1340th meeting, 12-14 March 2019 (DH)
Human rights

H46-30 McKerr group v. the United Kingdom
Supervision of the execution of the European Court’s judgments

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Case description

These cases concern investigations into the deaths of the applicants’ next-of-kin in Northern Ireland in the 1980s and 1990s, either during security force operations or in circumstances giving rise to suspicion of collusion with those forces.

McKerr group: the European Court found various combinations of the following shortcomings in the subsequent investigations into the deaths: lack of independence of investigating police officers; lack of public scrutiny or information to victims’ families about the reasons for decisions not to prosecute; defects in the police investigations; limitations on the role and scope of the inquest procedure; absence of legal aid for the representation of the victims’ families; and delays in inquest proceedings (procedural violations of Article 2). The McShane case also concerns a failure by the State to comply with its obligations under Article 34.

McCaughey and Others and Hemsworth: the European Court found that there had been excessive delay in the inquest proceedings which had concluded in 2012 and 2011 respectively (procedural violations of Article 2), caused variously by periods of inactivity; the quality and timeliness of the disclosure of material; and legal procedures necessary to clarify coronial law and practice.

Under Article 46 of the Convention, the Court indicated that the authorities had to take, as a matter of priority, all necessary and appropriate measures to ensure, in similar cases of killings by the security forces in Northern Ireland where inquests were pending, that the procedural requirements of Article 2 would be complied with expeditiously.
Status of execution

Individual measures:

The individual measures have taken the form of either one or a combination of three types of investigation: inquests, Police Ombudsman reports and/or Historical Enquiries Team (“HET”) reports. Investigations in four cases in this group are still outstanding (see DH-DD(2019)164 for details) due to problems examined under the general measures, mainly delays in the inquest procedure and/or delay in the work of the Police Ombudsman (see information document CM/Inf/DH(2014)16-rev for more details). These investigations are affected by the implementation of the Stormont House Agreement and, in particular, the proposed establishment of the Historical Investigations Unit (HIU) which, if established, would take forward all Police Ombudsman and HET investigations, and the measures taken to improve the legacy inquest procedure (see general measures).

At the 1243rd meeting (December 2015) (DH), the Committee noted various developments in the case of Finucane, closed in 2009, as well as the applicant’s request to reopen the individual measures. The Committee decided, in light of the ongoing domestic litigation in relation to Mr Finucane’s case, which the authorities committed to updating the Committee about, to resume consideration of the reopening of the individual measures once the domestic proceedings had concluded.

On 27 July 2017, the applicant was granted permission to appeal to the Supreme Court. The hearing took place on 26 and 27 June 2018 and judgment is expected to be delivered on 27 February 2019.

Separately, the Police Service of Northern Ireland (PSNI) examined the new and significant material identified by Sir Desmond de Silva in his December 2012 report into the death of Mr Finucane to determine whether it created any credible opportunities for further investigation (see DH-DD(2018)788 for further details). It submitted two reports to the Public Prosecution Service of Northern Ireland (PPSNI) to obtain independent prosecutorial advice. Taking into account the advice of the PPSNI and independent senior counsel, the PSNI concluded that there were no opportunities to pursue any criminal investigations and communicated that decision to the applicant’s representatives on 24 May 2018. They have not responded.

General measures:

Many general measures have already been adopted in the McKerr group of cases and the Committee has closed its supervision of the majority of them. However, questions are still outstanding regarding the functioning of the Office of the Police Ombudsman of Northern Ireland (OPONI), the HET and the inquest system (for more information, see information document CM/Inf/DH(2014)16-rev). The HET was closed in December 2014. The work of the OPONI continues but it does not have the capacity or the resources to conduct legacy investigations rapidly.

Stormont House Agreement

On 23 December 2014, the governments of the United Kingdom and Ireland published the Stormont House Agreement (see DH-DD(2015)81), which was welcomed by the Committee. The Agreement relates to a number of issues, but most significantly for the execution of this group of cases, it announced the establishment by legislation of four new institutions to deal with the past, including a single independent investigative body, the Historical Investigations Unit (HIU), to take over the investigation of legacy cases from both the Police Ombudsman and the HET. There are currently approximately 1,700 such cases outstanding. It also announced that appropriate steps would be taken to improve the way legacy inquests function, to reduce delay. The United Kingdom Government has indicated that an additional £150 million will be available for this purpose.

Historical Investigations Unit

The HIU and the other legacy institutions have not yet been established because of a failure to reach agreement on the details of the institutions and thus the legislation required, complicated further by the absence of a devolved power sharing government in Northern Ireland since January 2017.

1 McKerr, Shanaghan, Kelly and Others, and Hugh Jordan.
2 See the Notes and decision for the 1243rd meeting for further information.
3 See the decision at the 1222nd meeting (March 2015).
This lack of progress has been a matter of serious concern for the Committee, which has repeatedly underlined that, regardless of the complexity of the broader political picture, it is imperative that a way forward be found to enable effective investigations to be conducted, particularly in light of the length of time that has already passed since these judgments became final, and the failure of previous initiatives to achieve effective, expeditious investigations.4

Finally, on 11 May 2018, the public consultation and draft legislation on the establishment of the HIU and the three other legacy institutions were published, which was welcomed by the Committee at its last examination of the cases at the 1318th meeting (June 2018) (DH). The other institutions are

- the Independent Commission on Information Retrieval (to enable victims and survivors from the United Kingdom and Ireland to seek and privately receive information about the Troubles-related deaths of their relatives);
- an Oral History Archive (to enable people from all backgrounds to share experiences and narratives related to the Troubles); and
- the Implementation and Reconciliation Group (an independent institution to promote reconciliation and review and assess the implementation of the other bodies).

In their most recent submissions (see DH-DD(2019)164), the authorities explain that the public consultation provided all interested persons the opportunity to see the proposed way forward, to address the legacy of the past and contribute to the discussion of the issues. Throughout the consultation period, the government met with a wide range of victims' groups, civil society organisations and other interested stakeholders to ensure that the proposals were widely understood. Representatives from the Northern Ireland Office also attended over 30 public events to speak directly with the public about the consultation and hear their views.

The consultation closed on 5 October 2018, having been extended by three weeks due to public demand. Over 17,000 responses were received. The Northern Ireland Office is now nearing the end of the process of analysing these responses. The authorities report that the emerging feedback reaffirms the broad consensus that the current processes are in need of reform. The public feedback has also revealed a number of recommendations which could further improve the processes.

The government intends to publish an analysis of the responses shortly and set out how it proposes to respond. It hopes to then present amended legislation formally to Parliament. The Government’s position remains that the Stormont House Agreement institutions represent the best way forward to address the legacy of Northern Ireland’s past. The Government indicates that it remains committed to making progress and is in parallel continuing to support reforms to the legacy inquest system.

**Legacy inquests**

On 1 November 2015, the Lord Chief Justice of Northern Ireland (LCJNI) became president of the coroners’ courts, which was noted with satisfaction by the Committee. He reinforced key personnel in the coroner’s service and took a number of important steps to review the pending legacy cases and establish a strategy for the future.5 In February 2016, he proposed that it should be possible to complete the existing legacy inquest caseload within a period of five years, subject to the support of a properly resourced Legacy Inquest Unit, co-operation from the relevant justice bodies (the PSNI and the Ministry of Defence) and the required resources being made available. The Committee considered that such a constructive approach had the potential to make significant progress6 and has subsequently strongly encouraged the authorities to take all necessary measures without delay so that the legacy inquest system is properly resourced and reformed in accordance with the LCJNI’s proposals.7

At its last examination the Committee also noted with interest a judgment of the High Court of Northern Ireland, which both underlined the obligation to ensure that the Coroners Service could effectively comply with Article 2, irrespective of whether an overall package was agreed to deal with all legacy issues, and directed a reconsideration of the question of the provision of additional funding for legacy inquests which should not be postponed until broader political agreement is reached. The Committee further noted with satisfaction the authorities’ indication that they were discussing anew the approach to legacy inquest funding and strongly encouraged them to accelerate their consideration of further ways and means in this regard.

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4 See, for example, the most recent decisions at the 1294th meeting (September 2017) and the 1318th meeting (June 2018).
5 A full summary of the steps taken is set out in the Notes for the 1259th meeting (June 2016) (DH).
6 See the decision at the 1259th meeting.
7 See, most recently, the decision at the 1318th meeting.
In their most recent submissions, the authorities provide some updated information on the progress of pending legacy inquests (see DH-DD(2019)164) and confirm that, subject to the required resources and cooperation in place as envisaged by the LCJNI’s proposals, the projected time frame still remains five years for the completion of the 52 outstanding legacy inquests which relate to approximately 100 deaths. They explain that findings are awaited in three cases; and that three cases are at the hearing stage. The cases progressed to date are the oldest in terms of the date of death, all dating back to the early 1970s.

The Coroners Service has engaged three investigators and is in the process of appointing a fourth to support the legacy inquests. It is also working to ensure effective disclosure and information sharing.

As for the key issue of funding for all outstanding legacy inquests, a fresh business case was developed and approved in principle by the Northern Ireland Department of Finance in October 2018. In the absence of a devolved government in Northern Ireland, the United Kingdom government and the Northern Ireland Department of Finance are working together on the Northern Ireland Budget for 2019-2020. The current forecast includes provision for the funding of legacy inquests.

**Latest information received from NGOs**

A number of submissions have been received during the Committee’s examination of these cases, highlighting the ongoing problems as regards prompt and effective investigations into the deaths of the applicants’ relatives during the Troubles. A summary of these submissions and the authorities’ response are set out in the Notes for the 1259th, 1273rd and 1294th meetings.

In their most recent submissions of 14 February 2019 (see DH-DD(2019)195 and DH-DD(2019)196), the Committee on the Administration of Justice and the Pat Finucane Centre in conjunction with the Justice for the Forgotten have reiterated their concerns about, *inter alia*, the delays in the establishment of the HIU; safeguards to ensure the HIU’s independence; disclosure both to the HIU and to families; and the risk of abuse of national security grounds to undermine the HIU’s investigations. They also underline the ongoing delays in legacy inquest proceedings and the detrimental impact that this has on families and relatives. They are concerned that the necessary resources have not been made available to deal with the backlog of legacy inquests despite the High Court of Northern Ireland’s decision directing a reconsideration of the question in March 2018 (see above). Finally they raise concerns that the OPONI’s ability to conduct effective investigations is impeded both by a lack of resources and the failure of the PSNI to disclose all relevant information as required by domestic law.

**Analysis by the Secretariat**

**Individual measures:**

It is a matter of serious regret that the investigations and related litigation in the cases of *McKerr, Shanaghan, Jordan, Kelly and Others* and *McCaughey and Others* are not yet complete.

As mentioned above, the authorities have committed to updating the Committee about ongoing domestic litigation in relation to Mr Finucane’s case. It is now known that the Supreme Court judgment will be delivered on 27 February 2019. The Secretariat was therefore not in a position to conduct an analysis of the judgment in advance of the circulation of the Notes. It is recalled that the Committee decided to resume its consideration of reopening the individual measures in that case once the domestic litigation had concluded.

**General measures:**

As both the United Kingdom authorities and the Committee have reiterated since 2014, the existing mechanisms for conducting investigations into legacy cases required to implement the present judgments are not working effectively and a new approach is required. The current system is not delivering for victims, their families and for wider society.

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It therefore remains a matter of serious concern that the HIU and other legacy institutions have still not been established more than four years after the Stormont House Agreement of December 2014. Indeed, notwithstanding the complexities in the domestic processes, bearing in mind the length of time the families have already been waiting for answers, a way out of the impasse must now be found so that the HIU can be established and become operational without any further delay. It is therefore positive that the long-awaited public consultation on the draft legislation has concluded and received such a large response from the public, including in particular from victims’ groups and civil society organisations.

It is also to be welcomed that the authorities remain committed to the establishment of these key institutions to deal with the legacy of Northern Ireland’s past and are working on their response to the consultation to be in a position to present amended legislation to Parliament. In order to avoid any further delay, they should provide clarification on the estimated timetable for this.

Given the range of responses to the consultation, including recommendations from victims’ groups, as highlighted by the Rule 9 submissions, which could improve the proposed institutions, it is important that the legislation ultimately introduced to Parliament guarantee the HIU’s independence in both law and practice and enable it to conduct effective investigations which are sufficiently accessible to the victims’ families in full compliance with Article 2 of the Convention.

In the meantime, it is key that tangible progress is made on implementing the Lord Chief Justice of Northern Ireland’s proposals for dealing with the backlog of 52 legacy inquests and, in particular, on the provision of funding for this. As the High Court of Northern Ireland made clear in March 2018,9 there is an obligation on the United Kingdom to ensure that the Coroners Service can effectively comply with Article 2 irrespective of whether an overall package has been agreed to deal with all legacy issues. The authorities’ indication that the Northern Ireland budget forecast for 2019-2020 includes funding for outstanding legacy inquests is therefore positive. They should take all measures to ensure that the funding is provided so that the legacy inquest system is properly resourced and that legacy inquests, including those pending for the individual applicants in these cases, can be concluded without further delay.

Financing assured: YES

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