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Meeting: 1259 meeting (7-9 June 2016) (DH)
Item reference: Updated action plan (13/04/2016)
Communication from the United Kingdom concerning the McKerr group of cases against the United Kingdom (Application No. 28883/95)

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Réunion : 1259 réunion (7-9 juin 2016) (DH)
Référence du point : Plan d’action mis à jour
Communication du Royaume-Uni concernant le groupe d’affaires McKerr contre le Royaume-Uni (Requête n° 28883/95) (anglais uniquement)
EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS
CONSOLIDATED ACTION PLAN

MCKERR GROUP OF CASES V THE UNITED KINGDOM
Application number: 28883/95 McKerr, judgment final on 04/08/01
Application number: 37715/97 Shanaghan, judgment final on 04/08/01
Application number: 24746/94 Hugh Jordan, judgment final on 04/08/01
Application number: 30054/96 Kelly and others, judgment final on 04/08/01
Application number: 43290/98 McShane, judgment final on 28/08/02
Application number: 29178/95 Finucane, judgment final on 01/10/03
Application number: 58559/09, Hemsworth, judgment final on 16 October 2013
Application number: 43098/09, McCaughey and others, judgment final on 16 October 2013

Information submitted by the United Kingdom Government on 13 April 2016

CASE SUMMARY

In the McKerr Group of cases and the Hemsworth and McCaughey and Others cases the European Court of Human Rights (“the Court”) found a number of delays into holding inquests that were excessive and incompatible with the State’s obligations under Article 2 to ensure the effectiveness of investigations into suspicious deaths. Causes of delay included periods of inactivity; the quality and timeliness of disclosure of material; lack of contact with families of victims; prosecutorial decision-making; and delays stemming from legal actions necessary to clarify coronial law and practice.

The Court held that there had been a violation of the procedural requirements of Article 2 of the Convention by reason of excessive investigative delay. The Court commented that the Government must take measures to ensure that, in these and similar cases where inquests are pending, the procedural requirements of Article 2 are complied with expeditiously.

This consolidated action plan will describe events that have taken place since the previous action plan was submitted on 5 October 2015.
GENERAL MEASURES

Stormont House Agreement

The Stormont House Agreement, which was agreed in December 2014, includes measures to address a number of issues relating to Northern Ireland’s troubled past, including that of the legacy inquest process (para 31 of the Agreement) and provision for a new body, the Historical Investigations Unit (HIU), to take forward investigations into outstanding troubles-related deaths. The UK Government has indicated £150m of additional funding will be available for the Stormont House Agreement measures for dealing with the past.

The HIU, once established, will be an independent body. Officers investigating criminal allegations will have the powers and privileges of a police constable. The HIU will also provide dedicated family support staff and the next of kin will be involved in the process from the beginning and will be provided with support. The HIU will consider all cases in respect of which Historical Enquiries Team (HET) and Office of Police Ombudsman for Northern Ireland (OPONI) have not completed their work. Approximately 900 HET cases and 300 OPONI cases are outstanding. Oversight will be provided by the Northern Ireland Policing Board and the HIU will be structurally and operationally independent from the police. This independence is intended to address the criticisms that had previously been made of the role of the HET and OPONI.

The UK Government will make full disclosure to the HIU. To enable full disclosure, Westminster legislation is required, which will also prevent any damaging onward disclosure of information by the HIU.

Fresh Start Agreement

The previous Action Plan update from the UK Government noted that cross-party talks had been convened to discuss the implementation of the Stormont House Agreement, and other priority political issues. As a result, on 17th November 2015 the ‘Fresh Start’ Agreement was reached, following ten weeks of talks between the UK and Irish Governments and the Northern Ireland political parties. That agreement:

- helps give the Northern Ireland Executive a stable and sustainable budget, including additional UK Government financial support of around £500 million to assist them in tackling issues unique to Northern Ireland, including support for their programme to remove peace walls;
- paves the way of the devolution of corporation tax powers which is expected to lead to a reduction to 12.5 per cent by April 2018;
- allows measures to address the issues of flags and parades to go ahead; and

1 https://www.gov.uk/government/publications/the-stormont-house-agreement
introduces institutional changes to make devolution work better including on the size of the Northern Ireland Assembly, the number of departments, and provision for an official opposition.

On paramilitary activity, the Fresh Start Agreement strongly reaffirms support for the rule of law. Additional measures include: fresh obligations on Northern Ireland’s elected representatives to work together on their shared objective of ridding society of all forms of paramilitary activity and groups; and a concerted and enhanced effort to combat organised and cross border crime, which the UK government will help to fund.

Unfortunately, although a great deal of progress was also made during the negotiations on dealing with Northern Ireland’s past, it was not possible to achieve final agreement on those matters at that time.

Over the course of the political negotiations, substantial areas of common ground were developed on the legacy institutions, including on a range of issues where progress has previously proved impossible. Contentious questions were worked through by all the parties in the spirit of moving things forward for families and victims.

Even on the difficult question of how best to balance disclosure to families with the Government’s national security duties, a number of options were suggested and constructively considered. While that issue was not resolved during the talks, all of the participants to the talks agreed on the need for further progress in order for Northern Ireland to be able to deal with the past and to deliver better outcomes for victims and survivors.

The Government continues to support the establishment of new bodies identified in the Stormont House Agreement, and the NIO has continued to work with Northern Ireland’s political parties, Executive and victims groups. The Government considers that these institutions present the best way forward for Northern Ireland to deal with its past, and to ensure better outcomes for victims and survivors. The ongoing engagement process, especially with victims’ groups, has affirmed that there remains significant, broad support for new institutions to deal with the past. The Government will continue to work with Northern Ireland parties, victims’ groups and other stakeholders to achieve the needed consensus for legislation.

The Role of the Police Ombudsman and HIU

Once established, the HIU will carry out Article 2 compliant investigations into troubles-related deaths, including cases transferring from the police and the Police Ombudsman. Pending the establishment of the HIU, OPONI will continue to progress historical cases. Once established, these cases will transfer to the HIU.

OPONI’s governance and investigative processes in historical cases

After a previously critical report, a follow up report by Criminal Justice Inspection Northern Ireland (CJINI) in relation to OPONI on 30 September 2014 stated that
‘the independence of the Office has been fully restored’ and there was no external interference in its work.

**Cross-Agency Working Group**

The Representatives from the operational level Cross-Agency Working Group to reduce legacy delay are heavily involved in implementing the Stormont House Agreement in respect of establishing the HIU and realising improvements to the legacy inquest system (see below).

**Legacy Inquests**

The Lord Chief Justice of Northern Ireland (LCJ) became President of the Coroner’s Court on 1 November 2015. The LCJ has appointed a High Court Judge as the Presiding Coroner to oversee the management of cases and consider issues relating to scope and disclosure. The Presiding Coroner in conjunction with the Lord Chief Justice will determine which cases will be listed for hearing and when.

Following a review of the state of readiness of the outstanding legacy cases, which was undertaken by Lord Justice Weir in January 2016, and a series of meetings in Strasbourg on 15 January 2016, the LCJ has proposed that, with the support of a properly resourced Legacy Inquest Unit in the Northern Ireland Courts and Tribunals Service and co-operation from the relevant justice bodies including the PSNI and the MoD, operating in conjunction with the other reform measures he has recommended, it should be possible to complete the existing legacy inquest caseload within a period of five years, subject to the required resources being made available.

An experienced investigator has recently taken up post within the Coroners Service (CSNI), to assist progressing these cases towards readiness for hearing. CJINI has commenced an inspection of the arrangements in place in the PSNI to manage and disclose information in support of the coronial process in Northern Ireland. An update on the outcome of that exercise will be provided in due course.

The NI Executive has been asked by the Department of Justice to consider a proposed bid for funding for an initial phase of work which would aim to complete up to 16 legacy cases within a period of 19 months. If the bid is supported by the NI Executive, it is intended to submit it for consideration by the UK Government.

The review of the CSNI made a number of recommendations to improve the resilience of the CSNI. An update on the recommendations most relevant to the McKerr group has been provided in the recent update to the McDonnell action plan (Application number 19536/11).

**Review and update of coronial law in Northern Ireland**

The requirement for the review and update of Coronial Law in Northern Ireland was reflected in the CSNI review report. A scoping study for a review of the Coroners legislation has been completed.
INDIVIDUAL MEASURES

The individual measures in progress have been affected by the Stormont House Agreement dated 23 December 2014.2

Specific Cases

McKerr

This case is subject to on-going preparation for inquest in relation to disclosure on documents that date back to 1976 and is not yet at a stage where it can be listed for inquest. The disclosure exercise involves several thousands of pages of documents held by the Police Service of Northern Ireland (PSNI); this exercise is not yet complete. The PSNI disclosure has been separated into 13 tranches because of the volume of material involved. Disclosure within Tranche 1-Tranche 12 has not been completed. Tranche 13 consists of a substantial volume of documents in respect of which the Coroner has issued directions. Discussions are ongoing with PSNI as to the disclosure of this material, which must be cross-referenced against all documents previously disclosed in tranches 1 to 12, in order to avoid unnecessary duplication of disclosure.

The Coroner has also requested the disclosure of documents from across a number of government departments and agencies, including the Ministry of Defence (MOD), the Security Service, the Cabinet Office, the Northern Ireland Office, the Attorney General’s Office and the Home Office, as well as from the OPONI. Although a significant volume of documents has been disclosed to the Coroner’s legal team for consideration, this exercise continues. It is likely that, to capture all potentially relevant material, departments and agencies, including the PSNI, will necessarily conduct additional searches.

Hearings on Public Interest Immunity (PII) must await the outcome of an ongoing PII process. Approximately 100 lever arch folders of materials have been provided to the Coroner by departments and agencies other than PSNI although substantive disclosure remains outstanding.

Shanaghan

An inquest was carried out following the incident in August 1991 and there has been no referral from the Attorney General for a fresh inquest.

In relation to the Office of the Police Ombudsman for Northern Ireland (OPONI) investigation, the Shanaghan family and their CAJ representatives are in contact with the Ombudsman’s office. There is an active ongoing investigation in relation to a complaint about police misconduct. This case is a component of the OPONI Operation Greenwich investigation which, subject to consideration by the Public Prosecution Service, is nearing completion. It is anticipated a public statement by OPONI will be available in respect of the investigation by the end of 2016.

2 See: https://www.gov.uk/government/publications/the-stormont-house-agreement
In relation to the HET review, this case would automatically come under the remit of the Historical Investigations Unit (HIU) proposed under the Stormont House Agreement (see above).

**Jordan**

The first inquest was completed on 26 October 2012. Following various Judicial Reviews, a comprehensive Court of Appeal judgment, handed down on 17 November 2014, quashed the Coroner’s findings from 2012 and ordered a new inquest. The Lord Chief Justice assigned a High Court Judge to hear the new inquest, which commenced on 22 February 2016.

A Court of Appeal judgment on the issue of delay and damages was delivered on 22 September 2015 (following the resumption of a part heard hearing in June) and the final version will be published in due course.

**Kelly and Others**

An inquest took place following the incident on 8 May 1987, and in 2011 there was an HET investigation. The Committee on the Administration of Justice wrote on behalf of the families to the Attorney General for NI inviting him to decide whether there should be fresh inquests into the deaths. The Attorney General wrote to the Secretary of State on 29 January 2014 with regard to information relating to Loughgall. In September 2014 the Secretary of State issued a certificate under s.14(2) of the Coroner’s Act (Northern Ireland) 1959; the Secretary of State had determined that information existed which was relevant to the question of whether fresh inquests should be opened and which may, if it was disclosed, be against the interests of national security. The issue of the certificate meant that the decision in respect of a fresh inquest became a matter for the Advocate General. This division of responsibility between the Attorney General and Advocate General was set out in the Justice (NI) Act 2002\(^3\) and the Coroners (NI) Act 1959\(^4\). In March 2015 one of the families was granted leave to judicially review the Secretary of State’s decision to certify the case.

On 23 September 2015, the Advocate General for Northern Ireland announced his decision that new inquests into the Loughgall deaths are justified. The case was subject to review by Lord Justice Weir in January 2016, as part of the review into Legacy Inquests. The Court heard that the PSNI and MOD have commenced the collation of materials in preparation for the disclosure exercise. In relation to the HET review, this case will automatically come under the remit of the HIU proposed under the Stormont House Agreement (see above).

In relation to the OPONI investigation, OPONI has received a number of complaints in relation to issues associated with the incident at Loughgall. These have not been included by OPONI in its 2016/17 schedule of work. If the investigation is not

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complete by the time the HIU is established, the deaths would come within the remit of the new unit.

### Hemsworth

The inquest, sitting with a jury, took place on 16 May 2011. It made findings as to the cause of death and those likely to be responsible, as a result of which the coroner referred the matter to the Public Prosecution Service (PPS) to look into whether any prosecutions should be pursued. The inquest findings were not challenged by the family; however, the case was referred to OPONI in relation to police conduct. Investigation of this OPONI referral is now complete. It is anticipated that a report will be published in respect of the case by late summer 2016.

### McCaughey and Grew

The inquest, also sitting with a jury, was held between 12 March and 2 May 2012. It gave a narrative verdict, many aspects of which next of kin sought to challenge through judicial review. Following refusal to grant leave for hearing on a number of grounds by the Judicial Review court, the Court of Appeal granted leave for hearing. In April 2015, the Judicial Review Court delivered judgment *ex tempore* in which the Coroner’s decisions and inquest findings were upheld. The next of kin filed an appeal against the decision, which is listed for hearing in the Court of Appeal on 27 and 28 April 2016.

### Just satisfaction:

The just satisfaction awards have been paid in line with the judgments; evidence has previously been supplied.

### State of execution of judgment:

The Government will keep the Committee updated as to the outcome of any further talks and will provide another updated action plan by 1 August 2016 at the latest.