

# The Art 2 investigative duty and ‘historic’ allegations - when is the duty engaged?

written by Bridget Dolan QC | 21 December 2021

*In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3) [2021] UKSC 55*

In the same week that Dominic Raab unveiled his proposals for a new Bill of Rights, Parliament's intent when it enacted the existing human rights framework has also been the subject of scrutiny by the Supreme Court. *In the matter of an application by Margaret McQuillan for Judicial Review*, the Court has provided guidance on three key matters: the extent to which the investigative duty under articles 2/3 of the European Convention of Human Rights is engaged in pre-commencement deaths (the ‘Temporal Scope Issue’); when new evidence revives the investigative obligation (the ‘Brecknell Issue’); and how courts assess the independence of investigations (the ‘Independence Issue’).

## **Facts**

The appeal arises against the backdrop of the Troubles, specifically during 1971 and 1972. Two bereaved families sought judicial review of decisions by the Police Service of Northern Ireland (‘PSNI’) as to how the PSNI would investigate their loved ones’ deaths/ill treatment.

The first appeal related to the death of Ms Smyth in 1972, aged 24. On return from a night out she was fatally shot while a passenger in a car. In June 2014, following discovery of military logs suggesting that the fatal shot was fired by a member of the army, the PSNI proposed to conduct a further investigation into Ms Smyth's death. The investigation was to be conducted by the PSNI's Legacy Investigations Branch (‘LIB’). Before the LIB started its investigation, Ms Smyth's sister issued judicial review proceedings seeking a declaration that the LIB was insufficiently independent, in breach of article 2 (the ‘McQuillan Case’).

The other appeal (the ‘Hooded Men case’) relates to the case which became the seminal article 3 decision of *Ireland v United Kingdom* [1978] ECHR 1; (1979-1980) 2 EHRR 25. The original case concerned very serious ill-treatment suffered by people who were detained by the security forces for interrogation in 1971. Strasbourg determined that their ill-treatment constituted inhuman and degrading treatment, but not torture. In 2014, the Irish national broadcaster showed a documentary about the Hooded Men. The piece referred to documents from the UK National Archives, which it said had not been before Strasbourg. The documentary also referred to a memorandum by the Home Secretary to the Prime Minister, written in 1977, which referred to the use of “torture” and to its approval by UK ministers. Following the documentary, the PSNI considered whether there was sufficient evidence to warrant a further investigation into the allegation that the Government had authorised and used torture in the case of the Hooded Men. It concluded that there was not. One of the detainees and a daughter of another applied for judicial review of the PSNI's decision.

## **Temporal Scope Issue**

The ill-treatment arose almost 30 years before the enacting of the Human Rights Act, yet the claimants relied on the UK's investigative obligations under the ECHR. The first issue was therefore whether the claims fall within the temporal scope of the Human Rights Act (‘HRA’).

The existing Strasbourg case law has laid down pre-conditions of the investigative obligation, where

the death or ill-treatment occurred some years before the state accepted the right of individual petition to Strasbourg. There must be a “genuine connection” between the death or ill-treatment and the date when the right of individual petition is accepted. Alternatively, there must be an extraordinary situation in which the need to ensure effective protection constitutes a sufficient basis for connection (‘the Convention Values Test’) [53].

For there to be a “genuine connection” there must be:

1. A reasonably short time between death and the entry into force of the Convention, not in excess of 10 years; and
2. The major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that state ([135], as stated in *Janowiec v Russia* [2013] ECHR 1003; (2014) 58 EHRR 30.

In *Re Finucane* [2019] UKSC 7; [2019] 2 All ER 191, where the death had occurred 11 years and 8 months prior to the enactment of the HRA, Lord Kerr, giving the judgment for the Supreme Court, said that the ten-year limit was not an immutable requirement. Rather he considered that whether there was a genuine requirement involved a multi-factorial exercise in which the weight to be attached to each factor will vary according to the circumstances of the case [143]. It was, it may be thought, a characteristically ‘Kerrian’ approach that sought to eschew bright line rules in favour of a nuanced, fact-specific approach to avoid what he perceived to be injustice.

Whilst the Supreme Court in *McQuillan* doubted this interpretation, it did not depart from Lord Kerr’s decision. Instead, it held that 12 years is the absolute limit and narrowly confined the circumstances in which events more than ten years will qualify, at [144]:

*[A]n extension beyond the normal ten year limit of up to two years is permissible where there are **compelling reasons** to allow such an adjustment constituted by circumstances that (a) any original investigation into the triggering death can be seen to have been **seriously deficient** and (b) the bulk of such investigative effort which has taken place post-dates the relevant critical date [emphasis added].*

The Court held that the critical date is the date of entry into force of the HRA: 2 October 2000 [168]. That conclusion was supported by the clear choice made by Parliament as to non-retrospective effect, embodied in section 22(4) of the HRA. This section provides that the right to rely on a Convention right in legal proceedings should not apply retrospectively save where the proceedings are brought or instigated by the public authority [151]. It went on to hold that the Convention was not engaged on the basis of either test (genuine connection or the Convention Values Test).

### **The Brecknell Issue**

The revival of the investigative obligation was subject to the case falling first within the temporal scope of the Convention. Neither case did so – both related to events more than 12 years prior to the enactment of the HRA [177] to [180]. Therefore, what was said about the *Brecknell* Issue was *obiter*. Nevertheless, the Court has provided guidance which public authorities will find useful when considering whether the obligation to reinvestigate has arisen. It said at [128]:

*What is critical here is not the inconclusive nature of earlier investigations but whether there now exists such weighty and compelling new evidence as to require a fresh investigation.*

### **Independence Issue**

If Article 2 had applied, the proposed investigation into Ms Smyth's death would not have been effective because the PSNI failed to explain how they would secure its practical independence [201] to [212]. A key element is involvement of the deceased's family, which was lacking [208]. By contrast, it was not established that the enquiry by PSNI into the Hooded Men's ill-treatment was ineffective [214].

### **Application in future cases**

Police forces and coroners should bear in mind *McQuillan* when considering whether to re-investigate historic allegations of death or other ill-treatment. It provides clear guidance that if the triggering death/ill-treatment occurred before 2 October 1988, the Article 2/3 investigative duty is unlikely to arise, save in extraordinary situations meeting the Convention Values Test.

If the allegations do fall within the temporal scope of the Convention, where there has been prior investigation, the police or Coroner should look to see if any new evidence is "weighty and compelling", if not the Convention does not require further ECHR compatible investigation. It is not enough simply to point to outstanding questions.

Finally, when allegations are made engagement with the victim/ the deceased's family is key. Where the Convention applies the investigative duty will oblige police forces to involve the victim/family, but it is best practice to do this in all cases.

What effective engagement will require will depend on the circumstances of the case. Prior to investigation, as in *McQuillan*, it may require the victim/family being told how it is proposed the police investigation will be conducted to achieve practical independence [211]. Thereafter involvement can be achieved by informing them of at least a summary of the findings and recommendations [208].

Frances McClenaghan was Lord Kerr's judicial assistant in 2011/2012.

This article first appeared in the UK Police Law Blog [here](#)