political decision.

AA Would you describe the work as urgent?

NP It would be good to have clarity as soon as possible and the LCJ has stated his position in that regard.

[18] **Baroness O'Loan: 'Immoral' to link Troubles legacy to welfare reform** http://www.bbc.co.uk/news/uk-northern-ireland-33858683 11th August 2015

[19] http://www.irishnews.com/news/northernirelandnews/2016/05/04/news/troubles-inquests-delayed-again-after-dup-blocks-funding-bid-508502/

On 7th June 2016 the Council of Europe Committee of Ministers[20] commented in very robust terms, its severe misgivings about the impasse. Analysis by human rights officials for the Committee classified as '*deeply concerning*[21]*'* that the Historical Investigations Unit (HIU) and other legacy Institutions committed to under the 2014 Stormont House Agreement had still not been legislated for citing the 'major obstacle' to this being the 'national security veto' over information to victims families[22] The Council of Europe also commented specifically on the delays in establishing the Legacy Inquests Unit which has been taken forward by the Lord Chief Justice, but has had funding from the UK government delayed:

> *".. it must be strongly underlined that any further delay by the United Kingdom authorities in the provision of the necessary resources and the establishment of the Legacy Inquest Unit will lead to further delay in the conclusion of the examination of these cases by the coroners' courts. As underlined by the Lord Chief Justice, the failure to deal with these cases "has cast a long shadow over the entire justice system". The expertise and authority he commands and the steps taken by him have created a unique possibility for his office to take effective action. It is therefore critical, as the Lord Chief Justice has himself urged, that* ***the United Kingdom*** *authorities do "not to miss this window of opportunity" but instead* ***take all necessary measures to ensure that the legacy system is properly resourced and staffed to enable effective investigations to be concluded."***

On 5th September 2016 at the Opening of the Legal Year, the Lord Chief Justice took the opportunity to further record his concerns, publicly;

I had understood that a draft Bill to create the new institutions proposed under the Fresh Start Agreement would be published for consultation over the summer but this has not yet happened.

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[20] The Committee of Ministers, draws its membership from the 47 members states of the Council of Europe (an entirely separate entity from the EU), oversees the implementation of judgments of the European Court of Human Rights.

[21] "After the Stormont House Agreement was published in December 2014, it was hoped that the legislation to establish the HIU would be adopted by summer 2016 and that the HIU would be operational by autumn 2016. However, notwithstanding the Committee's calls to the United Kingdom authorities in December 2015 to introduce into Parliament on an agreed basis legislation to establish the HIU, there has been no significant progress on this issue since the cross-party talks in autumn 2015, which concluded without agreement on the legislation required. The major obstacle is the proposed national security veto on disclosure of information to the victims' families at the conclusion of an HIU investigation. Civil society, victims' groups and some political parties have raised concerns about the undefined and broad nature of this potential veto which will limit their access to the investigations.

…It is therefore *deeply concerning* that the legacy institutions agreed upon in December 2014 after months of talks have still not been established, nor has the draft legislation to establish them been introduced to Parliament. After nearly 18 months of subsequent discussions and talks on the substance of the legislation, it is now imperative that a way forward is found so that the HIU can be established and become operational without any further delay…"

[22](CM/Notes/1259/H4642**)** https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168064e71b

I am also disappointed that, having asked the Department of Justice some months ago to put together costings for the full package of measures for dealing with the past, these have not yet been provided. It is impossible to see how the issue of legacy can be moved forward politically without progress having been made on the new legislation and in the absence of a clear assessment of the costs involved in implementing all of the elements of a legacy package. The overall picture is, therefore, hugely disappointing.

If we were continue in this vein, the result would be, as I have said on previous occasions, that it would be decades before all of the outstanding cases were completed. This would not comply with the legal requirement to deal with the backlog of cases within a reasonable timeframe.

While we may live in austere times, the fact of the matter is that the devolved administration and the UK Government have a legal obligation to find a method of discharging their responsibilities in respect of legacy cases.

5. THE PROTRACTED HISTORY OF THE PEARSE JORDAN INQUEST

The concerns about the inordinate delay in progressing legacy inquests have crystallized in the history of the Pearse Jordan inquest. Mr Jordan was shot dead by Sergeant A of the Headquarters Mobile Support Unit ("HMSU"), a section of the Royal Ulster Constabulary ("RUC") on 25 November 1992 on the Falls Road, Belfast shortly after 5.00pm. The original inquest which commenced on 4 January 1995 was adjourned part heard. A further inquest held at the end of 2012 was set aside by the High Court and the Court of Appeal.

By 2014 when the Court of Appeal heard *In the Matter of Three Applications by Hugh Jordan for Judicial Review* [2014] NIQB 11 there had been **24 judicial reviews, 14 appeals to the Court of Appeal, one hearings in the House of Lords and one hearing before the European Court of Human Rights**. The 2012 Inquest was quashed by Stephens J following a judicial review. That decision itself was appealed to the Court of Appeal and the Court of Appeal provided further guidance on the future conduct of the investigation into Mr Jordan's death.

The protracted history of litigation in this case however, was not to indulge the pedantic whims of lawyers, rather a number of causes have contributed to the delay, among them controversy concerning the Director of Public Prosecutions' decision not to prosecute. Other judicial reviews challenged the Lord Chancellor's failure to introduce legislation to ensure that the

inquest system in Northern Ireland complied with article 2 of the European Convention[23]. Other challenges concerned a ruling of the coroner on 9 January 2002 that he would conduct the inquest on the basis of existing law and practice and would not leave to the jury the option of returning a verdict of unlawful killing[24].

The case has served as a beacon by which the boundaries of the law have been defined. The Jordan case, now sets the bar for core issues such as the scope of an inquest and the parameters of a verdict. Similarly, the House of Lords in McCaughey[25] has set the guidelines for disclosure in such inquests.

Yet, at the most recent incarnation of the case, last month, wherein Mr Justice Horner[26] presided over a concluded inquest, he commented that the gross and inordinate delay of nearly a quarter of a century in this case makes it almost impossible to reach any conclusion on the balance of probabilities as to what happened on 25 November 1992 and that this is a *"most unsatisfactory outcome".*

He further stated that he cannot emphasise enough, the importance for the future of the prompt investigation of any suspicious death, especially one in which there is suspected involvement of the security forces:

"The sooner such inquests are held the better for all parties. The rule of law and justice demand no less".

The Judiciary cannot make their voices any more clear.

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[23] This application was dismissed by Kerr J on 29 January 2002: Re Jordan's Application [2002] NIQB 7, [2002] NI 151.

[24] This application was dismissed by Kerr J on 8 March 2002: Re Jordan's Application [2002] NIQB 20.

[25] McCaughey (AP) (Appellant) v. Chief Constable of the Police Service Northern Ireland (Respondent) [2007] UKHL 14 https://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070328/jordan.pdf

[26] http://www.courtsni.gov.uk/enGB/Judicial%20Decisions/SummaryJudgments/Documents/Pearse%20Jordan%20inquest%20findings%20delivered/j_j_Summary%20of%20Coroner's%20Findings%20-%20Patrick%20Pearse%20Jordan%207%20Nov%2016%20(FINAL).htm

"It is now impossible with the passage of time to say with any certainty what happened on that fateful afternoon. At the remove of a quarter of a century I am simply unable to reach a concluded view which is fair and just as to whether the use of lethal force was justified or not. I remain profoundly unsure as to what happened. Neither side, for the reasons I have set out, have been able to convince me that what they say did occur immediately prior to the deceased's death. On the balance of probabilities if the events did happen as the PSNI contend, and as I have said I have been unable to determine that issue on the balance of probabilities, I am satisfied that Sergeant A acted in self-defence and that there was no breach of Article 2. However, in so far as the onus lies on the PSNI to provide a satisfactory and convincing explanation to the inquest for the use of lethal force it has failed to do so. But how precisely the deceased met his death on that fateful afternoon has not been proved to the satisfaction of this inquest and remains unknown."

6. PABLO DE GRIEFF 17th November 2016 – Further International Commentary

Speaking on the Concept Plan proposed by the Lord Chief Justice, Sir Declan Morgan QC, Pablo de Grieff, the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, stated in his report[27] of his mission to the United Kingdom of Great Britain and Northern Ireland, that;

> Such reforms include applying a thematic approach, creating structured and systematic linkages between cases, sequencing cases, ensuring that the presiding coroner reviews all relevant material in unredacted form, and establishing a dedicated legacy inquest unit. **This initiative, as a wisely designed strategy to maximize the truth-telling potential of inquests for individual cases, and illustrating the structural dimensions of violations, deserves strong support.**

7. BIRMINGHAM PUB BOMBINGS 1974

It is instructive at this juncture to make a brief comment regarding the Birmingham Pub Bombings 1974 in which 21 were killed and many others injured. An inquests was opened and suspended – not closed – on the conviction of the Birmingham 6. However, following the 1991 successful appeal by the six there has not, until now, been a re-opening of those inquests. The West Midlands Police, following an internal investigation by the Devon and Cornwall Police in 1993, maintained the Pub Bombings investigation was live but it was not until 2014 when three families came to Belfast that an application was made by our practice to the Attorney General for England and Wales to resume the inquests.

Following a series of hearings in Solihull a senior coroner decided earlier this year that she had the legal authority to resume the original inquest, that there was sufficient reason to do so and that any resumed inquests should be Article 2 compliant. This is the first time the relatives of the victims will be able to effectively participate in an independent investigation into the death of their loved ones, pending a protracted political argument about public funding for their legal representation by a firm from Belfast. It should be observed that at no point has our presence been questioned by the judiciary, the others IPs or the Law Society for England and Wales – as no questions were asked about English lawyers representing the Omagh families in their civil action in Belfast.

[27] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland 17th November 2016 A/HRC/34/62/Add.1 http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/CountryVisits.aspx

The inquests will resume next year. Extensive disclosure has been made by the West Midlands Police and ordered from the Home Office (MI5 and SB), the FCO (MI6) and the MOD. The scope of the inquests will encompass matters of preventability, failure to respond by the Emergency Services and the miscarriage of justice. Already, the wheels of justice are turning in respect of this important matter, which will provide an uneasy juxtaposition for the State and their response to analogous issues before our own courts.

If the funding situation is resolved, the political implications of the resumed inquests will match the Hillsborough Inquests and rattle the cages of those of in this jurisdiction who are determined to allow legacy Inquests here to fester and allow the stasis to continue. BUT: the BPB74 were not part of the Good Friday Agreement 1998 and therefore they cannot be placed within that convenient paradigm of delay.

8. CURRENT LEGAL APPLICATIONS

Loughgall /Ballymurphy JR re failure to fund LCJ Concept Plan[28] *- 14th December 2016*

An application for judicial review has been lodged by relatives of those killed at the Loughgall atrocity to challenge the ongoing failure of the Executive Office, the Northern Ireland Executive, the Department of Justice for Northern Ireland and the Secretary of State for Northern Ireland, to put in place adequate funding to prevent further delay to legacy inquests. The application seeks the court to make an order for mandamus to compel the authorities to put in place adequate resources to prevent further delays. This application is due to commence tomorrow week on Wednesday 14th December and will be heard as part of a similar application lodged by the Ballymurphy families.

[28] http://www.irishnews.com/news/northernirelandnews/2016/09/22/news/families-take-legal-action-over-stalled-troubles-inquest-funding-705491/

Jordan's and five other Applications[29] [2014] NIQB 71JR's re Declarations of Delay and Damages. 20th and 21st December 2016

In 2014, with the crisis in the Coroners Court becoming more apparent with each passing Preliminary Hearing, five separate judicial review applications seeking declarations that there had been delay in commencing inquests were commenced[30] and that the delay was incompatible with Article 2 of the European Convention on Human Rights and in breach of Section 6 of the Human Rights Act 1998.

Each of the applications identified different State bodies which it was suggested were responsible for the delays in each inquest. Those State bodies included the Ministry of Defence, the PSNI, the Police Ombudsman, and the Coroners' Service.

The different State bodies which were alleged to be responsible for the delays in the different inquests were made respondents but upon it becoming apparent to the applicants that the Coroners' Service was raising issues as to a lack of resources they applied to join the Department of Justice as a notice party on the basis that the Department is responsible for funding the Coroners' Service. Accordingly the Department of Justice was joined as a notice party in all five applications for judicial review[31].

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[29] http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2014/[2014]%20NIQB%2071/j_j_STE9256Final.htm

[30] The applications were brought by:
•Hugh Jordan, the father of Patrick Pearse Jordan who was shot and killed by an RUC officer in Belfast on 25 November 1992;
•Kathleen Ryan, the mother of Michael Ryan who was shot and killed by members of the SAS in Coagh on 3 June 1991;
•Christina McCusker, the mother of Fergal McCusker who was shot and killed in Maghera on 18 January 1998. The McCusker family have concerns about collusion between Loyalist paramilitaries and agents of the State in his death;
•Colette McConville, the mother of Neil McConville who was shot and killed by a PSNI officer near Ballinderry on 29 April 2003;
•Anne McMenamin, the mother of James Daniel McMenamin who died after being knocked down by a PSNI Land Rover in Belfast on 4 June 2005; and
•Jordan Brown, the son of Stephen Craig Colwell who was shot and killed by a PSNI officer on 16 April 2006 outside Ballynahinch Police Station.

[31] In fact the Department is not responsible for the funding of all the respondents. It is responsible for funding the Police Ombudsman for Northern Ireland, and the Coroners' Service. It is partially responsible for funding the PSNI. It is not responsible for funding the MOD. At a hearing on 16 May 2014 it was agreed that the declaration should issue against the particular respondents in each of the judicial review applications except against the MOD. Kathleen Ryan, the applicant in the judicial review in which the MOD was a respondent did not seek to obtain a declaration against the MOD given that relief was being obtained against the other respondents.

The issue for determination by the Court was therefore whether in addition each of the applicants was entitled to an award of damages and if so the amount of damages in each case. Mr Justice Stephens said he considered that following a finding of violation of the procedural obligation of promptness, the ECtHR had consistently found that applicants must thereby have suffered feelings of frustration, distress and anxiety. He also held that the ECtHR had consistently found that the non-pecuniary damage was not sufficiently compensated by a finding of violation:

"Taking into account the principles applied by the Strasbourg Court, and subject to the further points that arise in relation to Hugh Jordan's application, I consider that an award of damages is necessary to afford just satisfaction to each applicant and I consider that an award of damages to be just and appropriate."

Mr Justice Stephens held that each of the applicants, regardless as to their age, must have been caused to suffer feelings of frustration, distress and anxiety by the unlawful delays that have occurred. He awarded each of the applicants £7,500 in damages and made the award against the Department of Justice.

These applications have since been further delayed by cross appeals, primarily on the basis of the different state agencies contesting their liability for delay. The Chief Constable appealed the finding of £7500 to the Jordan family and Mr Jordan Senior, cross appealed the ruling that a Coroner cannot, as a judicial officer, be ordered to pay damages. That appeal & cross appeal are listed for hearing on 20th and 21st December 2016. If the family decide to lodge further JR proceedings challenging Mr Justice Horner's verdict., that date is likely to be vacated because the Court of Appeal has previously expressed the view that delay challenges should only proceed once all other proceedings have concluded

As such subsequent analogous JR's lodged by the next of kin of victims, Barry O'Donnell, Sean Brown and Seamus Dillon, have been notified that their cases (which were lodged in 2014) have been adjourned pending the conclusion of this appeal, and will not now be heard until 2017.

9. THE CURRENT POLITICAL VIEW OF THE NARROW GROUND

The new Secretary of State, Mr Brokenshire has announced that, instead of a renewed negotiation between the parties and the British government – as expected – the NIO will simply carry out a public consultation on its proposals for the SHA. It is likely that it will then push ahead and impose its own wishes on the scope and independence of the activities of the HIU[32].

It is worth pointing out the way that the British government invokes the devolved institutions and politicians when they wish not to do something (i.e. pay for legacy inquests), yet ignore local sensitivities when there is a danger that the activities of its overt and covert agents may be exposed to the light of independent scrutiny.

10. CONCLUSION

The ongoing breaches of the United Kingdom as the contracting legal state are well established. The legal response by the relevant State representative has been appropriate, as we consider that the LCJ Concept Plan, can discharge the State's article 2 obligations, insofar as it proposes a timeous, participative, independent, effected, State initiated investigation.

The political response has, however, been lamentable and indeed in my respectful opinion, anti-law, with the integrity of the Rule of Law being quite publicly undermined. Indeed, it could be argued, that the manner in which the British Government have conducted themselves has been quite Machiavellian

The article 2 responsibility resides in London. London signed the ECHR as the sovereign entity. However, in a clever, deft yet malevolent masterstroke, they have in effect delegated their article 2 responsibility to Stormont and have inbuilt the need for any request for funding for article 2 compliance to come from OFMDFM, endorsing the bid by the responsible Ministry, in this case the sponsoring Department is the DOJ.

DOJ have sponsored the bid to OFMDFM, and whereas one party, Sinn Féin are enthusiastic to submit same to London, the DUP are unfortunately refusing to heed the overt demands for funding from the most senior Judicial officer in the jurisdiction, and are refusing to authorise the bid to be submitted to London. This hiatus is of course warmly received by a pro-Brexit,

[32] http://www.sinnfein.ie/contents/41987

anti-Human Rights Act Conservative administration, previously represented by a Brexit cheerleader, Theresa Villiers,

The substantive and irrevocable issue is that article 2 responsibility CANNOT be delegated by London to local consensus politics!! Stormont is not a sovereign entity for the purposes of the European Convention on Human Rights (Greater Manchester Combined Authority has a greater mandate), London is the sovereign entity (as many are keen to advise us post BREXIT) and as such London must shoulder the responsibility of its international obligations.

The concern is that despite repeated censure from High Court Judge, after High Court Judge culminating in the public exasperation of the most senior Law Officer, the Lord Chief Justice, and despite consistent international monitoring, and serial condemnation (from the EU Human Rights Commissioner Nils Muižnieks, to the UN Human Rights Committee in Geneva, to the Council of Europe, the Committee of Ministers in Strasbourg, to the UN Special Rapporteur on Truth and Justice) the sum total of these concerns have been insouciantly disregarded like water off a ducks back. It would appear that the comfortable majority at Westminster, inflated by the Brexit referendum is such that the British Government will continue to ignore its international legal obligations to ensure that its role as a participant in our recent conflict remains undisclosed and mired in the emotions of those who endured the brunt of their actions.