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Judgment: approved by the Court for handing down
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY JONATHAN McKERR FOR JUDICIAL REVIEW

Before: Carswell LCJ, McCollum LJ and Coghlin J

CARSWELL LCJ

[1] The appellant is the father of Gervaise McKerr, who on 11 November 1982 was, together with two other men, shot dead by police officers. The circumstances of the shooting have been the subject of considerable investigation since that time, but remain a matter of unresolved controversy. It is not the function of this court in these proceedings to attempt any resolution of that controversy, and we shall express no opinion on the facts surrounding the death of the three men.

[2] An inquest into the death of the deceased men was opened by the Coroner for Armagh on 4 June 1984, after the criminal trial of three police officers for murder ended in their acquittal. The sequence of events between 1984 and 1994, culminating in the abandonment by the coroner of the inquest on 8 September 1994, is set out in detail in paragraphs 11 to 63 of the judgment of the European Court of Human Rights given on 4 May 2001 in the case of *McKerr v UK* (Application no 28883/95). The proceedings in that case were conducted simultaneously with those in the cases of *Jordan v UK* and *Kelly and others v UK*, both of which also involved deaths at the hands of members of the Security Forces, and *Shanaghan v UK,* in which it was alleged that there was police complicity in the murder of the deceased by paramilitaries.

[3] In its judgment the ECtHR held that the national authorities had failed in the obligation imposed by Article 2 of the European Convention on Human Rights to carry out a prompt and effective investigation into the circumstances of the death. It awarded to the appellant the sum of £10,000

compensation by way of just satisfaction, stating at paragraph 181 of its judgment:

> " … the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention."

The decision of the ECtHR became final on 4 August 2001.

[4] It is the responsibility of the Committee of Ministers under Article 46(2) of the Convention to supervise the execution of the judgment of the Court. The appellant's counsel claimed that the Government had decided to take no measures to pursue an investigation into the deaths, but the respondent's counsel stated that it has put forward a package of proposals to the Committee of Ministers covering all four cases with which the Court dealt in its judgments. At all events it appears that no other steps have been taken to carry out further investigation in the deaths and we approach the case on the basis that the investigation has not proceeded, bearing in mind that the respondent's case is that it is not required to carry out any further steps.

[5] On 30 January 2002 the appellant commenced proceedings for judicial review, claiming declarations that the UK Government had unlawfully and in breach of the convention failed to provide him with an investigation compliant with Article 2 of the Convention, an order of mandamus compelling it to provide such an investigation, and damages. By his decision given on 27 July 2002 Campbell LJ dismissed the application and the appellant has appealed to this court.

[6] It was common case that, as the judge set out in paragraphs 4 to 7 of his judgment, it is incumbent upon the appellant to establish that the act of which he complains (which includes a failure to act) occurred after 2 October 2000, the date on which the Human Rights Act 1998 came into force. The appellant's case was that the failure on the part of the Government to pursue the investigation continued after the ECtHR gave its decision and was still a continuing failure. The respondent argued, on the other hand, that the failure to act was complete on 8 September 1994, when the inquest was abandoned.

[7] The judge held that the obligation to hold an effective investigation was a continuing one and that it could not be said that the failure to act was complete when the inquest was abandoned. He went on to hold, however,

that the ordering of payment in just satisfaction was intended to bring the continuing obligation to an end. He stated at paragraphs 18 to 20 of his judgment:

> "18. As the authors of *Clayton & Tomlinson* state (para 21.36):
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> > 'The purpose of Article 41 is to ensure a *resitutio in intergrum:* so that the claimant is so far as possible put back into the situation in which he would have been but for the breach of his Convention rights.'
>
> 19. Article 42 of the Convention does not require applicants to exhaust domestic remedies a second time in order to obtain just satisfaction.
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> When judgment was given the Act was in force and it is difficult to understand how the Court could have exercised its discretion to award *just satisfaction* had it envisaged that there was more than a hypothetical possibility of *resitutio in integrum* through the holding of an effective investigation such as is being sought in this application.
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> 20. It is a fundamental doctrine of all courts that there must be an end to litigation. The applicant asked for and received a declaration and an order for *just satisfaction* from the European Court of Human Rights. The continuing obligation, referred to earlier in this judgment, under article 2 of the Convention, at this stage came to an end.
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> Accordingly the relief asked for by the applicant is refused."

[8] A respondent's notice dated 30 August 2002 was served, whereby it was contended that the judge's decision should be affirmed on the further ground that the failure to act was complete before the coming into force of the Human Rights Act 1998 and that the appellant had not established a continuing obligation to carry out an Article 2 compliant investigation. In our opinion the judge was plainly correct in his conclusion that the obligation to provide an investigation compliant with Article 2 did not end when the inquest was abandoned in 1994, but continued thereafter. It must follow from this conclusion that it is still continuing since the decision of the ECtHR, as no

investigation has yet been carried out, unless the ordering of a payment by way of just satisfaction has the effect contended for by the respondent. Mr Morgan QC for the respondent did not seek to uphold the line of argument adopted by the judge that payment of compensation had the effect *ipso facto* of terminating liability and bringing the continuing obligation to an end, but he contended that since the payment the appellant no longer was a "victim" and accordingly could not complain of breach of a continuing obligation to him. We therefore must examine the grounds on which this contention is based.

[9] The case upon which Mr Morgan relied most strongly was the decision of the European Commission of Human Rights in *McDaid and others v UK* (Application no 25681/94), given in 1996. The applicants in that matter were relatives of the thirteen men shot by soldiers in Londonderry on 30 January 1972 in the incident commonly termed "Bloody Sunday". They brought an application in August 1994 in which they claimed that the rights of the deceased under Article 2 of the Convention were violated. They submitted that the deceased had been intentionally and wrongfully deprived of their right to life and that the State failed in its positive duty to protect that right. They also claimed that there had been a failure to investigate the incident, which was a continuing breach of that duty. Under the then Article 26 (now reflected *mutatis mutandis* in Article 35) the Commission could only deal with the matter within a period of six months from the date on which the final decision on domestic remedies was taken. The Commission held that the time ran from the date of the inquest in August 1973, by which time it must have been clear to the applicants that they would not obtain any wider investigation. It could not be extended by invoking the doctrine of a "continuing situation", since in accordance with previous decisions of the Commission that referred to a state of affairs which operated by continuous activities by or on the part of the State to render the applicants victims. It stated:

> "Since the applicants' complaints have as their source specific events which occurred on identifiable dates, they cannot be construed as a 'continuing situation' for the purposes of the six month rule. While the Commission does not doubt that the events of 'Bloody Sunday' continue to have serious repercussions on the applicants' lives, this however can be said of any individual who has undergone a traumatic incident in the past. The fact that an event has significant consequences over time does not itself constitute a 'continuing situation.'"

[10] We do not consider that this decision of the Commission governs the issue now before us, whether the appellant ceased to be a victim and the Government's obligation to fulfil the requirements of Article 2 ceased when

the award by way of just satisfaction was made in his favour by the ECtHR. It does not appear to have suggested in the proceedings in *McKerr v UK* that the proceedings were out of time, and the fact that the Court gave the relief confirms that it did not take that view. It therefore could not have considered that the *McDaid* decision operated to bar the appellant's remedy, and there is accordingly no good reason why it should now operate to terminate the State's obligation under Article 2.

[11] Mr Morgan also relied in support of his thesis on two recent decisions of the ECtHR, both given in 2002 subsequent to the decision in *McKerr v UK.* In *Finucane v UK* (Application no 29178/95) the applicant complained that the lack of an effective investigation into her husband's murder was a breach of Article 2. The Court held the application admissible, because she had lodged her complaint within six months of the decision not to prosecute anyone for the murder. The issues were the same as in *McDaid v UK,* but in view of the Court's conclusion there was no need for it to consider the "continuing situation" doctrine and it made no reference to it. We do not think that the decision affects the issue before us. *Anguelova v Bulgaria* (Application no 38361/97) concerned a claim arising out of the death in custody of the applicant's 17-year-old son. The Court awarded her a sum of damages, although the Bulgarian Government objected that this should not be entertained since there was a possibility of reopening criminal proceedings. The Court regarded that as no more than a hypothetical possibility and therefore decided to proceed to make an award of damages. Again we do not consider that this decision is of material assistance in deciding the present issue whether the obligation to hold an effective investigation has been terminated or is still continuing.

[12] Nor can any of the other cases cited by the respondent's counsel assist him on the present issue. *K v Ireland* (Application no 10416/83) and *Montion v France* (Application no 11192/84) concerned the limitation period and the six-month rule to which we have referred. In the latter case the Commission held that there was no "continuing situation", where more than six months had elapsed since the act complained of and adequate domestic remedies were available. In *K v Ireland* it held that there were no special circumstances, even though the respondent government was reluctant to oppose the application to extend time. The Commission observed that the six-month rule –

> "serves the interests not only of the respondent Government but also of legal certainty as a value in itself. It marks out the temporal limits of supervision carried out by the organs of the Convention and signals to both individuals and state authorities the period beyond which such supervision is no longer possible."

In *Van Laak v The Netherlands* (Application no 17669/91) the Commission held that where an adequate domestic remedy had been given the complainant could no longer be regarded as a victim of the violation consisting of undue delay in hearing his case. In our opinion none of these cases bears on the issue whether there is a continuing breach of a Convention obligation, in respect of which a complaint was made within the proper time and for which no domestic remedy has been afforded to the complainant.

[13] We accordingly consider that the appellant's claim is well founded, that there is a continuing breach of Article 2(1) which requires to be addressed by the respondent Government. Since, however, the Committee of Ministers has not yet ruled on the proposals made to them by the Government in respect of the four cases heard by the ECtHR, we would not regard it as appropriate to do more than make a declaration. In these circumstances we propose to allow the appeal and make a declaration that the respondent Government has failed to carry out an investigation which complies with the requirements of Article 2 of the Convention, but not to grant any other relief.