

Duty to undertake effective investigation

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Finucane's Application for Judicial Review, Re [2019] UKSC 7

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This article is concerned with the procedural obligation to investigate effectively the use of force which results in death under [art.2](#) of the 1950 European Convention on Human Rights (ECHR) (as opposed to the substantive right to life under [art.2](#)).

Overview of Topic

1. [Article 2\(1\)](#) of the ECHR, given further effect in domestic law through scheduling to the [Human Rights Act 1998](#) (HRA), now reads effectively (given implied amending and rules on derogation): "Everyone's right to life shall be protected by law".
2. [Article 2\(2\)](#) continues to read as effectively a defence: Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
3. [Article 2\(1\)](#) has vertical effect, with positive as well as negative obligations imposed upon the state vis-a-vis a person.
4. A strand of case law from the European Court of Human Rights in Strasbourg, predominantly emanating from events which occurred during the Troubles in Northern Ireland, established a concomitant procedural obligation on public authorities to investigate effectively where the use of force results in death. Query whether it is all deaths or only state killings? Query whether Strasbourg has given any thought to terrorist killings?

Prelude to legal change

5. On 11 January 2000, Strasbourg decided: *Caraher v United Kingdom (24520/94) (2000) 29 E.H.R.R. CD119*. Here, the applicant's husband had been killed by two soldiers in Co. Armagh in 1990 (they were later acquitted of his murder). She relied upon the [art.2](#) substantive right. She lost on admissibility as no longer a victim, because she had settled a civil action in Northern Ireland for £50,000.

6. While this decision did not relate directly to the procedural obligation, *Caraher* was to be relied upon by the United Kingdom subsequently, and to inspire domestic courts to limit historical investigations on the basis of remedies obtained.

The Northern Ireland art.2 procedural obligation cases

7. These may be listed by date of judgment, indicating the circumstances of the deaths:
 - (1) *Jordan v United Kingdom (24746/94) (2003) 37 E.H.R.R. 2*, 4 May 2001, concerning Pearse Jordan, a IRA member, who was shot by a police officer after a car chase in Belfast in November 1992;
 - (2) *McKerr v United Kingdom (28883/95) (2002) 34 E.H.R.R. 20*, 4 May 2001, concerning Gervaise McKerr (driving a car with two others), all being killed as suspected terrorists by pursuing police officers in Lurgan in November 1982;
 - (3) *Kelly v United Kingdom (30054/96) [2001] Inquest L.R. 125*, the eight IRA members killed by the SAS defending Loughall police station in May 1987;
 - (4) *Shanaghan v United Kingdom (37715/97) [2001] Inquest L.R. 149*, probably a IRA member, who was killed by loyalists while driving his van near Castlederg in August 1991;
 - (5) *McShane v United Kingdom (43290/98) [2002] 35 E.H.R.R. 23*, 28 May 2002, killed by an army vehicle during a late-night riot in Londonderry on 13 July 1996;
 - (6) *Finucane v United Kingdom (29178/95) [2003] 37 E.H.R.R. 29*, 1 July 2003, the killing of catholic solicitor Patrick Finucane in Belfast in 1989 by loyalists;
 - (7) *Brecknell v United Kingdom (32457/04) [2007] 11 WLUK 675*, 27 November 2007, one of three customers killed in a loyalist attack upon a bar in Silverbridge, Co. Armagh in 1975;
 - (8) *McCaughy v United Kingdom (43098/09) (2014) 58 E.H.R.R. 13*, 16 July 2013 (a much later case), two IRA members killed at a suspected arms dump by soldiers near Loughall in 1990. This was essentially a delayed investigation case.
8. The key cases are (1) to (4), decided jointly on 4 May 2001. Strasbourg, avoiding substantive violations, fashioned a new procedural obligation. (The court did not rise to the occasion jurisprudentially on the issue of non-state actors having perpetrated the killings in cases (4), (6) and (7).) There are other cases emanating from Northern Ireland, including deaths in custody, but the above eight cases establish the procedural obligation. Strasbourg, which tried to discourage repeat cases, arguably acted counter-productively by awarding damages in each individual application (when, in the case of *McCann v United Kingdom (A/324) (1996) 21 E.H.R.R. 97*, which dealt with the shooting of unarmed IRA members planning a bombing in Gibraltar in 1988, it had reasoned that a substantive violation did not warrant an award given the intentions of the victims).
9. It could be argued that there is an initial legal problem with cases (1) to (4) above. Strasbourg made clear it was not making any findings of facts, about the original killings or the subsequent investigations, whether satisfactory or not. How then could it fashion a procedural obligation based upon an apparent finding of inadequacy?

Non-UK cases developing the procedural obligation

10. It is necessary to mention two non-United Kingdom cases at Strasbourg regarding procedural [art.2](#), developing the obligation.
11. *Silih v Slovenia (71463/01) (2009) 49 E.H.R.R. 37* is a medical negligence case, which makes the procedural obligation seemingly dependent upon a violation of the substantive right (para.194).
12. *Janowiec v Russia (55508/07) (2014) 58 E.H.R.R. 30* (concerning the Katyn forest killings in Poland during the second world war, by the Soviet Union and not Germany); in this case, the court came up with a three-stage test permitting retrospectivity of up to ten years - drawing upon Silih's case (plus *Varnava v Turkey (16064/90) (2010) 50 E.H.R.R. 21*) - namely:
 - procedural obligations after entry into force;
 - a genuine connection between the killings and the triggering event (the period between the death and the entry into force had to have been reasonably short (no more than 10 years), and a major part of the investigation had or ought to have been carried out after the date of entry into force; and
 - in "extraordinary situations" which did not satisfy the "genuine connection" standard, a consideration of convention values will be necessary.

Article 2 in UK law

13. The Strasbourg case law was considered by the House of Lords/Supreme Court in the following leading cases:
 - (1) *R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 A.C. 653*, a prisoner in custody killed by another, Lord Bingham deciding on 16 October 2003 to follow Jordan's case in Strasbourg;
 - (2) *R. (on the application of Green) v Police Complaints Authority [2004] UKHL 6; [2004] 1 W.L.R. 725*, a cyclist hit by a police car, Lord Bingham deciding on 26 February 2004 to dismiss an appeal concerning disclosure of police investigation material;
 - (3) *R. (on the application of Middleton) v HM Coroner for Western Somerset [2004] UKHL 10; [2004] 2 A.C. 182*, a prisoner committing suicide, Lord Bingham deciding again on 11 March 2004 to follow Jordan's case in Strasbourg;
 - (4) *McKerr's Application for Judicial Review, Re [2004] UKHL 12; [2004] 1 W.L.R. 807*, the McKerr above in Strasbourg (who had been awarded £10,000 damages there), with Lord Nicholls deciding also on 11 March 2004 that the [Human Rights Act 1998](#) did not apply to deaths before 2 October 2000, when it entered into force; (*R (Amin)* and *R (Middleton)* were held in McKerr's case to have been decided per incuriam the question of retrospectivity (para 23);
 - (5) *Jordan v Lord Chancellor [2007] UKHL 14; [2007] 2 A.C. 226* (being the Jordan and McCaughey in Strasbourg above), where Lord Bingham applied McKerr's case, the second appeal being allowed regarding police disclosure to a coroner;
 - (6) *R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner [2010] UKSC 29; [2011] 1 A.C. 1*, a British soldier dying of hyperthermia off an army base in Iraq, where Lord Phillips (with a court of nine) held on 30 June 2010 (on the assumption that human rights law applied in Iraq in this case, which it did not), that, on these assumed facts, the possibility of a substantive violation of [art.2](#) triggered the procedural obligation;
 - (7) *McCaughey's Application for Judicial Review, Re [2011] UKSC 20; [2012] 1 A.C. 725* (being the McCaughey in Strasbourg above again), where the Supreme Court held that, once the UK decided to hold an inquest, then the [art.2](#) procedural obligation might apply. The domestic court arguably responded too

precipitately to Silih's case in Strasbourg (which was remember a medical negligence case), before the international court further considered retrospectivity in Varnava's case and Janowiec's case;

- (8) *R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] A.C. 1355*, regarding a refusal to hold a statutory inquiry into the killing of 24 persons by the British army in Malaya in 1948, where Lord Neuberger held on 25 November 2015 that, as regards the [art.2](#) procedural obligation, Strasbourg jurisprudence now permitted retrospectivity (if there was a continuing breach) of up to ten years, between the date of death and 1966, when the UK first permitted individual petition. Lord Neuberger, considering McKerr's case after McCaughey's case, decided to leave open whether the UK had to follow Strasbourg (para 98). Lord Kerr, however, explained his thinking: Silih's case detached the procedural duty from [art.2](#) for the first time (paras 247-9). But he left open whether McKerr's case should be overruled;
- (9) In the matter of *Finucane's Application for Judicial Review, Re [2019] UKSC 7; [2019] 2 WLUK 382*, concerning the death of Geraldine Finucane's husband Patrick in 1989. The family remained critical of the 2012 report by the late Sir Desmond de Silva QC. They wanted a public inquiry. Lord Kerr (on behalf of the court) went further than Strasbourg, which had settled the case with the United Kingdom. He picked holes in the de Silva report. But he concluded with this arguably anti-climactic statement: "I would therefore make a declaration that there has not been an [article 2](#) compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of [article 2](#), what form of investigation, if indeed any is now feasible, is required in order to meet that requirement. The appeal should otherwise be dismissed." (paras 153-4).

14. It remains the position that McKerr's case in the House of Lords in 2004, is good law as regards the [art.2](#) procedural obligation under the [Human Rights Act 1998](#) (i.e., that it does not apply to deaths which occurred before the legislation came into force). It has not been overruled, especially not in McCaughey's case. And Finucane's case has not changed that position, despite the de Silva report being found to be non [art.2](#) compliant.
15. *Smith's* case and *Keyu's* case are (originally) English and United Kingdom law respectively, and both attempt to deal with updating Strasbourg jurisprudence. The former arguably limits the right (relating procedure to substance), while the latter clearly extends retrospectivity. It remains to be seen whether the Katyn forest massacre, involving war crimes, will have an impact on the law on republican violence in Northern Ireland, which remains a matter of criminal liability.

Conclusion

16. Two points need to be made on the basis of the above discussion:
 - First, there is the anterior problem of [s.2](#) of the [Human Rights Act 1998](#) and whether Strasbourg case law - which has been treated indiscriminately as a further source of domestic law - is, or should be, binding in the United Kingdom; and
 - Secondly, the senior courts, under the [Human Rights Act 1998](#), have upheld the McKerr argument that there is no investigation obligation for deaths which occurred before 2 October 2000 (after the end of the troubles). The common law is unlikely to be thrown off course by Janowiec's case.

Legislation

Key Acts

[Human Rights Act 1998](#)

Key Subordinate Legislation

None.

Key Quasi-Legislation

None.

Key European Union Legislation

[European Convention on Human Right](#)

Key Cases

Caraher v United Kingdom (24520/94) (2000) 29 E.H.R.R. CD119

Jordan v United Kingdom (24746/94) (2003) 37 E.H.R.R. 2

McKerr v United Kingdom (28883/95) (2002) 34 E.H.R.R. 20

Kelly v United Kingdom (30054/96) [2001] Inquest L.R. 125

Shanaghan v United Kingdom (37715/97) [2001] Inquest L.R. 149

McShane v United Kingdom (43290/98) (2002) 35 E.H.R.R. 23

Finucane v United Kingdom (29178/95) (2003) 37 E.H.R.R. 29

McCaughey v United Kingdom (43098/09) (2014) 58 E.H.R.R. 13

McCann v United Kingdom (A/324) (1996) 21 E.H.R.R. 97

Silih v Slovenia (71463/01) (2009) 49 E.H.R.R. 37

Janowiec v Russia (55508/07) (2014) 58 E.H.R.R. 30

Varnava v Turkey (16064/90) (2010) 50 E.H.R.R. 21

R. (on the application of Amin (Imtiaz)) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 A.C. 653

R. (on the application of Green) v Police Complaints Authority [2004] UKHL 6; [2004] 1 W.L.R. 725

R. (on the application of Middleton) v HM Coroner for Western Somerset [2004] UKHL 10; [2004] 2 A.C. 182

McKerr's Application for Judicial Review, Re [2004] UKHL 12; [2004] 1 W.L.R. 807

Jordan v Lord Chancellor [2007] UKHL 14; [2007] 2 A.C. 226

R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner [2010] UKSC 29; [2011] 1 A.C. 1

McCaughey's Application for Judicial Review, Re [2011] UKSC 20; [2012] 1 A.C. 725

R. (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] A.C. 1355

Finucane's Application for Judicial Review, Re [2019] UKSC 7; [2019] 2 WLUK 382

Reading

Key Texts

None.

Further Reading

None.