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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY FRANCIS McGUIGAN FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY MARY McKENNA FOR JUDICIAL REVIEW

IN THE MATTER OF A DECISION BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND BASED ON A REVIEW BY THE HISTORIC ENQUIRIES TEAM OF EVIDENCE RELATING TO THE TORTURE OF MR McGUIGAN AND OTHERS

AND

IN THE MATTER OF DECISIONS AND ONGOING FAILURES OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND, THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND AND THE NORTHERN IRELAND OFFICE

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MAGUIRE J

Introduction

[1] The background to these applications is the period of internment in 1971-1972 of hundreds of people in Northern Ireland suspected of being involved in terrorist activity. In that context 12 men were taken to an interrogation centre, now known to have been located at a British Army base at Ballykelly. There they underwent "interrogation in depth" over the period from 11 to 17 August 1971. Two further men underwent deep interrogation in October 1971. The deep interrogation process involved, as an aid to interrogation, what has been referred to as "the five techniques" which may briefly be described as prolonged hooding, subjection to continuous loud noise, sleep deprivation, deprivation of food and water, and the maintenance of stress positions over long periods of time. Owing to the first of these techniques, these 14 men came to be known as "the hooded men".

[2] Reports of what had happened during in-depth interrogation and internment more generally quickly emerged and led to the establishment by the UK Government of two committees of inquiry, leading to the Compton and Parker reports and to a statement in the House of Commons by the Prime Minister, Edward Heath, that the five techniques would not again be employed. Reports also led to the Irish Government making an inter-State application to the European Commission for Human Rights in December 1971, which concluded that the five techniques, used together, contravened Article 3 of the European Convention on Human Rights (the "Convention") in that they constituted the use of torture and inhuman and degrading treatment. Being concerned to have the finding made an order by the European Court of Human Rights ("ECtHR"), for the purpose mainly of preventing the five techniques being again used in Northern Ireland, the Irish Government pursued the case before the ECtHR. Like the Commission, the Court also found that the use of the five techniques had constituted inhuman and degrading treatment contrary to Article 3; but did not uphold the Commission's finding that there had been torture (Ireland v UK (1979-80) 2 EHRR 25).

[3] The issue of the treatment of the hooded men lay dormant for many years. However, in 2003, in accordance with the 30 year rule, United Kingdom Government papers from the relevant period began to be released in stages, mainly to be housed at the National Archives at Kew, London. Thereafter research of the archives was conducted by the Pat Finucane Centre and National University of Ireland ("NUI") Galway. Research was also carried out by RTÉ which, on 4 June 2014, broadcast a documentary called *The Torture Files*. In this documentary it was suggested that newly available materials indicated (a) that deep interrogation had been authorised at a higher level (*i.e.* Ministerial level), and with a greater degree of knowledge of what it entailed, than had previously been publicly stated; and (b) that information available to the Government on the effect of deep interrogation did not accord with its public position that it had not had a deep or lasting effect on those on whom it was used. The documentary suggested that the UK Government had withheld this

information during the proceedings before the Commission and Court of Human Rights at Strasbourg.

[4] In the aftermath of the documentary, the issue of ministerial authorisation of torture was raised before the Northern Ireland Policing Board in 2014. This led in July 2014 to the Police Service of Northern Ireland ("PSNI") undertaking a review of some of the materials in the National Archives. The PSNI later, in October 2014, accepted the Investigating Officer's recommendation that there was no useful purpose in taking the investigation further. A further consequence of the exposure of the new materials was that on 4 December 2014 the Irish Government applied to reopen the inter-State case of Ireland v UK before the Court of Human Rights. It is understood that this reference affords the Court the opportunity to revisit its original ruling in its entirety, including the question of whether the actions of the United Kingdom constituted torture within the meaning of Article 3 of the Convention. At the present time, the matter is pending before that Court.

[5] The applicants in these proceedings seek judicial review of decisions by the PSNI, the Northern Ireland Office ("NIO"), and the Department of Justice in Northern Ireland in respect of how they have dealt with issues affecting the hooded men. The first applicant, Francis McGuigan, was one of the 12 men who first underwent deep interrogation. The second applicant is Mary McKenna. She is a daughter of Sean McKenna, who was also one of the 12. He is now deceased. In particular, both seek judicial review of the decision made by PSNI that there is no evidence to warrant an investigation, compliant with Article 2 and 3 of the Convention, into the allegation that the UK Government authorised the use of torture in Northern Ireland. They also challenge decisions of all three respondents as constituting a continuing failure to order and ensure a full, independent and effective investigation into torture at the hands of the United Kingdom Government and/or its agents in compliance with Articles 2 and 3 of the Convention, common law, and customary international law. They also challenge the decision by all three respondents that these applications and, by implication, any investigation, are premature pending the determination of the review initiated by the Irish Government before the ECtHR. Leave to apply for judicial review was granted by Mr Justice Treacy on 4 June 2015.

[6] Counsel instructed on behalf of Mr McGuigan are Mr Hugh Southey QC, Blinne Ní Ghrálaigh BL and Adam Straw BL. Counsel instructed on behalf of Ms McKenna are Karen Quinlivan QC and Gordon Anthony BL. Counsel for the Secretary of State for Northern Ireland/NIO and PSNI are Dr Tony McGleenan QC and Paul McLaughlin BL. Dr McGleenan is also instructed on behalf of the Department of Justice, with Philip McAteer BL. The submissions made on behalf of the Secretary of State/NIO and PSNI and their skeleton argument have been adopted by the Department.

[7] In what follows, the Court will at Part A provide a detailed review of the factual background to these challenges. At Part B it will consider the range of

information which has become available about these events recently. At Part C the court will offer a short summary of its key factual assessments. Part D will, in brief compass, identify the main legal issues before the court. Part E will consider the legal landscape in broad terms. Part F which will seek to apply the law to the facts of this case. Part G records the court's conclusions.

PART A

The arrest and detention of the 12 men (August 1971) and of two further men (October 1971)

[8] Against the backdrop of increasing fatalities, injuries and civil unrest in Northern Ireland during the late 1960s and early 1970s, the authorities exercised a series of extrajudicial powers of arrest, detention and internment during the period from August 1971 until December 1975.

[9] The decision to introduce a policy of detention and internment was taken on 5 August 1971 by the Northern Ireland Government, following a meeting in London between the Northern Ireland and UK Governments. The authorities came to the conclusion that it was necessary to introduce a policy of detention and internment of persons suspected of serious terrorist activities but against whom sufficient evidence could not be laid in court. The target of the policy was the IRA and, in the weeks preceding the introduction of internment, the police, in consultation with the British Army, prepared lists of persons to be arrested. In addition to people suspected of IRA membership, the lists included persons suspected of being associated with the IRA or of possessing information about others so associated. It is generally accepted that, because of the scale and speed of internment operations, some persons were arrested and detained on the basis of inadequate or inaccurate information.

[10] The first internment operation, known as "Operation Demetrius" began at 4am on 9 August 1971 and led to the arrest of some 350 people. They were taken to various holding centres and interrogated by police officers of the Royal Ulster Constabulary ("RUC"). 104 people were released within 48 hours and the remainder were detained in prisons. Out of the remainder, 12 men were moved to a British Army facility for "interrogation in depth" which took place between 11 and 17 August 1971. Arrests continued to be made and, in October 1971, two further men were selected to undergo in-depth interrogation which took place between 11 and 18 October 1971.

[11] By the end of March 1972, over 900 people were held under detention or internment orders. In the same month direct rule of Northern Ireland from Westminster was introduced.

The use of in-depth interrogation

[12] In around March 1971, the British military was requested to provide advice and training to the Northern Ireland authorities about the establishment of an

interrogation centre. The training provided by the military included the use of the five techniques. They were taught orally by the British military's English Intelligence Centre to members of the RUC at a seminar held in April 1971. It subsequently emerged that the five techniques had been used in the past throughout former British colonies.

[13] Military Standing Orders were drawn up to govern the operation of the interrogation centre and the conduct of the interrogations. The General Officer Commanding gave specific orders to ensure that the interrogations were conducted in accordance with Joint Intelligence Directive JIC (65)15 on military interrogation which had been formulated in 1965 and amended in 1967. Those amendments had been made following a report in 1966 by Roderic Bowen QC, who had been asked to investigate allegations of abuse of detainees by the British military in Aden. Joint Intelligence Directive JIC(65)15 required adherence to the Geneva Convention and expressly prohibited the use of violence including "mutilation, cruel treatment and torture....outrages upon personal dignity....humiliating and degrading treatment". It also required daily inspection by a medical officer and medical examination on arrival and departure from interrogation.

Ministerial briefing

[14] Officially, the decision to conduct deep interrogation and use the five techniques in Northern Ireland was said to have been made by the Northern Ireland Government in concurrence with the UK Government. As outlined below, statements in Parliament towards the end of 1971 indicated that Ministers knew the interrogation would be conducted within the guidelines in Joint Intelligence Directive JIC(65)(15) and that the methods would be the same as had been used in numerous occasions in the past. It is worth noting that the Joint Intelligence Directive does not itself contain any reference to the five techniques. The position, as reflected in the judgment of the Court of Human Rights, was:

> "97. From the start, it has been conceded by the respondent Government that the use of the five techniques was authorised at "high level". Although never committed to writing or authorised in any official document, the techniques had been orally taught to the RUC by the English Intelligence Centre at a seminar in April 1971."

The Five Techniques

[15] The form of the in-depth interrogation that took place involved the combined application of the five techniques, which were described as follows in the judgment of the European Court of Human Rights:

> "96. … These methods, sometimes termed "disorientation" or "sensory deprivation" techniques, were not used in any cases other than the 14 so indicated above. The techniques consisted of the following:
>
> (a) *wall-standing:* forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';
>
> (b) *hooding:* putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;
>
> (c) *subjection to noise:* pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;
>
> (d) *deprivation of sleep:* pending their interrogations, depriving the detainees of sleep;
>
> (e) *deprivation of food and drink:* subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.
>
> 167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."

The circumstances of the applicants

Mr McGuigan

[16] Mr McGuigan's evidence about his detention has been provided to the court in affidavit form. It has not been the subject of cross examination. He averred that he was woken at 4.30am on 9 August 1971 by a soldier hitting him with the butt of his rifle. He said he was allowed to put on underpants and trousers, was taken downstairs at gunpoint, and forced to run barefoot through the street to the back of a lorry where he was forced to lie down with other men. He said that soldiers piled in, sitting and standing on top of the men and poking them with rifles points and

hitting them with batons as they travelled to Girdwood Barracks. He said that only military took part in this operation.

[17] On arrival he was searched and photographed and sent to a gymnasium where, by the end of the day, there were 300 men. Mr McGuigan's evidence is that he spent 48 hours at Girdwood and was subjected to repeated questioning and ongoing beatings. He said he was given nothing to eat and was permitted to sleep for just a few hours. He was told that the street in which his home was located had been bombed and that 70 people had been killed. He said that at around 3am on 11 August Special Branch RUC and military police started to take the men out in groups leaving him and another man. The officer commanding the military police came forward and said they had something "special" in mind for him. He was brought to another building where plainclothes men were placing a hood over each man's head. He said there were military police and paratroopers in the corridor but that the plainclothes men seemed to be in charge. He said that a hood was then put over him, that it was double material, a square-shaped bag, about 16 to 18 inches square. It was darkish grey, sufficient to block out the light, and came down to the shoulders and onto the chest. He fainted and was punched in the stomach which revived him.

[18] Mr McGuigan's evidence was that he was taken away in a helicopter handcuffed to another hooded man. He was taken into a building where there was a severe noise, giving him the impression that it was a saw in a joiner's shop. He said he was taken to another room where a doctor told him he would give him a medical examination. The handcuffs and clothing were removed but the hood remained. He was issued with boiler suit overalls and taken to a room with the deafening noise, similar to that of compressed air. He said he was put through various forms of what he would call torture, which included him being lifted up on shoulders and thrown to the ground and being starved for long periods while against the wall. He said "they ran him over a table", back and forth and put him against a wall until he fell. During this time he continued to be beaten and his hood was tightened so much he had difficulty breathing. He says he was dragged and placed against a wall in a stretch position (fingertips to the wall and feet well apart). He said he was kept like this for hours and any time he tried to move he was kicked and beaten. He said that when, at one point he heard screaming and removed his hood to see if one of the other men was alright, he was blinded by bright lights, grabbed and thrown to the floor, kicked in the genitals, and had his hair pulled. He said the hood was put back on and he was kept against the wall for three days without food, drink or rest. He said that at one point he collapsed and then found himself with his hands handcuffed behind his back in the back of a lorry. He said he began to hallucinate and believe he was dying and prayed that he would die. He said that during this time he was brought to another room for interrogation about a dozen times. He said that the first occasion he got water was three days after he arrived. At the end of the period he was examined by the same doctor and he saw that his weight had fallen from 12 to 9 stone.

[19] Mr McGuigan said he was then taken to Crumlin Road prison and the hood was removed. He said he was unable to read the detention order he was shown as his eyes would not focus. The hood and handcuffs were replaced and he was kicked and beaten along the way to the courtyard. He was taken to another location and handcuffed to a pipe in a very cold room. Mr McGuigan says he was later returned to Ballykelly where he continued to be interrogated during which the assassination of his family was threatened. He said he was unable to spell his last name or count to 10 when asked to do so. He said he had hallucinations and thought he was going mad. When he was removed from the interrogation room he was placed in a "thinking room" where he was told he could not remove his hood or fall asleep. Each time he attempted to do these things someone came in and beat him. He said each time he did not provide the interrogator with the information he wanted he was sent to the room with noise, which the soldiers referred to as "the music room".

[20] In 1971 Mr McGuigan met with a priest, Fr Raymond Murray, who interviewed him and took his signed statement, which consisted of a more detailed version of the above account. His statement was later published in July 1974 in *The Hooded Men, British torture in Ireland, October 1971* by Frs Denis Faul and Raymond Murray. Mr McGuigan avers that he has been diagnosed as suffering from post-traumatic stress disorder and continues to suffer from depression and anxiety.

Ms McKenna

[21] The second applicant is Mary McKenna. Her evidence before the court is in affidavit form. She has not been cross examined. She is the daughter of Sean McKenna, one of the 12 men interrogated at Ballykelly. Mr McKenna was interned until May 1972, at which time he was released on medical grounds into a psychiatric hospital. He died on 5 June 1975. Ms McKenna considers that her father was particularly vulnerable because he had a heart condition and averred that she has always believed that there was "a direct link between his experience of torture and his death".

[22] Ms McKenna stated that she was 14 when her father was detained. She describes that when she saw him 10 days later, he was a broken man, was crying, and was very shaky. He told her that he had been hooded and handcuffed to a soldier who had an Alsatian dog; that he would be required to run barefoot up and down as the dog bit him, and that he had been required to drink from the same dish as the dog. He said the Army would smack him into a concrete post. She reports that he said he had seen his mother, who had passed away. Ms McKenna surmised that her father must have blacked out at this time. Ms McKenna said that her father had not prior to this suffered from any psychiatric condition; that he had been a very different man before he was interned. She believes that the impact of the five techniques caused his psychiatric break-down.

[23] In relation to the treatment of this applicant's father and the consequences of that treatment, two main pieces of evidence have emerged which are of particular relevance to the present application. The first is that the applicant's father was assessed by Dr Denis Leigh in 1975. He was a medical expert witness on behalf of the British Army in the proceedings before the Commission and Court of Human Rights. When he examined Mr McKenna in 1975 he noted that the psychiatric problems that Mr McKenna was experiencing at that time were probably the result of the deep interrogation methods. The second piece of evidence concerned knowledge of a heart condition that afflicted Mr McKenna at the time he was subjected to the deep interrogation techniques and which caused his premature death in 1975. Dr Leigh referred to the fact of Mr McKenna's angina when stating that it would be hard to show "that it was wise to proceed with the interrogation". The doctor was also of the view that it would be difficult to show "that the interrogation did not have the effect of worsening his angina". Ms McKenna also points to internal UK Government documentation relating to the settlement by the Government of a claim for damages taken by her father. In a letter dated 21 April 1975 to the Crown Solicitor, it was indicated that, based on medical evidence, Mr McKenna's symptoms were "significantly more severe and incapacitating" than those of one of the other men and that those symptoms would "not remit during the short life he has left".

The immediate aftermath of internment

[24] The introduction of internment provoked rioting, an increase in shootings and bombings, a rapid deterioration of the security situation, and the alienation from the authorities of many within the Catholic/Nationalist population. Within a few days of Operation Demetrius there were allegations by and on behalf of those detained of physical brutality and ill-treatment by the security forces. These were published in reports, first in Irish newspapers, and then newspapers in England and Northern Ireland.

The Compton Inquiry

[25] On 31 August 1971 the UK Home Secretary, Reginald Maudling, appointed a Committee of Inquiry under the chairmanship of Sir Edmund Compton, to investigate the allegations of ill-treatment. Also on the Committee were His Honour Edgar Fay QC and Dr Ronald Gibson.

[26] The Committee's terms of reference were to:

> "Investigate allegations by those arrested on 9 August under the Civil Authorities (Special Powers) Act (NI) 1922 of physical brutality while in the custody of the security forces prior to either their subsequent release, the preferring of a criminal charge or their being lodged in a place specified in a Detention Order."

[27] The Committee wrote to every man who had been detained. Among the 40 who came forward were 11 of the men interrogated at Ballykelly. These 11 did not meet the Committee but provided them with written statements. They included Mr McGuigan and Mr McKenna. Evidence was also taken from the security forces. Witnesses were not required to give sworn evidence or evidence in public.

[28] The Committee's report, adopted on 3 November 1971, was made public, as was a supplemental report of 14 November in relation to three further cases occurring in September and October, one of which involved the five techniques.

[29] The Commission set out a definition of brutality as follows:

> "105. … we consider that brutality is an inhuman or savage form of cruelty and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain …"

[30] The Committee's findings at paragraphs 91-96 of the report were that in-depth interrogation by means of the techniques constituted physical ill-treatment but not brutality.

[31] The report contained a foreword by the Home Secretary, Reginald Maudling, in which he said that the choice of interrogation technique is "inevitably to some extent a matter of judgment on the part of those immediately responsible for the operations in question". He accepted the findings of the report and stated that the Government rejected any suggestion that the "methods currently authorised for interrogation" contained any element of cruelty or brutality. He also announced that the Government would take separate advice on the "procedures for interrogation of persons suspected of involvement in a terrorist campaign".

[32] The Committee did not examine who authorised use of the techniques. The evidence from the Government had referred to principles established in 1965 and revised in 1967, following the Bowen Inquiry into allegations of mistreatment of detainees by the British Army in Aden. The principles prohibited the use of violence, mutilation, cruel treatment and torture, outrages on personal dignity, and humiliating and degrading treatment. They required detainees to be treated humanely, but with strict discipline, but did not endorse or prohibit any particular interrogation technique.

[33] The Compton reports were debated in the House of Commons on 16 and 17 November 1971. The Home Secretary said that there was no evidence of "physical brutality or torture..." and announced the establishment of a further committee to explore whether any policy change was required. When asked whether the techniques had gone beyond the principles established in 1967, the Home Secretary said:

> "On individual cases, it is not a matter in which any individual is regarded as having gone beyond what were his instructions. … I am entirely satisfied that the methods used have not gone beyond the rules laid down in 1965, as amended in 1967."

[34] The Minster of State for Defence, Lord Balniel MP, also spoke for the Government. In the course of the debate, the former Minister of State for Defence, Roy Hattersley MP, asked who had taken the decision that these techniques were appropriate and "whether ministers at Westminster knew it was happening, whether they knew the details of what was happening, and whether they gave their specific approval to what was happening." Lord Balniel stated:

> "The methods of interrogation have been used for many years. They were used specifically at the time of Aden and they were used in Malaysia and in Borneo. Is the hon. Gentleman honestly saying that in his belief the Minister at the time did not know the methods which were being used by their Departments? I find this very hard to accept."

[35] Mr Hattersly clarified his question as follows:

> "The rules concerning interrogation do not say that all detainees held by the Army should be interrogated in this way. They say that this is the limit to which interrogation should go. What I want to know is whether the Army went to that limit without Ministerial approval or whether the Army went to that limit with the approval of, or indeed the express instruction of, Minister. I want the Minister of State to tell me whether it was his decision or whether it was taken in default of his knowledge."

[36] Lord Balniel stated:

> "I can tell the Hon. Gentleman – exactly the same Ministerial concurrence as was given to the same methods of interrogation used in Aden, Malaysia and Borneo."

[37] Roy Hattersly stated the suspicion that decisions were being taken not by British Ministers but by the Minster for Home Affairs in Northern Ireland, Brian Faulkner.

[38] Later in the debate, a similar question was asked by James Callaghan MP. Lord Balniel stated:

> "... The formal authorisation to remove certain detainees to the interrogation centre was necessarily given by the Northern Ireland Minister for Home Affairs, with the knowledge and concurrence of Her Majesty's Government. Ministers knew that the interrogation would be conducted within the guidelines laid down in 1965 and 1967 and that the methods would be the same as had been used on numerous occasions in the past. Their detailed application was necessarily a matter for the judgment of those immediately responsible."

[39] During early 1971, a series of written Parliamentary Questions were submitted by George Cunningham MP who also secured a further adjournment debate on 9 December 1971 on the specific question of "the responsibility of Ministers for the use of physical and mental interrogation techniques against internees in Northern Ireland". In the course of the debate, Lord Balniel again stated:

> ".... This interrogation was authorised by the Northern Ireland Government with the knowledge and concurrence of Her Majesty's Government. ... The Compton Report confirmed that the methods currently authorised for interrogation contain no element of cruelty or brutality, but more generally it drew attention to the problem of implementing the rules in detail in circumstances in which it is vital to carry out intensive urgent interrogation."

The Parker Inquiry

[40] As mentioned above, during the debate in Parliament on the Compton report the Home Secretary, Reginald Maudling, had said that the principles applied to the interrogation of suspects in Northern Ireland and the methods employed were the same as those used in other struggles against armed terrorists. The Government considered, however, that it would be right to review them. This led to the Prime Minister establishing a Committee of three Privy Councillors, whose task would be to consider:

> "whether, and if so in what respects, the procedures currently authorised for interrogation of persons suspected of terrorism and for their custody while subject to interrogation require amendment".

[41] Lord Parker of Waddington was appointed as the chairman along with Mr J A Boyd-Carpenter and Lord Gardiner. In addition to the above terms of reference it is also worth noting paragraph 2 of the majority report which stated:

> "We also read our terms of reference as calling upon us to enquire quite generally into the interrogation and custody of persons suspected in such circumstances of terrorism in the future, and not specifically in connection with Northern Ireland. In particular, we are not called upon to consider afresh matters already dealt with in the Compton report. Further, while in our view the use of some if not all of the techniques in question would constitute criminal assaults and might also give rise to civil proceedings under English law, we refrain from expressing any view in respect of the position in Northern Ireland in deference to the courts there, before whom we understand proceedings which raise this issue are pending."

[42] The Parker report was adopted on 31 January 1972 and contained a majority and a minority opinion. The Committee made clear that the only "procedures currently authorised" were those which could be said to comply with Joint Intelligence Directive JIC(65)15 albeit that the Directive itself did not refer to or expressly endorse the use of these particular interrogation techniques.

[43] The majority addressed the issue of whether the five techniques complied with the Directive and the broader question of whether they *should* be authorised. It considered that the boundaries between hardship, humiliating treatment and torture were ultimately matters of fact and degree and would also ultimately attract different opinions. The majority concluded that the application of the techniques, subject to recommended safeguards against excessive use, need not be ruled out on moral grounds; they could be used in limited circumstances, subject to safeguards, within the scope of the Directive and with the express authorisation of a Minister. The majority also made a finding that interrogation in depth consisted in the main of questions and answers across a table.

[44] The minority report by Lord Gardiner disagreed that such interrogation procedures were morally justifiable, even in emergency terrorist conditions.

[45] The majority did not make any express findings on whether or not the use of the techniques had been authorised in advance by a UK Minister. However, it did recommend that any future use should only take place under the express authority of a Minister. The minority report, on the other hand, indicated that use of the techniques was unlawful and therefore, in the absence of legislation, could not be authorised by a Minister.

[46] Both the majority and the minority considered the methods to be illegal under domestic law, although the majority confined their view to English law and to "some if not all the techniques".

[47] The Parker report was published and debated in Parliament on 2 March 1972. On the same day the Prime Minister stated that the techniques would not be used in future as an aid to interrogation. He further stated that if a Government did decide that additional techniques were required for interrogation, they would probably have to come to the House of Commons to ask for the requisite powers.

[48] Directives expressly prohibiting the use of the techniques, whether singly or in combination, were then issued by the Government to the security forces. During the hearing before the European Court, the UK Government gave an unqualified undertaking that the techniques would not in any circumstances be reintroduced as an aid to interrogation.

Civil claims

[49] All 14 men on whom the techniques were used brought civil claims for damages, which included claims alleging unlawful conspiracy directed against Ministers. All claims were settled and compensation was awarded. The settlements ranged in quantum from £10,000 to £25,000. Dr Leigh, who gave expert evidence on behalf of the UK Government in the proceedings before the Commission for Human Rights, also acted as medico-legal expert for the defence in the civil claims. The settlements were approved during the terms of three Prime Ministers, Edward Heath, Harold Wilson, and James Callaghan. From the documents which have been put before the court in these proceedings, it would appear that one of the reasons supporting settlement of claims was concern about the possibility of a case being successful against those who authorised the use of deep interrogation methods.

The inter-state case before the European Commission for Human Rights

[50] On 16 December 1971 the Irish Government submitted an application to the European Commission for Human Rights against the United Kingdom. Its stated object was to ensure that the UK Government would assure to everyone in Northern Ireland certain rights and freedoms defined in the Convention; to bring to the attention of the Commission breaches of those rights; to determine the compatibility with the Convention of certain legislative measures and administrative practices of the UK Government in Northern Ireland, and to ensure the observance of the legal engagement and obligations undertaken by the UK Government in the Convention.

[51] Briefly stated, the submission of the Irish Government, relevant to these proceedings, was that persons detained were subjected to treatment in breach of Article 3 carried out by the security forces of the United Kingdom; that their treatment constituted, in breach of Article 3, an administrative practice and a

continued series of executive acts exposing a section or sections of the population to torture or inhuman and degrading treatment.

The role of the Commission

[52] Until the late 1990s the European Commission for Human Rights existed for the purpose of undertaking a preliminary examination to determine the admissibility of applications brought against a State under the Convention. Where an application was declared admissible, the Commission placed itself at the parties' disposal with a view to brokering a friendly settlement. If no settlement was reached, the Commission drew up a report establishing the facts and expressing an opinion on the merits of the case. The report would then be transmitted to the Committee of Ministers. A period of three months then followed during which any contracting state concerned had the option of bringing the case before the Court of Human Rights for a final, binding adjudication. If a case was not referred to the Court, the Committee of Ministers decided whether there had been a violation of the Convention and, if appropriate, awarded "just satisfaction" to the victim. As the volume of claims taken pursuant to the Convention increased, it was found necessary to reform the structure for supervising the Convention and so, in 1998, the part-time Court and Commission were replaced by a single, full-time Court of Human Rights.

Steps taken by the Commission

[53] Having obtained written and oral observations from the parties, the Commission ruled on admissibility of the claims on 1 October 1972. It then received written submissions on the merits of the cases from November 1972 to September 1973. A hearing on the Article 3 allegations took place on 12 and 13 December 1973. In the meanwhile, implementing decisions it had made on 6 April 1973 relating to the taking of evidence, the Commission decided in late 1973 that it would proceed, through delegates, to hear witnesses.

[54] The written evidence adduced by the parties may be further described as follows. The Irish Government submitted written evidence on 228 cases concerning incidents of alleged ill-treatment. These cases included eight from the 12 men who underwent deep interrogation between 11 and 17 August 1971. The evidence consisted of statements either from alleged victims themselves and/or statements or medical certificates relating to alleged victims. The Irish Government also filed reports by four psychiatrists, containing either general observations or observations relating to particular persons, copies of the Compton report and other items such as newspaper reports. The UK Government did not submit written evidence in relation to the above cases, but provided documentary materials such as the relevant legislative framework, the Parker report, and RUC and military instructions.

[55] The procedure followed for the purposes of ascertaining the facts was decided by the Commission and accepted by the two Governments. The

Commission, it was established, would examine in detail 16 "illustrative" cases selected at the Commission's request by the Irish Government. For these 16 illustrative cases the Commission would receive medical reports and oral evidence. Among the 16 cases were two of hooded men cases. The two were referred to in the Commission's report as T6 and T13. (It later transpired that these were Patrick J McClean and Pat Shivers respectively.) It was agreed that the Commission would also consider a further 41 (non-hooded men) cases (the so-called "41 cases") and in those it would rely on medical reports and written comments. The Commission was also to have before it evidence obtained during the course of the Compton and Parker enquiries.

[56] Delegates of the Commission took oral evidence from witnesses during the course of a period lasting over a year. Three delegates began by hearing in Strasbourg the witnesses proposed by the Irish Government in the illustrative cases. This lasted from 26 November to 1 December 1973 and 25 February to 1 March 1974. They then heard witnesses proposed by the UK Government at Sola Air Base in Norway from 2 to 11 May 1974 and 12 to 15 June 1974. In a similar way, throughout the second half of 1974 and into early 1975, evidence was taken in respect of allegations relating to Article 14 and Article 3. The hearings concluded on 20 February 1975 when the Commission's delegates heard the evidence of three more witnesses in London. Altogether the Commission heard 119 witnesses. 100 gave evidence in relation to Article 3 issues. The evidence was reproduced in 14 volumes of verbatim records summarised in a further volume comprising some 580 pages.

[57] During proceedings before the Commission, Dr Denis Leigh, Consultant Psychiatrist to the Army, gave expert evidence on behalf of the UK Government. Professors Robert Daly and Jan Bastiaans gave expert evidence on behalf of the Irish Government. Professor Daly had worked with the RAF and Professor Bastiaans had treated Nazi death camp survivors.

[58] The Commission came to the view that neither the witnesses from the security forces nor the case witnesses put forward by the Irish Government had given accurate and complete accounts of what had happened. Consequently, where the allegations of ill-treatment were in dispute, the Commission treated as "the most important objective evidence" the medical findings, which were not contested.

[59] It was also noted, as summarised later by the Court of Human Rights in its judgment, that:

> "148. … [The Irish Government] also maintain—though they do not ask the Court to make a specific finding—that the British Government failed on several occasions in their duty to furnish the necessary facilities for the effective conduct of the investigation. The Commission does not go as far as that; however, at various places in

> its report, the Commission points out, in substance, that the respondent Government did not always afford it the assistance desirable. ...."

[60] Finally, from 14 to 20 March 1975 the Commission heard the parties' oral conclusions and final submissions on the issues relating to Articles 3 and 14 of the Convention. The full text of the parties' oral pleadings both on the admissibility and on the merits of the case was reproduced in four volumes of verbatim records comprising 1001 pages, summarised in the Commission's report.

Some aspects of the parties' submissions

[61] In terms of the Irish Government's evidence of ill-treatment, it submitted that there had been virtually no contradictory evidence filed by the respondent. It was submitted that under UK law the ill treatment claimed amounted to assaults.

[62] In terms of submissions relating to the concept of an administrative act (as described from page 256 onwards of the report) the Irish Government submitted:

> "…that the allegations were not made personally against any member of the United Kingdom Government, but were based on the legal concept of an administrative practice: the alleged acts were not isolated in time or in place and had not been duly punished.
>
> (i) <u>Repetition of acts</u>
>
> The applicant Government submitted that the facts disclosed a repetition of acts …
>
> (ii) <u>Official tolerance</u>
>
> The applicant Government submitted that there had been official tolerance of these acts of ill-treatment …
> The applicant Government stated that they were aware, however, that it was claimed on behalf of the respondent Government that, in the words of the Greek case "higher authorities" had been investigating these allegations and that accordingly official tolerance was not established. But in the applicant Government's submission the Commission had in its definition of official tolerance suggested a number of alternative ingredients.
>
> (iii) <u>The level of tolerance</u>

> Further the applicant Government considered that the allegations which had been made by individuals were of such a character and continued over such a length of time and in such circumstances that they could not possibly have occurred without the knowledge of superior officers of the individual men concerned.
>
> Referring to the respondent Government's submission that in order to establish official toleration there must be condonation or toleration of the acts by somebody in a position to act for the Government or with the Government's approval, the applicant Government submitted that this suggestion was directly contrary to the views expressed in the Greek case. …"

[63] Submissions continued analysing 'administrative act' in terms of whether there had been prosecutions, investigations, compliance with orders and regulations, complaints' procedures, domestic remedies, and the revocation of the measures.

[64] In response, part of the UK Government's submissions were (from page 260 onwards) that, insofar as any instances of ill-treatment occurred, far from tolerating them, the Government took all reasonable steps to prevent their recurrence. Without prejudice to the submission that five techniques did not constitute use of an administrative practice contrary to Article 3, their use, it was submitted, had now ceased. Further, any treatment capable of constituting a breach under Article 3 would, it was pointed out, constitute a wrong in domestic law for which remedies existing in the law of Northern Ireland had not been exhausted. This was so with certain allegations of assault and the Irish Government had not shown that such remedies had been exhausted. Turning to the legal principles applying to demonstrating an administrative practice it was submitted:

> "(iii) Official tolerance
>
> …
>
> The respondent Government denied that the alleged ill-treatment had been tolerated by superiors who had been cognisant of the acts of ill-treatment but had done nothing to punish or prevent them.
> The respondent Government submitted that instructions had been issued and that every complaint had been or was being investigated.
>
> (iv) Level of tolerance

…

> It would, in the respondent Government's submission, neither be fair nor reasonable to regard condonation by subordinate officers of acts forbidden by higher authorities as an administrative practice for which the Government is responsible and there was no evidence of such toleration. …"

[65] Further, the UK Government had established a system of joint investigation with members of the RUC attached to military police and army headquarters for liaison purposes. Prior to direct rule in March 1972, results of investigations were sent to the Chief Crown Solicitor of Northern Ireland who submitted them to the Attorney General for Northern Ireland to decide whether there should be a prosecution. After March 1972 prosecutions were the responsibility of the DPP.

[66] Later (at page 275) the UK Government indicated that it was now not an issue that use of the five techniques were an administrative practice and how "it had arisen was therefore not of any importance". They had been abandoned, it was acknowledged they were contrary to law, they would not be used again, and so it was not necessary to reach a finding on whether they were contrary to Article 3. The respondent Government explained that their reason for advising their witnesses not to answer questions on the use of the five techniques was for concern for the safety of the witnesses involved. As the issue of whether there was an administrative practice had been determined by the UK Government's admission, the fact that the delegates were inhibited from fully examining this part of the case was not a material issue.

[67] Later, in final submissions, the Irish Government submitted (at page 336):

> "… the applicant Government drew attention to the respondent Government's refusal to inform the Commission what authority had ordered the application of the five techniques and the ban imposed on witnesses heard in January 1975 precluding them from answering questions on the five techniques. …"

[68] The UK Government submitted (at page 356) that the Commission should act on the basis of the UK Government's formal and deliberate abandonment of the techniques, not some remote academic contingency. It should note what the Government had done and leave the matter there.

Medical evidence

[69] In relation to the expert medical evidence in the context of the two hooded men's case, the Commission referred to the parties' position (at page 273):

> "The applicant Government then dealt with the conflict of opinion as to the seriousness of psychiatric after-effects of what was done to the prisoners in these cases. They observed that Dr. Lh. had admitted that in the cases of T.6 and T.13 he had found psychiatric symptoms, but described them as being minor and wearing off with the passage of time. Professors Daly and Bastiaans, on the other hand, had expressed the firm view that quite serious long-term sequelae were a probability in these and other cases where the persons were subjected to the practices now impugned …"

The Commission's findings in respect of the evidence

[70] The Commission's investigation resulted in the production of a report of over 500 pages in length (though parts of this dealt with claims of unlawful detention and discrimination). The report was adopted on 25 January 1976 and transmitted to the Committee of Ministers. It stated that a friendly settlement had not been reached. The purpose of the report was to (a) establish the facts; and (b) state an opinion as to whether the facts found disclosed a breach by the UK of its obligations under the Convention.

[71] The Commission found that T6 and T13 (the two hooded men) were arrested on 9 August 1971 during Operation Demetrius and, two days later, transferred from Magilligan Regional Holding Centre to an unidentified interrogation centre where they were medically examined on arrival. Then, with intermittent periods of respite, they were subjected to the five techniques during four or possibly five days. The Commission was satisfied that both men were kept at the wall for different periods totalling between 20 to 30 hours, but it did not consider it proved that the enforced stress position had lasted all the time they were at the wall. The Commission considered that the required posture caused physical pain and exhaustion. Later on, T13 was allowed to take his hood off when he was alone in the room, provided that he turned his face to the wall. The Commission found that it was not possible to establish the periods T6 and T13 had been without sleep, or to what extent they were deprived of nourishment.

[72] In terms of physical effects resulting from use of the five techniques the Commission was satisfied (p.397) that the witnesses suffered loss of weight. Further, the wall-standing, in particular, had caused physical pain while it was being applied, but that pain ceased when the person was no longer in that position. The Commission also stated (page 399) that it was satisfied that the total periods during which the two witnesses were at the wall were 23 and 39 hours respectively. A certain degree of force was used to make them stand in the required posture which caused physical pain and exhaustion.

[73] In terms of psychiatric effects, the Commission was unable to establish the exact degree of any psychiatric after-effects produced on T6 and T13, but in general it was satisfied that some psychiatric after-effects in certain of the 14 persons subjected to the techniques could not be excluded. It stated at page 398:

> "The witnesses themselves described feelings of anxiety and fear, as well as disorientation and isolation during the time they were subjected to the techniques and afterwards. …..
>
> On the other hand, the psychiatrists disagreed considerably on the after-effects of the treatment and on the prognosis for recovery. Professors Daly and Bastiaans considered that both witnesses would continue for a long time to have considerable disability shown by bouts of depression, insomnia and a generally neurotic condition resembling that found in victims of Nazi persecution. Drs. 5 and 1 considered that the acute psychiatric symptoms developed by witnesses during the interrogation had been minor and that their persistence was the result of everyday life in Northern Ireland for an ex-detainee carrying out his work travelling to different localities. In no sense could the witnesses' experiences be compared with those of the victims of Nazi persecution.
>
> On the basis of this evidence the Commission is unable to establish the exact degree of the psychiatric after-effects which the use of the five techniques might have had on these witnesses or generally on persons subjected to them. It is satisfied, however, that, depending on the personality of the person concerned, the circumstances in which he finds himself, and the conditions of everyday life in Northern Ireland at the relevant time, some after-effects resulting from the application of the techniques cannot be excluded."

[74] In addition T13 claimed to have been beaten and otherwise physically ill-treated, but the medical evidence before the Commission gave reason to doubt that he had been assaulted to any severe degree, if at all. T6 also alleged that he was also assaulted in various ways at, or during transport to and from, the interrogation centre. On 17 August 1971 he was medically examined on leaving the centre and also on his arrival at Crumlin Road Prison where he was detained until 3 May 1972. The medical reports of these examinations and photographs taken on the same day revealed bruising and contusions that had not been present on 11 August. While not accepting all T6's allegations, the Commission was "satisfied beyond a reasonable doubt that certain of these injuries … [were] the result of assaults committed on him

by the security forces at the centre". As a general inference from the facts established in T6's case, the Commission found it "probable that physical violence was sometimes used in the forcible application of the five techniques". (page 413)

Outcome

[75] On 1 October 1972, the Commission had accepted that the treatment of persons in custody, in particular the methods of interrogation of such persons, constituted an administrative practice in breach of Article 3 of the Convention.

[76] In the final report adopted on 25 January 1976 and transmitted to the Committee of Ministers of the Council of Europe on 9 February 1976, the Commission concluded unanimously that:

- the combined use of the five techniques in the cases before it constituted a practice of inhuman treatment and of torture contrary to Article 3, and
- violations of Article 3 occurred by inhuman (and in two cases degrading) treatment of several persons including T6.

[77] The Commission's conclusion included the following (p. 402):

> "… the five techniques applied together were designed to put severe mental and physical stress, causing severe suffering, on a person in order to obtain information from him. …
>
> Compared with inhuman treatment discussed earlier (pp. 376 seq.), the stress caused by the application of the five techniques is not only different in degree. The combined application of the methods which prevent the use of the senses, especially the eyes and the ears, directly affects the personality physically and mentally. The will to resist or to give in cannot, under such conditions, be formed with any degree of independence. Those most firmly resistant might give in at an early stage when subjected to this sophisticated method to break or even eliminate the will.
>
> It is this character of the combined use of the five techniques which, in the opinion of the Commission, renders them in breach of Art. 3 in the form of not only inhuman and degrading treatment, but also torture within the meaning of that provision.
>
> Indeed, the systematic application of the techniques for the purpose of inducing a person to give information

> shows a clear resemblance to those methods of systematic torture which have been known over the ages. Although the five techniques - also called "disorientation" or "sensory deprivation" techniques – might not necessarily cause any severe after-effects the Commission sees in them a modern system of torture falling into the same category as those systems which have been applied in previous times as a means of obtaining information and confessions."

The inter-state case before the European Court of Human Rights

[78] As indicated above, the Irish Government decided to press for an order to be made by the European Court of Human Rights. In January 1977, oral hearings were due to commence before the Court. The Secretary of State visited Dublin. He was briefed in advance about the case including the possibility of a friendly settlement between the two Governments. This led to a meeting between the two Attorneys General in London on 23 March 1977. At that time, the first part of the oral hearings before the Court had concluded and hearings were due to re-commence on 19 April 1977. On 25 March 1977, the UK Attorney General reported on the meeting to the Prime Minister. The issue upon which the two governments differed was the possibility of initiating prosecutions or disciplinary proceedings against the officers who were involved in conducting the interrogations. A friendly settlement was thus not forthcoming and proceedings before the Court continued.

How the case came to be before the court

[79] The Irish Government's application to the Court had as its stated object "to ensure the observance in Northern Ireland of the engagements undertaken by the respondent Government … and in particular of the engagements specifically set out in the pleadings filed and the submissions made on their behalf and described in the evidence adduced before the Commission…". To this end the Court was invited to "consider the report of the Commission and to confirm the opinion of the Commission that breaches of the Convention have occurred and also to consider the claims … with regard to other alleged breaches ….".

[80] The Court also noted the Irish Government's request in a letter dated 5 January 1977 for a consequential order that the UK Government (para 186):

- refrain from reintroducing the five techniques, as a method of interrogation or otherwise; and
- proceed as appropriate, under the criminal law of the UK and the relevant disciplinary code, against those members of the security forces who committed acts in breach of Article 3 referred to in the Commission's findings and conclusions, and against those who condoned or tolerated them.

[81] At the hearing before the Court the Irish Government withdrew the first request following the solemn undertaking given on behalf of the UK on 8 February 1977 that the five techniques would not in any circumstances be reintroduced as an aid to interrogation. However the second request was maintained. Ultimately the Court found that the sanctions available to it did not include the power to direct a state to institute criminal or disciplinary proceedings in accordance with its domestic law (para. 187).

Steps before the court

[82] The Registrar of the Court received the Commission's report in March 1976. It was decided to constitute the plenary Court "considering that the case raised serious questions affecting the interpretation of the Convention (para. 5). The Court directed the parties to make submissions (referred to as "memorials") and thereafter conducted oral hearings in which the legal representatives of the parties appeared. The Court relied on the findings in the Commission's report.

Outcome

[83] The Court of Human Rights delivered its decision on 18 January 1978. It held:

- by 16 votes to one that the use of the five techniques constituted a practice of inhuman and degrading treatment, which practice was in breach of Article 3;
- by 13 votes to four that the said use of the five techniques did not constitute a practice of torture within the meaning of Article 3;
- by 16 votes to one that no other practice of ill-treatment was established for the unidentified interrogation centres; and
- unanimously that it could not direct the UK to institute criminal or disciplinary proceedings against those members of the security forces who have committed the breaches of Article 3 found by the Court and against those who condoned or tolerated such breaches.

[84] The Court's reasoning in relation to the five techniques was as follows. In a section entitled 'Questions concerning the merits', it stated:

> "*1. The unidentified interrogation centre or centres*
>
> (a) The 'five techniques'
>
> …
>
> 167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense

physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

On these two points, the Court is of the same view as the Commission.

In order to determine whether the five techniques should also be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment.

In the Court's view, this distinction derives principally from a difference in the intensity of the suffering inflicted.

The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between 'torture' and 'inhuman or degrading treatment', should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

Moreover, this seems to be the thinking lying behind Article 1 *in fine* of Resolution 3452 adopted by the General Assembly of the United Nations on 9 December, 1975, which declares: 'Torture constitutes an *aggravated* and deliberate form of cruel, inhuman or degrading treatment or punishment.'

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not

> occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.
>
> 168. The Court concludes that recourse to the five techniques amounted to a practice of inhuman and degrading treatment, which practice was in breach of Article 3."

[85] The Court continued, in relation to any other practice of inhuman or degrading treatment:

> ***"(b) Ill-treatment alleged to have accompanied the use of the five techniques***
>
> 169. The applicant Government claim that the 14 persons subjected to the five techniques, or some of those persons including T6 and T13, also had to undergo other kinds of treatment contrary to Article 3.
>
> The Commission has found such treatment only in the case of T6, although it regarded it as probable that the use of the five techniques was sometimes accompanied by physical violence (see para. 105 above).
>
> 170. As far as T6 is concerned, the Court shares the Commission's opinion that the security forces subjected T6 to assaults severe enough to constitute inhuman treatment. This opinion, which is not contested by the respondent Government, is borne out by the evidence before the Court.
>
> 171. In the 13 remaining cases examined in this context … the Court has no evidence to support a finding of breaches of Article 3 over and above that resulting from the application of the five techniques.
>
> 172. Accordingly, no other practice contrary to Article 3 is established for the unidentified interrogation centre or centres; the findings relating to the individual case of T6 cannot, of themselves, amount to proof of a practice."

[86] The Court set out an account of events which it stated was based on the information found in the Commission's report and in the other documents before the Court. In relation to the 12 hooded men it stated that the Commission examined as illustrative the cases of T6 and T13.

> "104. ….The Commission found no physical injury to have resulted from the application of the five techniques as such, but loss of weight by the two case-witnesses and acute psychiatric symptoms developed by them during interrogation were recorded in the medical and other evidence. The Commission was unable to establish the exact degree of any psychiatric after-effects produced on T6 and T13, but on the general level it was satisfied that some psychiatric after effects in certain of the 14 persons subjected to the techniques could not be excluded.
>
> …
>
> 106. Although several other cases were referred to before the Commission by the applicant Government in connection with the unidentified interrogation centre or centres, no detailed allegations or findings are set out in the Commission's report except in the case of T22 which was one of the '41 cases'. …."

[87] It is worth noting that the UK Government did not contest the Commission's finding about torture. The Court's judgment stated:

> "152. The United Kingdom Government contest neither breaches of Article 3 as found by the Commission… nor … the Court's jurisdiction to examine such breaches."
>
> 165. The facts concerning the five techniques are summarised at paragraphs 96–104 and 106–107 above. In the Commission's estimation, those facts constituted a practice not only of inhuman and degrading treatment but also of torture. The applicant Government ask for confirmation of this opinion which is not contested before the Court by the respondent Government."

[88] The judgment of the court includes separate opinions by those judges who considered that the Court should not have interfered with the Commission's finding that use of the five techniques was an administrative practice amounting to torture.

The scope of the inter-state case in the areas of inspection / punishment of offenders

[89] As indicated above, the Court of Human Rights unanimously held that it could not direct the UK to institute criminal or disciplinary proceedings against those members of the security forces who had committed the breaches of Article 3

found by the Court and against those who condoned or tolerated such breaches. The jurisprudence of the Court at the time of its judgment is reflected as follows:

> "187. …. In the present case, the Court finds that the sanctions available to it do not include the power to direct one of those States to institute criminal or disciplinary proceedings in accordance with its domestic law."

The issue of criminal liability for what occurred in the period 1971-1978

[90] As indicated above, the Parker report stated:

> "…. Further, while in our view the use of some if not all of the techniques in question would constitute criminal assaults and might also give rise to civil proceedings under English law, we refrain from expressing any view in respect of the position in Northern Ireland in deference to the courts there, before whom we understand proceedings which raise this issue are pending."

[91] It was also clear in the proceedings before the Commission of Human Rights, in the context of the arguments about whether the use of the five techniques constituted an administrative practice, that the position of the UK was that anyone affected by what had happened had full recourse to civil and criminal remedies (see page 264-265). This included the submission that "since August 1971, 77 members of the security forces had been, or were being, prosecuted for assault; 25 of these were for ill-treatment of persons being arrested, arrested persons, or persons in custody". This does not, however, deal specifically with the men who underwent deep interrogation.

[92] From the papers before this court, there is no sign that anyone involved in authorisation or operation of the five techniques of interrogation in depth has been the subject of criminal charges. At a very early stage the Attorney General for England and Wales indicated on 1 December 1971 that no prosecutions would result from these events and the Court understands that the same position was adopted in Northern Ireland.

Events after the judgment of the ECtHR

[93] As indicated above, following the disposal of proceedings before the Court of Human Rights, the issue of what had happened to the hooded men lay dormant for a considerable period of time. However, some three decades after the introduction of internment, the issue of releasing Government papers in accordance with the normal practice arose. This was a matter, as will be explained below, which was discussed strictly within the confines of government, but once materials had

been released this ultimately triggered the interest of various parties who carried out research into the historical record.

[94] In or about January 2003 internal Government documents began to be deposited at the UK National Archives at Kew. The evidence of the NIO indicates that in advance of this and in accordance with usual practice, the NIO and other Government departments spent time considering the records to determine whether there were any reasons why they should not be released or should be redacted (for example, to avoid disclosing the identity of individuals who gave evidence to the Commission or in respect of some details of information obtained during interrogation). A review of papers was carried out during 2000-2002 by a working group comprising officials from the Foreign and Commonwealth Office, the NIO, the Ministry of Defence, the Treasury Solicitor's Office, the Law Officers' Department, and the Cabinet Office.

[95] Consideration was given to the question of Ministerial authorisation of the five techniques and whether there existed any impediment to the release of information or records which included information about this topic. For example, in a letter dated September 2000 recommending that release of papers be shelved for a further 10 years in deference to the Northern Ireland peace process, an NIO official wrote:

> "On this file there are various papers that show that Ministers and senior officials were indeed aware of the interrogation methods being used. These indications are unclear or ambiguous as to whether they had been *aware in advance* i.e. had expressly authorised their use but could plausibly be held to imply that that had been so. …"

[96] Another NIO document dated 15 February 2000 indicated that some of the papers "contained implicit acknowledgement of authorisation of the "five techniques" at Government level". Consideration was given to advising former ministers of the pending release of documents relating to the Ireland v UK case and the five techniques. A draft submission on this to the Cabinet Secretary, Sir Andrew Turnbull, stated:

> "Ministerial awareness
>
> Various papers show that Ministers and senior officials were indeed aware of the interrogation methods being used by the Army in Northern Ireland. In some cases the indications are unclear or ambiguous as to whether they had been aware in advance, i.e. had expressly authorised their use, but could plausibly be held to imply that they had been so. FCO papers show that officials admitted to

> themselves and alerted their superiors to the UK's legal vulnerability over Article 3 charges, eg a paper submitted to Lord Carrington, Mr Whitelaw and the Attorney General makes clear that "charges … dealing with the main allegations of torture, inhuman and degrading treatment … under Article 3 are likely to stand up." The papers go on to warn that "Ministers must therefore accept that it is a virtual certainty that, if proceedings continue to the stage of a finding by the Commission, that finding will be that … a systematic practice of ill-treatment contrary to Article 3, involving toleration at a high level, has been established." In other words at that time (27 November 1972) Ministers knew the situation and had a chance to comment. Other papers show that there was a warning to Ministers about the possibility or likelihood of a finding of "official toleration at a Government level"; and recognition of the UK's vulnerability under Article 3, where "only 5 out of 28 cases could be defended with any reasonable arguments". Later files contain a draft of the UK's Counter-memorial with a denial of official connivance or toleration. A draft letter to the Taoiseach has the Prime Minister explicitly denying Ministerial responsibility and resenting the Irish allegations because (though this was not in the final version) they are "malign and untruthful per se"."

[97] NIO officials, for the purpose of this case, were unable to clarify whether or not draft letters were in fact sent to the former ministers. But however that might have been, ultimately it was decided that the issues described above were not grounds for not releasing the records.

[98] Research of the National Archives, it seems clear, was conducted both by the Pat Finucane Centre and NUI Galway. Research was also carried out by RTÉ which, on 4 June 2014, broadcast a documentary called *The Torture Files*.

The uncovery of materials from the National Archives and the RTÉ documentary of 2014

[99] Mr McGuigan avers that since the time of these events the hooded men had not been in contact with each other save for personal friendships among some of them. However in July 2013 he was contacted by a historian, Jim McIllmurray, who had carried out research in relation to the hooded men and wished to meet each of the men. In addition, he says that the men had become aware of the techniques being deployed in Iraq and in particular in the case of Baha Mousa, notwithstanding that there had been a commitment that the techniques would not be used again.

Mr McGuigan said that in August 2013 the men sought advice from KRW Law. They became aware of materials that had been found in the UK National Archives through research conducted by the Pat Finucane Centre and NUI Galway. He said that when RTÉ broadcast a documentary on the issue in June 2014 he became aware of the full significance of the new material and he asked his solicitors to correspond with the respondents to request an investigation into the men's treatment.

[100] In addition, Mary McKenna, who was supported by the Committee of the Administration of Justice, undertook research into how her father and the other men were treated.

The RTÉ programme

[101] The RTÉ documentary referred to materials it said were newly discovered which had not been before the Commission and Court of Human Rights. The assertions made in the documentary included that the UK Government withheld from the Commission and Court of Human Rights:

(a) information as to who was responsible for the use of the five techniques. The programme linked this to the issue of attempts to seek a friendly settlement which had been pursued by the Irish Government and which had involved the question of whether there should be criminal or disciplinary proceedings against anyone; and

(b) materials it had which tended to undermine its assertions that the five techniques were not long-lasting or severe in their effects on the men. This had been an important issue in the litigation and had contributed to the Court's finding that, although the five techniques as applied in combination "were used systematically", they did not cause suffering of the particular intensity and cruelty implied by the word torture. It was noted in the documentary that, before the Commission, the UK Government declined to call direct evidence on in-depth interrogation and its witnesses were instructed not to answer questions about it.

[102] The RTÉ documentary referred to a variety of documents which appear to have been found at Kew. They cover a wide ambit and include documents which concerned planning for the operation of the interrogation centre; documents concerned with authorisation for the use of the five techniques; documents relating to the later investigations of Compton and Parker; and documents concerned with the settlement of the civil claims, including communications between officials and Ministers and medical reports. Of particular importance to the documentary was a memorandum which was written by Merlyn Rees, the then Home Secretary. This was dated 31 March 1977 and gave rise to the claim that Lord Carrington, then Defence Secretary, had in 1971 authorised torture. It is necessary to set this document in context.

[103] In early 1977, as proceedings before the Court of Human Rights were underway, the two Governments liaised to see if a friendly settlement could be found. Hearings before the Court had taken place in early February 1977 and resumed in April 1977. During this interval, on 23 March 1977, the Irish and UK Attorneys General met with each other (Mr Costello and Mr Silkin).

[104] On 25 March 1977 the UK Attorney General wrote a minute of the meeting to Prime Minister, James Callaghan, setting out the Irish Government's proposals for a friendly settlement. The proposals included an agreement to investigate the possibility of prosecution or disciplinary action against those who had carried out the interrogations and the introduction of a Bill of Rights in Northern Ireland. The UK Attorney General set out in the note how far he had indicated the UK Government might be willing to go on these issues and also that there was to be further discussion. He considered that on the issue of prosecutions or disciplinary action the Governments were too far apart. He had already given consideration to the issue as had his predecessor, and the Northern Ireland DPP, and he considered that there was likely to be no evidence to justify reopening these cases.

[105] On 31 March 1977 the then Home Secretary Merlyn Rees wrote a memo to Prime Minister about the meeting above. His memo (the "Rees memo") has featured prominently in these proceedings. It stated:

> "… Costello [the Irish Attorney General] raised the proceedings brought by the Irish Government to the European Court of Human Rights, and in particular the possibility of either prosecuting or taking disciplinary action against those responsible in 1971/72 for acts found by the Commission to have been in breach of Article 3.
>
> It is my view (confirmed by Brian Faulkner before his death) that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by Ministers – in particular Lord Carrington, then Secretary of State for Defence.
>
> If at any time methods of torture are used in Northern Ireland contrary to the view of the Government of the day I would agree that individual policemen or soldiers should be prosecuted or disciplined, but in the particular circumstances of 1971/72 a political decision was taken."

[106] In a note in the margin of the Rees memo, Head of the Army Department in the Ministry of Defence, John M Parkin, wrote: "This could grow into something awkward if pursued".

[107] The Rees memo was followed by a letter dated 12 April 1977 from UK Defence Secretary, Fred Mulley to the Prime Minister. It is convenient that the court should set out this response and Mr Rees' reply to it, although neither featured in the programme, though both later were discussed by an investigator, on behalf of the PSNI, who himself carried out research at Kew, as will be discussed later.

[108] The Mulley response stated:

> "1. I have seen the Home Secretary's minute to you of 31st March about the Attorney General's meeting with the Irish Attorney General, and I strongly agree that there should be no question of either prosecuting or taking disciplinary action against those responsible for "deep interrogation" in 1971.
>
> 2. I was however a little surprised by the statement that our predecessors, and in particular Lord Carrington, took a "decision to use methods of torture in Northern Ireland". The published records do suggest that this is rather a hard way of putting the decision to use deep interrogation.
>
> 3. Lord Balniel said in the House of Commons on 9th December 1971 interrogation in depth was authorised by the Northern Ireland Government with the knowledge and concurrence of HMG; but the rules then in force to govern the conduct of interrogation, which were summarised in the Compton Report, explicitly prohibited torture, brutality and humiliating or degrading treatment. Moreover, paragraph 12 of the Parker Reports says of the "five techniques" used in deep interrogation that "it cannot be assumed that any UK Minister has ever had the full nature of the particular techniques brought to his attention and consequently that he has ever specifically authorised their use". We have not contested the subsequent finding of the European Commission of Human Rights that the five techniques constitute torture but we have not explicitly accepted it and indeed the burden of our argument at Strasbourg was that they did not amount to torture. In short, we have rested publicly on the statement mentioned above.
>
> 4. I certainly do not want to labour the point since I entirely endorse the Home Secretary's conclusion, and in any case we have no responsibility to answer for what happened in 1971-72. But I thought the Home Secretary

had compressed the record rather too starkly and in a way which goes beyond any public position.

5. I am copying this to the Home Secretary and the other member of IN."

[109] This prompted a further letter from Merlyn Rees on 18 April 1977 in which he stated:

"… I was concerned in that minute to stress that action against individual policemen or soldiers, as raised by Mr Costello, would not be justified, since a political decision had been taken in 1971/72.

Given that, I would accept that in discussing the situation in 1971/72 I compressed the record too starkly. It would have been better had I referred to a decision to use interrogation in depth in Northern Ireland in 1971/72 rather than referring to a decision to use methods of torture at that time.

But like Fred Mulley, I would not wish to labour this point unduly, particularly since these methods have been abandoned and have never been resumed."

[110] In terms of the commentary in the RTE programme, the Rees memo was viewed as damning new evidence that a senior Cabinet Minister had authorised torture in Northern Ireland in 1971.

[111] In the documentary, there was also reference to the Strasbourg Court being misled by the UK Government about the effects of the exposure of the men to the five techniques. The programme rehearsed the differing views of the psychiatrists retained by the Governments in the inter-State case but concentrated on the position of the UK Government's psychiatrist, Dr Leigh who had on more than one occasion examined Mr McKenna.

[112] Dr Leigh gave expert medical evidence to the Commission for Human Rights on behalf of the UK Government. His evidence was that the psychiatric effects on the men had been minor and their persistence due to everyday life in Northern Ireland. He disagreed with the evidence of the witnesses called by the Irish Government, Professors Robert Daly and Jan Bastiaans. In the documentary, Professor Daly said that he and Professor Bastiaans had independently come up with the same answers, namely that the men had serious mental illness and some physical illness and that the prognosis was poor.

[113] The documentary claimed that after Dr Leigh gave his evidence to the Commission, but before proceedings before the Court of Human Rights were disposed of, information was available to the UK Government which contradicted the view that the effects on the men had been minor.

[114] The programme referred to medical entry records at Ballykelly which had noted that Mr McKenna had "mild heart trouble". Nonetheless, he was declared fit for interrogation. In May 1972 he was released from internment into a psychiatric unit.

[115] On 10 April 1974 Dr Leigh examined Mr McKenna in connection with his civil claim. In an official document setting out advice given to the UK Government about the value of the claim it was noted:

> "20. … I have now read Dr Leigh's Reports in these three cases.
>
> 21. I consider that Sean McKenna's case is one of the more serious ones. …. When Dr Leigh examined him on 10 April, 1974, he was tense and anxious and sobbed at times during the interview, and complained of many serious psychiatric symptoms, including contemplation of suicide."

[116] Officials advised that Mr McKenna's settlement would be the largest to date.

[117] On 3 June 1975 Dr Leigh examined Mr McKenna again. His report, dated 20 June 1975, stated:

> "… I note that prior to his interrogation it was recorded by the doctor who examined him on admission to the Interrogation Centre on 11.8.71 that he suffered from mild heart trouble … It is clear, therefore, that at the time of admission to the Detention Centre he was already suffering from angina pectoris, and that this angina had increased in severity. In addition, he complained to me of a number of psychiatric symptoms, mainly of an anxious and fearful nature.
>
> Angina pectoris is by many considered to be a psychosomatic disorder; it is a symptom of underlying heart disorder and is always associated with the risk of sudden death. It seems that Mr McKenna was suffering from angina before he was interrogated and I think it would be hard to show

a) that it was wise to proceed with interrogation, and

b) that the interrogation did not have the effect of worsening his angina.

With regard to his other psychiatric symptoms, I think that one will probably have to regard them as being the result of the so-called 'deep interrogation' procedures."

[118] Three days after this examination, Mr McKenna died of a heart attack. The programme claimed that while Dr Leigh's report was circulated among UK officials, it was not placed before the Court of Human Rights.

[119] The RTÉ documentary also went on to outline the illnesses suffered by other men in the years subsequent to their internment including incidents of cancer in the early 1970s.

Events at the Policing Board 2014

[120] Following the broadcast of the RTÉ documentary solicitors for Mr McGuigan wrote on 14 August 2014 to the Irish Attorney General requesting confirmation that the material had been received by her office. The documents from the RTÉ programme were passed by the Attorney General to the Irish Department of Foreign Affairs and Trade. Also on 14 August 2014 KRW Law solicitors, acting for Mr McGuigan and several of the other men, contacted the Public Prosecution Service in Northern Ireland requesting that consideration be given to a formal criminal inquiry. On 4 September 2014 the PPS replied that an investigation into a complaint of criminal conduct was a matter for the Chief Constable of the PSNI and forwarded the correspondence to the Chief Constable.

[121] At a Policing Board meeting on 3 July 2014 Catriona Ruane, MLA, referred to the RTÉ documentary and asked whether there was an investigation and if so in what structure it was taking place. Assistant Chief Constable, Drew Harris indicated that the PSNI were aware of the Rees memo through the RTÉ documentary and that the PSNI wanted to now source the original document and any other documents that would confirm or further clarify its contents, by visiting the public records' office. Once that was done they would contact the PPS and seek advice as to next steps. He said that the investigation currently lay with Crime Operations and, in particular the Historical Enquiries Team ("HET") who were conducting this particular part of the investigation.

[122] In addition, Gerry Kelly, MLA, tabled a question which elicited the following response:

"Question:

> Following the assertion in official documents that Lord Carrington authorised the use of methods of torture in this jurisdiction, what action has the Chief Constable taken?
>
> Response:
>
> The PSNI will assess any allegation or emerging evidence of criminal behaviour, from whatever quarter, with a view to substantiating such an allegation and identifying sufficient evidence to justify a prosecution and bring people to court."

Action to look into the position

[123] The responsibility for the investigation was given to DC Superintendent Hanna. The evidence of the PSNI is that the allegations of torture were outside the remit of HET but responsibility for carrying out further investigations was given to HET because of the knowledge and experience that some of their investigators had of examining historic records and conducting research in the National Archives. An Investigating Officer, who was a temporary worker, was directed to carry out research in the National Archives "to verify the existence of the memorandum and any other documentation which may explain the context in which it was written and whether or not the use of torture had been authorised". He provided a first report, dated 10 July 2014, providing a summary of his findings immediately after his research, followed by a more detailed report on 18 August 2014.

[124] The Investigating Officer reported that he located two files of relevance (CJ4/1609) containing papers dated from 2 September 1976 to 16 May 1977 and (CJ4/1612) containing papers dated from 15 February 1977 to 4 April 1977.

[125] In his first report the Investigating Officer said he was unable to locate the Rees memo. He stated however that:

> "It is of interest that a "dummy" sheet is attached which is in the midst of the other documents cross-referenced to the missing memorandum. I attach a copy of this sheet which records the following. "Document dated 31.3.77 retained under S.38 of the Freedom of Information Act, 2000. (Appendix 2) Having sought clarification in regard to that statement, I was informed that the document had most likely been returned to the original department which would have provenance over it. … The explanation as to its retention was for health and safety reasons. This would appear to be something of an all embracing and convenient rational.

> The file is not available for public viewing, assuming it is released, until 2020. An application, however, can be submitted by the PSNI under the Freedom of Information Act."

[126] The Investigating Officer stated there was an abundance of information in the file that added significant clarity to the Rees memo and the situation at the time. He said that whoever had obtained the Rees memo mentioning torture must have seen, but had not disclosed the various other documents that provided context. He concluded as follows:

> "Having taken this matter as far as I can within a limited time period, I can conclude that we are now in possession of documents of interest, or can have access to a considerable amount of information contained within two very relevant files.
>
> Should it be decided to further research this subject, it must be clearly understood that such a task would involve a considerable amount of research.
>
> The information in my possession, by its nature opens up a number of other lines of enquiry. This would involve the possible reading of no less than one hundred and fifty individual files and may never answer the question posed."

[127] The Investigating Officer then made suggestions, should it be deemed necessary to conduct further research, as to areas of research. These included limited research into Lord Carrington and Government papers during 1971/72 and applying for the dummy document.

[128] The second report explained further that the dummy document was held by the NIO. For various reasons it could be assumed that it was the Rees memo but it was open to the PSNI to try to confirm this with the NIO.

[129] The second report then described relevant materials from the two files referred to in the first report. The first file (CJ4/1609) contained:

- a press notice following a statement made by Merlyn Rees at Stormont Castle on 2 September 1976 relating to important steps taken by the UK Government to secure the protection contemplated by the Convention, including "fresh instructions to the security forces about the proper treatment of arrested persons, fresh disciplinary regulations for the RUC, and so on";

- Fred Mulley's letter of 12 April 1977, described above;

- Merlyn Rees' letter dated 18 April 1997, described above;

- a letter from the Private Secretary to the Prime Minister stating the Prime Minister had seen the letter of 18 April 1977;

- five press articles which, according to the Investigating Officer, mainly reported the views of Brian Faulkner and John Taylor and that both seemed to be in denial about the type or gravity of the interrogation methods used at the time; and

- documents relating to legal points and arguments relating to the proceedings taken by the Irish Government.

Of this file the Investigating Officer said that the first four documents described placed the Rees memo in context and that:

> "It is perfectly clear that Merlyn Rees felt he unwittingly used the word "torture" in an ill-advised and unfortunate manner. This one memorandum has been seized upon by some groups and individuals to attempt to justify claims that the Government sanctioned the use of "torture"."

[130] The second file (CJ4/1612) described by the HET Investigation Officer contained papers dated from 15 February 1977 to 4 April 1977 and was marked as relating to the discussion between the two Attorney Generals. It also contained the "dummy" sheet. The Investigating Officer referred to a document contained therein entitled Meeting with the Attorney General – RUC interrogation dated 15 March 1977 marked for the attention of the Secretary of State, and concerned with the BBC Tonight Programme concerning allegations of brutality during RUC interrogation at Castlereagh Police Station. The Deputy Chief Constable gave categorical assurance that the RUC were not using the five techniques. He said he would be "reinforcing instructions which already existed about the need to avoid any hint of brutality or use of undue force in interrogation". Mention is made of rules of guidance but these were not in the file.

[131] The Investigating Officer located further materials relating to a report and recommendations by Roderic Bowen QC in 1966 on the Procedures for the Arrest, Interrogation and Detention of Suspected Terrorists in Aden. There were materials relating to the preparation of the Joint Directive on Military Interrogation JIC(65)15, amended following the Bowen report, and other documents dealing with arrest, interrogation and detention. The materials identified suggested that the Bowen report had formed the basis of the guidelines in place in 1971 for the interrogation techniques used in Northern Ireland. The Investigating Officer commented that:

> "… it is abundantly clear that a great deal of effort and thought had gone into the preparation and implementation of those directives. They were clearly acceptable at the time and used at a juncture in history when terrorism was rife in British Colonies and later in Northern Ireland."

[132] The Investigating Officer also outlined the findings of the Compton and Parker investigations and the Court of Human Rights. The Investigating Officer also noted that he had searched the files in close proximity to the two files described above but had found no reference to the Rees memo.

[133] The Investigating Officer concluded that there was no useful purpose in taking the investigation further; that there was no reference to the word "torture" as stated in the Rees memo and no documentation linking Lord Carrington to matters of "torture". He went to so far as to say that it was abundantly clear that the use of torture was never authorised at any level.

[134] Based on these findings, the issue of the next step appears to have been considered at senior officer level. This resulted in a decision at Assistant Chief Constable level in October 2014 not to take the matter any further on the basis that no evidence had been found which supported the allegation that the British Government authorised the use of torture in Northern Ireland.

[135] It is this decision which seems to have been the trigger to this litigation but it should be noted that it appears that the quantity of information which was in fact before those who made the above decision on behalf of the PSNI was small and is not of a similar dimension to the bulk of papers which have now been put before the court.

[136] It is also right that the court should indicate that a substantial replying affidavit was filed in these proceedings by the RTE journalist who had been responsible for the 'The Torture Files' programme. This step was taken in response to affidavit filed by the PSNI. Rita O'Reilly, in her affidavit, strongly defends what she views as the 'unfounded' and 'untrue' claims about her reporting which were made by PSNI.

[137] The court has fully considered the contents of this affidavit. However, it is not of the view that for the purpose of these proceedings it is necessary for it to delve into the areas of dispute revealed by it. It notes that Ms O'Reilly has averred that she had accessed the Rees memo from the UK national archives in a Ministry of Defence file and that the documentary was based on careful examination and analysis of thousands of records.

PART B

[138] A substantial volume of documents have been supplied to the court as exhibits to affidavits. Many of these consist of old records of one sort or another. Quite a number go back to the 1970s or before. The court, impliedly if not explicitly, has been asked to take them into account in determining this case. The documents have come from all sides. As an exhibit to an affidavit sworn on behalf of the Northern Ireland Office, hundreds of pages of documents have been put before the court. Most of these take the form of correspondence within government. Many of the documents are illegible or barely legible. The same is true in relation to lesser, though not insignificant, volumes of documents, filed by each of the applicants.

[139] While the court has read or tried to read the exhibited materials, it believes that it would be wise to treat what they contain with some circumspection. Much of what it has considered has little relevance to the issues which fall to be considered in this judicial review. But, even apart from that, there could be no serious argument that the court is obtaining a full, as against a partial, picture of events. Self-evidently, there will have been, and perhaps still are, many other documents which the court has not seen.

[140] Additionally, the court considers that it ought also to keep in mind that many of the documents it is looking at arise from a different era.

[141] In what follows the court will seek to draw on these exhibited materials sparingly and will only cite particular documents or parts of documents when it appears to have something of importance to the issues in this case to say. It is simply not viable for the court to quote at length from document after document, especially where the flavour of a debate or the content of a dispute has already been described in Part A of this judgment.

Ministerial knowledge/authorisation

[142] This issue has been central to these proceedings. From what has already been said it can be seen that in the period immediately after the use of deep interrogation techniques there existed a broad official line in relation to this issue. This was that the use of deep interrogation was authorised, both by the authorities in the United Kingdom and by the authorities in Northern Ireland. Different formulations were used but often the language was that authorisation came from a high level or from the Northern Ireland authorities with concurrence from the United Kingdom authorities. This leaves little doubt that authorisation was being provided at least by officials if not by Ministers. But there also remained doubts about the state of knowledge of the authoriser. This was a subject largely finessed in the official line.

[143] Some of the documents which the court has seen shed some light on this issue either directly or indirectly.

[144] Many of the indirect references go to showing that the requisite systems were being established but there are direct references which appear to make it likely that particular Ministers were involved in authorising the process of interrogation with (at least) basic knowledge of what was involved.

[145] In this regard there are repeated references in the documents to a briefing provided to the Secretary of State for Defence on 9 August 1971 by an intelligence branch. At this time, the decision had just politically been made to proceed with internment.

[146] The court has considered a document dated 9 August 1971 which appears to be highly relevant. It is from a Brigadier Lewis and is marked 'Top Secret'. It is headed "Interrogation – Northern Ireland". It begins by indicating that the recipient may wish to ensure that the Secretary of State (for Defence) is fully aware of the JIC Directive on Interrogation. It then describes the safeguards which are contained in that document (see paragraph [13] above). Following that description, there is a discussion of the aim of interrogation in depth which is said to be along the lines of acquiring knowledge in relation to terrorist plans. It then describes the essence of interrogation in depth. It explains the methods of interrogation. It refers in this connection to "the now well tried methods outlined above". This refers back to the subject's ignorance of his whereabouts; isolation; fatigue; and white sound. Some detail is provided. It notes, in its penultimate paragraph, that "subjects who refuse to give any information within approximately five days will be released to segregated detention". In the final paragraph of the document there is a reference to Ballykelly being designed with the knowledge of the RUC under the professional guidance of the Joint Service Intelligence Wing "in the light of the latest techniques evolved from recent operations". It then goes on to note that it was to be the RUC, not the army, which would conduct the interrogation in depth. The final sentence indicates that not to use the Centre and the techniques ('within their safeguards') would be to lose one of the major advantages of internment.

[147] The document has all the appearance of a briefing document but it is not possible to say from its contents that it was actually read or approved by the Secretary of State.

[148] Other documents the court has seen, however, suggest that it is likely that this or a similar document was considered by the Secretary of State. In this connection, the court will refer to a document dated 9 November 1971 from a MOD official, Mr Hockaday. The document is marked 'Secret' and is entitled "Northern Ireland – Authority for Interrogation". In its material part, it reads:

> "2. Following a visit to Northern Ireland by the Intelligence Co-ordinator, whose report emphasised the importance of interrogation and the desirability of assisting the RUC Special Branch in every way possible, a

request for assistance in the setting up of an RUC Interrogation Centre was discussed on 24 March 1971 at a meeting in the Ministry of Defence with representation of the Security Service. As the Security Service was not prepared to undertake the commitment, it was agreed that assistance should be provided by the Joint Services Intelligence Wing (JSIW) which is recognised as the only official school for interrogation training. The Home Office was informed at official level of the agreement, and DGI mentioned the matter in general terms to the Minister of State at the end of March.

3. In discussion on the pros and cons of internment in early August, S of S was advised that one of the advantages would be the intelligence dividends expected to be obtained through interrogation. Following the decision to proceed to internment, VCGS forwarded to S of S on 9 August a note from BGS (INT) which:-

(a) summarised the safeguards provided in JIC(65)15;

(b) explained that the supporting methods designed to heighten the subject's desire to communicate with his fellow human beings included isolation, fatigue, white sound, and deprivation of sense of place and time;

(c) made clear that the interrogation would be conducted by the RUC and that JSIW had provided, and would continue to provide, advice and support from the technical intelligence aspect.

4. On 10 August S of S [Lord Carrington] discussed the matter with the Home Secretary [Reginald Maudling]. Neither Secretary of State indicated any dissatisfaction with the situation explained in BGS (INT)'s minute. S of S consider I believe, that he and the Home Secretary (in the Prime Minister's absence) thereby acquiesced in the provision by the Army of advisory services for the interrogations that were expected to be authorised by the Northern Ireland Minister of Home Affairs and to produce a valuable intelligence dividend. The selection of individuals to be interrogated was, however, entirely a matter for the RUC and the Northern Ireland Government.

> 5. On 11 August Mr. Faulkner, acting as Minister for Home Affairs, and on the advice of the RUC, signed orders … authorising the removal of each of the 12 persons … Mr Faulkner had received recommendations that these individuals should be interrogated, and he had been extensively briefed by the Director of Intelligence in Northern Ireland on the techniques of interrogation. By authorising the removal of these persons in the circumstances, Mr Faulkner must be deemed to have agreed that they should be interrogated.
>
> 6. I believe therefore that not only would it be fair that any public answer should be in terms that interrogation had been authorised by the Northern Ireland Government with the knowledge and acquiescence of HMG; but that the legal fact of the signing of the removal order by Mr Faulkner virtually precludes any other answer. Likewise, if asked who authorised interrogation of these particular individuals, the facts permit no other answer than "the Northern Ireland Government".
>
> 7. This minute is being copied to the Home Office and the Secretary of the JIC. If they agree the facts and deductions in the foregoing paragraphs, it will be for consideration when and how the Home Office should obtain Mr Faulkner's agreement that this will be the public line taken."

[149] It seems to the court that this is an important document in that:

(a) It confirms the briefing given on 9 August 1971.

(b) It shows that the Secretary of State for Defence was the object of the briefing.

(c) It demonstrates that the Secretary of State was told of the intelligence dividends which would be expected to be obtained through interrogation.

(d) It confirms that he was told not only about the safeguards found in JIC(65)15 but also about "the supporting methods" designed to heighten the subject's desire to communicate with his fellow human beings including isolation, fatigue, white sound and deprivation of sense of place and time.

(e) It indicates that the interrogation would be conducted by the RUC and that JSIW had provided, and would continue to provide, advice and support from the technical intelligence aspect.

(f) It shows that the Secretary of State discussed the matter on the following day with the Home Secretary.

(g) It makes clear that neither demonstrated any dissatisfaction with the situation.

(h) It indicates that the Northern Ireland Minister for Home Affairs had been extensively briefed on the techniques of interrogation and had authorised the removal of each of the persons who was to undergo the process.

[150] Another document contains similar references to the above. It is a report about interrogation training dated 27 August 1971. It is written by Brigadier Lewis and was intended for the DGI (Director General Intelligence?). In its material part, it reads:

> "Ballykelly
>
> 10. The Home Office was fully represented on inter-departmental discussions surrounding internment, and these included the establishment of the Interrogation Centre at Ballykelly. There can have been NO doubt in anybody's mind as to the purpose for which this camp was being modified.
>
> **Implementation**
>
> 11. I need NOT document the recent history of interrogation because it is fresh in all our minds. It is enough to record that:
>
> a. I made a full explanatory report to VCGS, setting out our interrogation techniques in detail.
>
> b. VCGS forwarded this to S of S (VCGS/828 of 9 Aug 71).
>
> c. Later PS/S of S told me that S of S discussed this with the Home Secretary personally – I think on the same day.

> d. Interrogation began on 11 Aug 71 at 1900 hrs, but NOT until D of I had had one hour of personally explaining techniques to Mr Faulkner".

[151] It will also be recalled that when the issue of release of records was considered in 2002 concerns were expressed by officials about, *inter alia*, ministerial awareness of interrogation methods. This is referred to at paragraphs [93]-[98] above. This concern appears to dovetail with the content of the documents set out above.

[152] There are a range of other documents the court has seen which might be viewed as consistent with the position described but the court does not see any necessity to go into these in this judgment.

[153] There is also evidence within the papers that the Minister of State for Defence (Lord Balniel) visited a location in England where he saw at least some of the techniques being used. For example, a visit by him is referred to having occurred in September 1971 to a training exercise "to see the techniques of interrogation being practised" in a letter from an official within the Ministry of Defence dated 8 February 1973. The date in this letter is important as while it was after the interrogation in depth of 12 detainees, it was before two other men were subjected to them in October 1971. Lord Balniel was asked a question in Parliament about when he first had heard the noise made by the Army's electronic noise machine. The question was asked (by Mr George Cunningham MP) on 6 December 1971. The answer provided by the Minister was 28 October 1971 – a date after the interrogation in depth of the two further men. This date is referred to in an internal MOD document dated 9 February 1972 in which it is stated that the Minister for State on 28 October 1971 "visited JSIW to be briefed on interrogation and to watch a demonstration of the techniques".

[154] The court will turn to another aspect of the volume of documents before it.

The issue of possible prosecutions arising from the events

[155] It does appear that the issue of possible prosecutions was considered at a relatively early stage after the use of interrogation in depth methods came to light, at least in England and Wales. The court is able to be clear about this because the matter was raised in the House of Commons as early as 1 December 1971. In answer to a written question from Mr George Cunningham MP specifically on the issue of proceedings being taken against those who planned the use of in depth interrogation in Northern Ireland, the Attorney General stated:

> "In my opinion there is no evidence that any person within the jurisdiction of the English courts has committed a criminal offence of the nature alleged".

[156] The court has not seen anything which suggests that in the period since this answer the position set out in it changed.

[157] The court does, of course, note that the answer was limited to the position in England and Wales. At that time the Attorney General would not have had direct responsibility for prosecutions in Northern Ireland, which were matters which would have fallen within the responsibility of the Attorney General for Northern Ireland.

[158] As will be seen from a document compiled in 1978, which is discussed below, there are doubts about the adequacy of investigations carried out at the time.

Assurances given to the RUC

[159] It is evident from a number of the documents which the court has seen that at some stage in or around the period when interrogation in depth was planned or was being used or in its immediate aftermath, the RUC was provided with a degree of assurance about the position of its officers who were involved in interrogations, at least provided that they were carried out within the JIC Guidelines.

[160] During the course of the Compton inquiry, the Committee met with senior RUC officials on 3 September 1971. In the minutes of the meeting, it was suggested that the methods of interrogation used were recommended by the Army and, although they did not involve physical violence, their use had been unprecedented within the RUC. The minute records that the techniques were only used "after the highest Stormont and Westminster authority had been obtained". The minutes also record the RUC personnel at the meeting stating that high assurances had been obtained before the operation was conducted. The RUC expressed the hope of individual officers that they should not have to appear before the Committee, but it was understood that this may not apply where there were allegations of assault.

[161] On 22 September 1971 another meeting was held between the secretaries to the Compton committee and the RUC. A minute of the meeting indicates that the Assistant Chief Constable, Mr Johnson:

> "… expressed grave concerns about the enquiry examining detailed allegations lest they proceeded in practice to look at the whole of the interrogation process. He rehearsed at length the history of the enterprise so far as the RUC were concerned; how the military had initiated the idea; how in the early part of the year they had run a presentation for his officers; how the whole thing had been forgotten until immediately before internment; and how at the last moment it had been decided to go ahead only after assurances had been obtained from the highest places. The assurances, as

> Mr Johnson interpreted them, give every support to the operation short of actions that involved physical brutality and it was because the Inquiry's terms of reference had been limited to looking at allegations of brutality that the RUC had found the idea of an investigation acceptable at all having regard to the protection they had sought and obtained …"

[162] On 4 October 1971 Sir Edmund Compton met with a Government official. The minute of the meeting records that Sir Edmund handed over a document (which has not been located) which was given to him and caused him concern. The memo suggested that it related to an allegation in the civil proceedings taken by Patrick J McClean in respect of the granting of prior ministerial authority for the use of the five techniques. Sir Edmund repeated his understanding that RUC officers had acted on instructions and an assurance that they would be immune from legal proceedings. He appears to have expressed concern about the extent to which he could investigate the issue of prior authority in light of his terms of reference.

[163] There is a later letter dated 15 October 1971. It is headed 'Note for Secretary of State'. It enclosed a copy of the draft of part of the Compton report. The writer said he had held a meeting that afternoon with CGS, DGI and AUS (GS) (the court believes these to be entities within the Ministry of Defence) and that he had also discussed it with Sir Philip Allen. At the meeting it had been pointed out the Compton team had been told before they started work that interrogation was a security matter which could not be investigated. However, the draft report, nonetheless, contained references to hooding and noise. It was agreed at the meeting that "he (the court assumes Compton) will have to be allowed to say something about hooding and noise in the concluding part of his report". The writer states that a note would be prepared explaining why the Ministry wanted substantial changes to the report – particular about hooding and noise – for security reasons. The letter then continues:

> "5. There is a further position of the RUC's Special Branch referred to in paragraph 4c. of Mr Hockaday's note. In so far as there may well be public criticism when the report is published about the procedures used, the RUC will, I think, clearly expect UK Ministers to deal with the criticisms particularly since it was the UK authorities who persuaded the RUC to adopt the procedures in question."

[164] While the detail is not completely clear the above references suggest that indeed the RUC had been provided with certain assurances in respect of their part in the operation.

[165] This information to a degree is also supported by evidence which was given by the Attorney General for Northern Ireland when he met with members of the Parker Enquiry in January 1972. In the course of discussion the position adopted by him was not only that it was accepted that the interrogation techniques constituted a breach of the law, subject to reservations about noise and sleep deprivation, but that consideration was being given by the Northern Ireland authorities in the aftermath of events to the possibility of an Act of Indemnity being passed on the basis that persons who were acting in the public interest should not be exposed to the criminal law. Nothing later became of this suggestion.

The depth of the investigation into those who were responsible

[166] There is, within the welter of documents provided, a document which is dated 13 February 1978 from a senior official who had been dealing with the inter-State case. The document is entitled 'Irish State Case: Investigation of Allegations of Ill-treatment and Prosecutions of Offenders'. The document was written after the judgment by the ECtHR had been given. It contains some interesting remarks on the subject of the investigations which were carried out in respect of the events of 1971. For example, the author stated:

> "All the Commission cases were investigated at the time [but] [t]he major difficulty, however, is that there is a large area of doubt about the adequacy of the investigations which were carried out."
>
> Reference was also made to a 'cover up' on the part of the RUC at least in the years 1971 and 1972 leading to the "complete absence of prosecutions in the illustrative cases" and to the paucity of prosecutions in the remaining cases.

In respect of the issue of what line the authorities should take on investigations and prosecutions, the author went on:

> "In relation to the five techniques, there is no point in talking about evidence or investigations. It would not be a week's work to discover who was responsible if we set our minds to it. As I understand it, the decision not to prosecute was, and is, a policy decision (and no doubt an admirable one)."

[167] The court will take these remarks into account but will remind itself that they are, in the context of this case as a whole, far from definitive and reflect only a particular official's view.

Materials relating to the issue of independence of the PSNI

[168] An issue in the case is whether, if a police investigation has to be carried out, the PSNI is sufficiently independent to discharge the role of investigator. Relevant to this, is material which was provided by the PSNI to the first applicant's solicitors in January 2015, following a request made pursuant to the Freedom of Information Act 2000. The reply indicated that there were 51 staff in the Legacy Investigations Branch ("LIB") (which has now taken over the work of the HET), 22 of whom were former members of the RUC. Within the figure of 51, in addition, there were 29 staff who had served in PSNI Special Branch, and 17 who had served in the HET.

[169] The applicants also placed before the court the Seventh Report of Session 2014-2015 of the United Kingdom Parliament's Joint House of Lords/House of Commons Joint Committee on Human Rights, published on 11 March 2015. In discussing investigations into deaths in Northern Ireland, the report refers to the then proposed Historical Investigations Unit ("HIU") which was to be established pursuant to the Stormont House Agreement of December 2014. It notes that, in the meantime, the work of the HIU is to be carried out by LIB and states:

> "3.7 … As well as having fewer resources at its disposal than its predecessor, the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service. We recommend that the legislation establishing the Historical Investigations Unit be treated as an urgent priority …"

[170] On 16 March 2016 it was averred on behalf of the Department of Justice in an affidavit in these proceedings that in the "absence of any evidence to support a direct causal link between the alleged torture and the death of Mr McKenna, the case would not fall within the remit of the HIU in the event of it being established. Operational responsibility for the decision as to whether to carry out an investigation in the circumstances of this case remains within the remit of the PSNI".

Requests to the Irish Attorney General and Secretary of State for Northern Ireland

[171] Following the discovery of the new materials and the airing of the RTÉ documentary representations were made to the Attorney General in Ireland requesting that the new materials be reviewed with a view to applying to the European Court of Human Rights under Rule 80 of the Rules of the Court to reopen the case. In correspondence dated 12 March 2014 the Attorney General's office indicated that, from the documents it had seen, it did not consider that new evidence had become available. In November 2014, solicitors for Mr McGuigan initiated judicial review proceedings in the High Court in Dublin to compel the Irish Government to apply to reopen the case. In 2 December 2014 the Irish Government

confirmed in Court that they were applying to reopen the case and on 4 December 2014 the application to the ECtHR was made.

[172] On 8 December 2014 KRW Law wrote to the Secretary of State for Northern Ireland, Theresa Villiers, asking her to consider the position and in particular to consider convening an independent and effective inquiry pursuant to the Inquiries Act 2005 to remedy the UK's substantive violation of Article 3 of the Convention and the customary international law prohibitions on torture, as reflected in the UN Convention against Torture 1984.

[173] On 8 January 2015 KRW Law sent a pre-action letter to the Crown Solicitor's Office indicating that Mr McGuigan intended to challenge the continuing failure of the respondents to conduct a full, independent and effective investigation into his torture at the hands of British state servants or agents in compliance with the UK's Article 3 and international law obligations. It also indicated he wished in particular to challenge the PSNI decision of 17 October 2014 that there was no evidence to warrant an investigation into the allegation that the UK Government authorised torture. The letter stated that the applicant expected the respondents to ensure an effective, independent investigation without further delay. It was further asserted that the PSNI was not sufficiently independent to conduct an Article 3 compliant, effective official investigation. The reason given for this was that the PSNI was the successor institution of the RUC, inheriting resources and counting RUC men among its ranks, and that RUC officers were directly implicated in the treatment of the hooded men.

[174] The complaints made by Ms McKenna are expressed in similar terms save that she alleges that the failure to have an effective independent investigation is a breach of Article 2 rights under the Convention, in addition to those in Article 3.

[175] Replies dated 15 January 2015 were provided by the Crown Solicitor's Office on behalf of the Secretary of State and PSNI. These proposed respondents considered that, in circumstances where the case was being reconsidered by the ECtHR, the requests for a public inquiry/a police investigation were premature. A letter on 10 February 2015 on behalf of the Department of Justice agreed with this position.

[176] At the hearing the court was told that the United Kingdom Government is currently seeking the permission of the ECtHR to rely on the transcript of Dr Leigh's evidence before the European Commission. This will, it was submitted, provide an accurate record of the evidence which Dr Leigh actually provided. To date the court has not received any such transcript.

PART C

Summary of Court's assessment

[177] Having considered the factual background in some detail, together with the extensive documentary material with which the court has been provided, and before addressing the law, the court is minded to record its main conclusions as they relate to the broad themes relevant to this litigation.

[178] These are as follows:

(i) Deep interrogation techniques were taught by the MOD to members of the RUC beginning around March 1971.

(ii) Interrogations were as a result supposed to be conducted in accordance with JIC (65) 15.

(iii) Ministers at Westminster and in Northern Ireland were aware of the techniques as they were told what the methods to be employed were to be. The techniques were to be those which had been used on numerous occasions in the past. The above position was not disguised when controversy surrounding the use of the techniques broke out within days of deep interrogation being used but, for the most part, the use of general formulations to describe the official position was adopted. Authorisation, it was said, occurred at a "high level" or it was said that steps were taken by the Northern Ireland Government with the concurrence of the United Kingdom Government. The role of individuals was not highlighted. The court considers there is evidence which supports the view that informed authorisation in advance was given by one, if not two, Cabinet Ministers, as well as by the Northern Ireland Minister for Home Affairs.

(iv) The Compton inquiry did consider issues of alleged ill-treatment /brutality in the context of the use of deep interrogation but it did not explore the process of authorisation in any depth. Nor did it explore issues related to the identification or punishment of those responsible for what occurred.

(v) The Parker inquiry likewise did not concentrate on the issue of identifying those responsible for setting up and authorising the operation of deep interrogation. Rather it was chiefly concerned with policy development. However, both majority and minority reports acknowledged that some, if not all, of the techniques in use involved unlawfulness and the possible commission of criminal offences.

(vi) It appears likely that at some point in the process of authorising the use of interrogation in depth or in the immediate aftermath of controversy involving its use, the RUC received assurance that its members, provided they acted in line with the JIC Guidelines, would not face legal sanction. The detail of this is unclear.

(v) Unsurprisingly, the Government of the day announced when Parker was debated in Parliament that the techniques would not be used in future as an aid to interrogation.

(vi) The Ireland-United Kingdom inter-State case was brought in the aftermath of these events. Insofar as the case involved the issue of deep interrogation it centred on the question of the substantive breach of the requirements of Article 3 ECHR, including the issue of whether the respondent State was engaging in an administrative practice. The overall issues were subjected to careful consideration and evidence taking, albeit on a limited scale. Ultimately, the UK Government conceded the administrative practice point but the issue of the impact of deep interrogation on the mental health of the individual who was the subject of it was contested.

(vii) While both the Commission and the Court found that the UK had substantively breached Article 3 in the context of deep interrogation, the emphasis was different as between the two with the Commission viewing what had occurred as amounting to inhuman and degrading treatment and torture whereas the court declined to make any finding of torture. Notably, the court's conclusion was reached in circumstances in which the UK had not, before the court, contested the Commission's finding in respect of torture.

(ix) Neither the Commission nor the court focussed to a substantial degree on the question of the effectiveness of any official investigation on the part of the UK authorities in the context of bringing those responsible for what occurred to justice. This aspect of Article 3 jurisprudence had not at that time been developed.

(x) Only a very limited finding was made by the Commission about the psychiatric effects arising from deep interrogation, though it acknowledged that on this issue there was disagreement between the psychiatrists on either side. The Commission said it was unable to establish the exact degree of psychiatric after-effects which the use of the techniques had. However it accepted that some after-effects resulting from the application of the techniques could not be excluded. This position was adopted later by the court.

(xi) Explicitly the ECtHR held that it could not direct the UK to institute criminal or disciplinary proceedings against those members of the security forces who had committed acts in breach of Article 3 or against those who condoned or tolerated such breaches.

(xii) There is little sign that any serious investigation in fact took place in the immediate aftermath of the use of the measures directed at the issue of identifying persons responsible for possible prosecution. Nor is there

evidence which suggests that such an investigation in a meaningful way was conducted subsequently.

(xiii) Following the end of the inter-State proceedings in 1978 the issue of what had happened to the hooded men lay dormant. While issues arose within the UK Government as to the disclosure of official public records in the early 2000s the discussion of this issue was conducted privately. Ultimately from in or around 2003 some documents were deposited in the UK National Archives, though their presence for long went unnoticed.

(xiv) It was not until 2014, as a result of documents found in the National Archives, that controversy in respect of the hooded men was re-awakened. The immediate trigger for this was a RTÉ broadcast in 2014 which suggested that torture had been authorised at the time by a UK Government Minister and that at the time of the inter-State case the UK Government had withheld from the Strasbourg institutions evidence which tended to undermine the UK case that the after-effects of the use of the five techniques were not long lasting or severe.

(xv) The RTÉ broadcast led to questions being asked about the posture of the PSNI in relation to the above allegations. In July 2014 the forum of the Northern Ireland Policing Board was used to question senior police officers, including the Chief Constable, about what steps the police proposed to take, in particular in relation to the allegation that torture had been authorised by a UK Government Minister.

(xvi) These questions elicited the response that the police would assess any such allegation and, if there was sufficient evidence, the question of prosecution could be considered.

(xvii) Thereafter a preliminary investigation was carried out at the National Archives on behalf of the police but while it considered a range of documents it was concluded by the investigator that there would be no useful purpose served by taking the investigation further. This resulted in two Assistant Chief Constables stating that the evidence to support an allegation that the UK Government had authorised torture had not been found.

(xviii) This led to the present proceedings.

(xix) The issue of whether or not the ECtHR was misled is a matter which is currently being considered at Strasbourg.

PART D

The legal issues before the Court

[179] While there are two applications for judicial review before the court, the applications have a considerable amount in common. The key legal issues before the court, upon which the applicants and respondents are divided, can be encapsulated in the following way.

[180] Firstly, it is alleged by each of the applicants that the respondents are guilty of failing to ensure that, as required by Convention law, an effective investigation is carried out relating to the performance by the UK of its procedural obligation under Article 3 (or in the case of the second applicant, Articles 2 and 3). It is alleged that there is at this time a duty enforceable in domestic law on the state to carry out an effective official investigation into the treatment of the "hooded men" which is capable of leading to the identification and punishment of those responsible for the methods which were used. Likewise, it is said that a similar duty enforceable in domestic law arises from of the death of Mr McKenna. The court will refer to this issue as the "Convention" issue.

[181] Secondly, it is alleged that, even if the Convention as a matter of domestic law does not require the steps referred above to be taken, as a matter of common law such steps are required. The court will refer to this issue as the "common law" issue.

[182] Thirdly, both applicants suggest that if the court finds that an effective official investigation (whether under Article 2 or Article 3) must be conducted by the requisite organs of the State, the PSNI should not be permitted to carry out the same, as it lacks the requisite measure of independence required by the Convention. The court will refer to this issue as the "independence" issue.

[183] In addition to the above there are a range of miscellaneous issues which arise which the court will consider.

PART E

The legal landscape

[184] Before considering each of the issues in turn, it may be helpful to consider the legal landscape, as it affects the main issues referred to above, more broadly.

[185] The terms of Articles 2 and 3 of the Convention are well known and need not be set out in their generality. This is because this case is concerned with that aspect of these Articles which is concerned with the requirement on the State, in the context of a death, or in the context of Article 3 violations, to carry out an effective official investigation into what has occurred. Such a requirement is common to both Articles and has the purpose of reinforcing the substantive right in each case *viz* the right to life and the right not to be made subject to inhuman or degrading treatment or torture at the hands of the State. The gravity of any State interference in these issues begets the need for the State to carry out such investigations as are necessary

to secure accountability in practice and to ensure that those responsible are capable of being identified and punished.

[186] This investigative aspect of Articles 2 and 3 – sometimes referred to as the procedural aspect – is not grounded in the words of the Articles but springs by implication from the jurisprudence of the Strasbourg Court and has evolved over time. At the time of the inter-State case of Ireland v United Kingdom it had yet to achieve any prominence and it is this factor which largely explains why this aspect does not appear at the forefront of the concerns highlighted in that litigation. However, especially after the decision of the ECtHR in McCann v United Kingdom in 1995[1], the importance of the procedural obligation grew. For long the procedural obligation was viewed as being inextricably linked to the death itself so that it could not be viewed as detached from it. But in more recent times, beginning with the ECtHR's decision in Silih v Slovenia (2009) 49 EHRR 37 and ending most recently in the case of Janowiec v Russia (2014) 58 EHRR 30, the Strasbourg court has regarded it as a free-standing obligation which may fall to be performed even in circumstances where a death or the treatment in question occurred before the State party respondent adhered to the Convention.

[187] What certainly appears to be clear today is that if the events with which this case is concerned were to be repeated at this time there would be no question but that the procedural obligation would have to be performed by the State involved and that its standards would be demanding. In the context of Article 3, a good example of this, taken from the modern era, is the case of Al-Nashiri v Poland (2015) 60 EHRR 16, which involved the use of interrogation techniques, contrary to Article 3, by United States personnel in Poland. The court emphasised that where there was an arguable claim from an individual that he or she had suffered from treatment at the hands of agents of the State, contrary to Article 3, there should be an effective official investigation which should be capable of leading to the identification and punishment of those responsible:

> "Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity" (see paragraph 485).

The court went on (at paragraph 486) to say that:

[1] 21 EHRR 97. The ECtHR stated that "The obligation to protect the right to life under [Article 2] read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State" (see paragraph 161).

> "The investigation into serious allegations of ill-treatment must be both prompt and thorough. This means that the authorities must act of their own motion once the matter has come to their attention and must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence. Any deficiency in the investigation which undermines the ability to establish the cause of injuries or the identity of those responsible will risk falling foul of this standard".

In a later paragraph (495) the court stated that:

> "An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing the appearance of impunity, collusion in or tolerance of unlawful acts".

The court (at paragraph 497) also, on the facts of the case, spoke of the importance and gravity of the issues requiring "particularly intense public scrutiny of the investigation".

[188] Domestic case law has contributed on the issue of the standard of scrutiny which is relevant in this context. In some cases the State will enjoy a limited margin of appreciation as to how it performs its duty to investigate, depending on the nature and severity of the case under consideration. But the width of the discretion available to it, according to Laws LJ in D v Commissioner of Police for the Metropolis [2016] QB 161 at [45], "widens at the bottom of the scale but narrows at the top" in the context of a sliding scale which goes from, at the top, torture by State agents to, at the bottom, negligence by non-State agents. This suggests that in a case of the sort with which this judgment is concerned, even if the practice at issue is viewed as less than torture, there is unlikely to be a substantial area of leeway in the way in which the State is required to perform its procedural obligation.

[189] It is also clear from the Strasbourg jurisprudence that, as in the present case, the later payment of compensation to the victim is an insufficient form of remedy by itself. In the recent Grand Chamber decision in Jeronovics v Latvia (Application 44898/10) (5 July 2016) the respondent State had suggested on the facts of the case that the payment of compensation had the effect of providing appropriate redress for the victim, but this was roundly rejected. The court stating:

> "In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice" (see paragraph 105).

[190] The court went on to note in that judgment what will later herein be described as the Brecknell doctrine in the context of Article 2 *viz* that a new obligation to investigate a death may arise where there is new information which has come into the public domain purportedly casting a new light on the circumstances, applies similarly to the procedural obligation under Article 3. However, in both cases the nature and extent of any subsequent investigation required by the procedural obligation will inevitably depend on the circumstances of each individual case and may well differ from that to be expected immediately after the event had occurred: see paragraph 107.

The problem of the efflux of time

[191] A fault line in the legal landscape in this case relates to the efflux of time since the events giving rise to the applicants' complaints.

[192] The key events took place in the 1970s but these proceedings were initiated long afterward in 2015. Insofar as the cornerstone of the litigation relates to non-compliance with the requirements of the Convention, this raises serious issues about whether a domestic court can apply the Human Rights Act 1998, which itself commenced on 2 October 2000, to them. If the HRA is viewed as not applying to this case, it is difficult to see how otherwise the rights which it brings into domestic law can be brought home.

[193] On this issue there are conflicting domestic legal authorities.

[194] The case of In Re McKerr [2004] 1 WLR 807 is the first in a line of cases which requires consideration. This was a case involving the death in November 1982 of the applicant's father at the hands of the police. In proceedings begun after the HRA had come into force, it was argued that there had been a continuing failure on the part of the Secretary of State to hold an effective official investigation into the death, as required by Article 2 of the Convention. When the judicial review proceedings reached the House of Lords, it was unanimously held that the Convention was not part of domestic law save insofar as it was incorporated into the

1998 Act and that the 1998 Act was not generally retrospective. As there had been no domestic law breach of Article 2 before the Act commenced, it was held that there could be no breach after it had been passed.

[195] The speeches were broadly in line with one another and a single quotation will suffice taken from the leading speech of Lord Nicholls at paragraph 21:

> "In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the Article 2 obligation to investigate must have occurred post-Act".

[196] It, therefore, can be seen that the effect of McKerr had been to put in place a clear temporal cut off point in respect of deaths and the requirement to have an effective, official investigation following same. For Article 2 to apply as a matter of domestic law the death would have to be on or after the HRA came into force on 2 October 2000.

[197] Part of the approach taken in the House of Lords owed its origin to the fact that the procedural obligation until that time has been identified as attached to the death but, as already noted, this situation altered as a result of the Grand Chamber decisions in Silih (and later still by the same court's more developed view in Janoweic).

[198] In Silih the Grand Chamber identified the procedural obligation as one which was detached from the death. It was decided in April 2009 and led to the case of In Re McCaughey which was decided by the Supreme Court in 2011: see, [2012] 1 AC 725. In this case the applicant had been killed by soldiers in 1990 but, though a coroner had been dealing with it from 1994, the inquest was not due to take place until much later in 2009. An issue arose as to whether the inquest to be held at that time was to be conducted in a way which complied with the requirements of Article 2. This issue ultimately made its way to the Supreme Court. The lower courts had held that as McKerr applied Article 2 did not apply as the death had long pre-dated the commencement of the HRA, but by a majority of 6 to 1 the Supreme Court held that the inquest had to be conducted in line with the requirements of Article 2.

[199] There appears to be a number of different strands to the Supreme Court's decision which are worth identifying.

[200] Clearly the Strasbourg Court's decision in Silih was viewed as of great importance. The context of that decision was not the enactment of the HRA in the United Kingdom. Rather, Silih related to the issue of the temporal competence of the Court of Human Rights. In Silih the court held that the procedural obligation within Article 2 should be viewed as a freestanding obligation detached from the death in question. Consequently if the death had occurred prior to the critical date, which was the date on which the respondent State ratified the Convention, the procedural obligation, at least in certain circumstances, fell to be performed and could be enforced within the Convention system. It was therefore the case that the court held that in the context of a death which had occurred before Slovenia had acceded to the Convention there could be a breach of Article 2's procedural obligation in respect of events which largely took place after the date of accession.

[201] The Grand Chamber, however, appeared to be anxious to place some limits on the width of the doctrine it was propounding. It did not hold, *simpliciter*, that the detachable procedural obligation could be enforced in a case of this type in respect of deaths that had occurred before the critical date on an open-ended basis. In the interests of legal certainly, it laid emphasis on the operation of certain tests (which have been subsequently expanded upon in the later case of Janowiec). In Silih the Court made reference to various controls *viz*:

(a) That only procedural acts and/or omissions occurring after the critical date fell within the court's temporal jurisdiction.

(b) That there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligation to come into effect.

(c) That a significant proportion of the procedural steps will have been or ought to have been carried out after the critical date.

(d) However, in certain circumstances, the connection could be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

[202] It fell to the members of the Supreme Court to interpret the meaning to be given to these and other aspects of the decision in Silih. The leading judgment of the court was given by Lord Phillips. He stated at paragraph 47:

> "I can start by stating with some confidence what the Grand Chamber did not decide. It did not decide that there is a continuing obligation to hold a procedural

> investigation that persists from the time of the death until the obligation has been satisfied".

He then went on, at paragraph 48:

> "The 'procedural acts and/or omissions'…relate to specific incidents of a particular process or procedure. "Omissions" cannot be read as applying to historic failings before the critical date that have not been remedied".

At paragraph 49 he commented that:

> "The concept of a connection between a death and the entry into force of the Convention for the State in question is not an easy one if, as seems to be the case, this connection is more than purely temporal".

And at paragraph 50 he said:

> "The obligation to comply with the procedural requirements of Article 2 is to apply where 'a significant proportion of the procedural steps ' that Article 2 requires (assuming it applies) in fact take place after the Convention has come into force. This appears to be free-standing obligation".

[203] Later in his judgment Lord Phillips posed the question: what difference has Silih…made? His answer was given at paragraph 61 as follows:

> "I believe that the most significant feature of the decision…is that it makes it quite clear that the Article 2 procedural obligation is not an obligation that continues indefinitely…[j]ust because there has been a historic failure to comply with the procedural obligation imposed by Article 2 it does not follow that there is an obligation to satisfy that obligation now. In so far as Article 2 imposes any obligation, this is a new free standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into [the applicants'] deaths. Silih…establishes that this event gives rise to a free standing obligation to ensure that the inquest satisfies the procedural requirements of Article 2".

[204] A second strand in the Supreme Court's consideration of the issue before it in McCaughey was that of the operation of the 'mirror principle' in the context of the interpretation of the HRA. This principle was explained by Lord Phillips at paragraph 59:

> "The second principle is that the ambit of application of the Act should mirror that of the Convention…[t]he object of the Act was to bring rights home. This will only be achieved if claimants are able to bring in this jurisdiction claims that they would otherwise be permitted to bring before the Strasbourg court".

At paragraph 62, Lord Phillips asked "Is the presumed intention of Parliament when enacting the HRA that there should be no domestic requirement to comply with this international obligation?". To this, his answer was: "the mirror principle should prevail. It would not be satisfactory for the coroner to conduct an inquest that did not satisfy the requirements of Article 2, leaving open the possibility of the claimants making a claim against the United Kingdom before the Strasbourg court. On a natural meaning of the provisions of the HRA they apply to any obligation that currently arises under Article 2".

[205] On the above reasoning Lord Phillips was of the view that there needed to be a departure from the McKerr decision.

[206] While there was a clear majority in the Supreme Court in favour of the result the court arrived at in McCaughey, not all of the judges agreed with the views expressed by Lord Phillips. For example, Lord Hope at paragraph 65 was of the opinion that before the court there were two issues:

> "The first is whether Article 2…gives rise to a procedural obligation on the State to carry out an effective public investigation into the circumstances of a death where agents of the State are, or may be, in some way implicated, even though because the death occurred before 2 October 2000 the substantive obligation does not apply to it in domestic law. The second is whether, if there is no such obligation in domestic law but the State nevertheless decides to carry out an investigation into a pre-commencement death of that kind, the investigation which it carries out must meet the procedural requirements of Article 2…".

[207] In Lord Hope's view the first issue should be answered in the way in which it was in McKerr (see paragraph 75), a decision with which he saw no reason to disagree. However, in respect of the second issue, in circumstances where it had been decided that there was going to be an inquest held in relation to the death he

saw no reason why it should not be carried out in accordance with the requirements of Article 2 (see paragraph 76).

[208] Interestingly, Baroness Hale expressed the view (at paragraph 93) that "[a]ccepting that this inquest must comply with the procedural requirements of Article 2 does not require that old inquests be reopened (unless there is important new material) or that inquiries be held into historic deaths". She appears to accept that the McCaughey case fell within narrow parameters, where the coroner had begun his inquiries in 1994 but where a significant part of his investigation post-dated the introduction of the HRA. She did not see the case as involving the retrospective operation of the 1998 Act (see paragraphs 89-90).

[209] The other judgments reflect a range of approaches. Lords Dyson and Kerr are largely supportive of Lord Phillips' position, though the latter does not appear to have viewed the case as being about retrospectivity. However, he plainly did view it as one in which Silih had altered the law in a way which impacted on the McKerr decision – as the nature of the procedural obligation had changed.

[210] Lord Brown's judgment seems to be closely related to the issue of outstanding inquests. He does not advert in terms to the status of McKerr. Lord Rodger, who dissented in respect of the outcome, considered that McKerr should prevail and that it was the governing authority and was unaffected by Silih.

[211] The full implications of the McCaughey decision have been the subject of consideration in later decisions domestically. A question which remains controversial is the status now of the McKerr decision. It had not been directly overruled in McCaughey and it seems clear that this issue will probably have to be elucidated further by the higher courts in due course.

[212] There have been two sets of litigation which it is necessary to refer to which have arisen in the domestic courts subsequent to McCaughey. Both sets post-date the Strasbourg court's judgment in Janowiec which had offered further guidance in respect of the conditions which had to be satisfied for the temporal jurisdiction of the ECtHR to arise in cases where the death in question had taken place prior to the critical date.

[213] According to Janowiec those conditions which, if met, trigger the court's temporal jurisdiction, in broad summary, were as follows. Firstly, the genuine connection test had to be fulfilled. This required that there must be a reasonably short period of time between the death and the entry into force of the Convention in the respondent State. A period of not in excess of 10 years was stipulated. In addition, the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention in the State in question.

[214] Secondly, as an alternative to meeting the requirements in the first condition, there could be the assumption of temporal jurisdiction in the special case

where what was described as the 'Convention values' test was satisfied. This test was viewed as applying only in 'extraordinary situations'. It would arise for consideration only where it could be said that such a step was necessary in order to ensure that the underlying values of the Convention, if it was to provide real and effective protection, were at risk. By way of guidance, it was indicated that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. The ECtHR commented that "[t]his would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments" (paragraph 150).

[215] The case of R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another was decided in the Supreme Court in November 2015[2]. At issue was the question of whether there was any obligation under the Convention or in domestic law outside the Convention for the authorities in the United Kingdom to hold an inquiry today into deaths at the hands of the British Army which had occurred in 1948 in the State of Selangor, now part of Malaysia, but then a part of a British Protected State. Of particular interest for present purposes was whether it could said that Article 2 of the Convention as a matter of domestic law required an effective official investigation to take place by reason of the operation of the HRA. There had not been such an investigation heretofore despite the fact that, in particular, during the period 1969-1970, statements had emerged from British soldiers which cast doubt on the official version of events leading to the deaths which suggested that the civilians killed had been unlawfully killed.

[216] In order to come to a conclusion on this issue, the court considered the authorities already discussed above, including Janowiec. Plainly in 1948 the Convention had yet to be devised. This did not occur to 1950. Moreover, while the United Kingdom ratified the Convention in 1953, it has not provided for a right of individual petition to Strasbourg to 1966. The court held that the equivalent of the 'critical date' in Convention terms, for the purpose of the proceedings was 1966, the date when the right of individuals to petition was accepted.

[217] Against this background, the court went through a process of applying by analogy the tests prescribed by the Strasbourg court. The outcome of this was that it was held that the genuine connection test could not be met as the length of time between the triggering event (1948) and the critical date (1966) far exceeded the 10 year period put forward in Janowiec. This meant that the Convention values test had to be considered but on this aspect the Court held that it could not be applied as, at the time of the triggering event, the Convention had not been devised.

[2] [2016] AC 1355

[218] In these circumstances the court determined that if the issue had arisen at Strasbourg no reliance could have been placed on Article 2 and the case would have been rejected on temporal grounds.

[219] In an important section of the judgment Lord Neuberger, who spoke for the majority in the court, adverted, notwithstanding the analysis which had just been described, to the issue of whether there simply was no right which could be relied on by the appellants under the 1998 HRA. He described the respondents' contention on this point as being based on the proposition that the jurisdiction of a UK court to entertain the proceedings arose from the 1998 Act, which only took effect on 2 October 2000. It could not, the respondents claimed, be invoked in respect of an event which occurred before that date. This submission by the respondents brought him into the direct territory of the scope of McKerr in the light of the McCaughey case. However, following some discussion of this issue at paragraphs [92]-[98], he reached the following position as to whether McKerr remained good law (at paragraphs [97]-[98]):

> "In the light of this somewhat unsatisfactory state of affairs, there would be much to be said for our deciding the issue of whether McKerr remains good law on this point. However, given that it is unnecessary to resolve that issue in order to determine this appeal, we ought not to decide it unless we have reached a clear and unanimous position on it. We have not. On the one hand, the respondents' case is supported by an unanimous decision of a five-judge court in McKerr, whose ratio is clear and simple to apply, but it could lead to undesirable conflicts between domestic and Strasbourg jurisprudence. On the other hand, the appellants' case derives significant support from two, and arguably three, of the judgments in the subsequent seven-judge court in McCaughey, and, while it involved applying Strasbourg jurisprudence which has been criticised for lack of clarity, it would ensure that domestic and Strasbourg jurisprudence march together…Accordingly, I would leave open the question of whether, if the Strasbourg court would have held that the appellants were entitled to seek an investigation into the Killings under Article 2, a UK court would have been bound to order an inquiry pursuant to the 1998 Act".

[220] The final authority which the court will advert to is the decision of the Court of Appeal in Northern Ireland in the case of In Re Geraldine Finucane [2017] NICA 7, in which judgment was given after the close of argument in this case. In that case the applicant was the wife of a solicitor who had been murdered by terrorists in February 1989 against a background which included significant concerns that the

authorities in Northern Ireland were complicit in the murder. The issue had become one of whether Article 2 of the Convention required an effective official investigation. An aspect of this was whether the Strasbourg court would have found the past record of investigations inadequate to meet the demands of Article 2 and another aspect related to whether, as a matter of domestic law, an investigative obligation pursuant to Article 2 arose from the HRA.

[221] On the former aspect, the court found that, applying the approach to the temporal aspect adopted in Janowiec, the tests therein set out were satisfied. Consequently the case would have been treated, in the court's view, as one within the temporal reach of the Strasbourg court. But it also held that in fact the investigations already carried out in the case would have been viewed as reasonable and adequate. Hence, in the court's judgment, the Strasbourg court would not have found a breach of Article 2. On this basis, the judicial review proceedings were dismissed.

[222] In reaching its conclusions the Court of Appeal made a number of close judgment calls. For example, it held that the genuine connection test had been met, notwithstanding that the distance in time between the death (1989) and the analogous triggering event in the form of the commencement of the HRA in domestic law (2000) was in excess of 10 years. On this point it considered that in respect of the period which should not be exceeded there existed an element of flexibility. The court also held that the Convention values test was met, notwithstanding that it described the meeting of this test as involving the overcoming of "an extremely high hurdle" (paragraph 167). Finally, by a majority, it held that the Brecknell test, which the court will consider shortly, was met.

[223] On the aspect of whether an obligation under Article 2 could arise by virtue of the terms of the HRA, notwithstanding the date of the death, the court offered at most a provisional view, in the course of which it drew attention to the treatment of the issue by Lord Neuberger in Keyu as well as the treatment of the point by the Court of Appeal in the same case.

[224] This latter treatment of the issue by the Court of Appeal is of interest as, speaking for the Court, Kay LJ, against a background in which the court had already held that the Strasbourg court would have extended its temporal jurisdiction on the facts of the case, clearly held that McKerr was still good law. The court's conclusions followed an extensive discussion of McKerr and McCaughey between paragraphs [86]-[98]. Its conclusions were stated at paragraphs [99]-[100] in passages quoted by the Northern Ireland Court of Appeal in Finucane. Kay LJ stated:

> "[99] We return to Mr Fordham's essential submission, using the language of his skeleton argument, namely that, whilst McKerr has constructed a roadblock, Re McCaughey has removed it. It is a bold submission. In our judgment it is wrong because it seeks to derive more

> from Re McCaughey than it has placed on offer. We do not consider that the Supreme Court was addressing the question whether a post-Human Rights Act decision whether or not to commence an investigation or inquest into a pre-Human Rights Act historic death is constrained by the procedural obligation under Article 2. Re McCaughey was a clear case of an inquest formally commenced before 1 October 2000 but with the major part of it being processed after that date.
>
> [100] What they (appellants) have been seeking in recent years is a new public inquiry, embracing an inquiry into the inadequacy of previous investigations. In our view, the domestic law in relation to reliance on Article 2 in these circumstances is still expounded in Re McKerr, by which we remain bound. We do not accept that a majority of the Supreme Court overruled Re McKerr on this point or intended to do so… Any attempt to move in that direction would now be a matter for the Supreme Court rather than us".

The Brecknell doctrine

[225] A survey of Convention law in respect of Article 2 (and Article 3) would not be complete without reference to the particular situation which the above doctrine has been designed by the ECtHR to deal with. In the aftermath of a violent or suspicious death (or by analogy behaviour consisting of inhuman or degrading treatment or torture) the obligation to hold an effective official investigation will usually be triggered straightaway. Accordingly, most such investigations must be conducted promptly following the death in question. However, while the object of such an investigation is to find the facts and, if possible, to attribute criminal responsibility, it is one of means only, and there will be investigations which have properly to be carried out which, in terms of outcome, are desultory.

[226] Such a situation is not to be viewed necessarily as the end of the matter as there will be situations where after a lapse of time information purportedly casting new light on the circumstances of a death comes into the public domain. The issue which then arises is whether, and in what form, the procedural obligation to investigate is revived. This is the issue which arose in Brecknell where following a death in 1975, in 1999 new information emerged, and the question arose as to whether this revived the need under Article 2 to investigate.

[227] In approaching this issue, the ECtHR considered that the State authorities needed to be sensitive to any information which might have the potential to undermine the conclusions of an earlier investigation or which would allow an earlier inconclusive investigation to be pursued further but, as the court put it, "[i]t

cannot be the case that any assertion or allegation can trigger a fresh investigative obligation" under the Convention. Bearing in mind what the court had before said in Osman v United Kingdom (1998) 29 EHRR 245 about the difficulties of policing modern societies and about the need to make choices in terms of priorities and resources, obligations had, the court indicated, to be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities.

[228] With these sentiments in mind, the view of the Court was expressed in the following passage at paragraph 71:

> "…the Court takes the view that where there is a plausible, or credible, allegation, piece of information or item of relevance to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures".

[229] But the steps which will be reasonable to take will, the court went on, vary considerably with the facts of the situation:

> "The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably…[t]he court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospect of success of any prosecution".

[230] The Court's judgment in Brecknell was provided in November 2007 before Silih or Janowiec. A question which, therefore, arises is how the ECtHR views the interaction, if any, between the revivalist doctrine and the tests developed in these latter authorities to deal with the criteria for extending the court's jurisdiction *ratione temporis*.

[231] This aspect is referred to in Janowiec at paragraph 144 and it is best to set out below the words used to express it:

> "Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law. However, if the triggering event lies outside the Court's jurisdiction *ratione temporis*, the discovery of new material after the critical date may give rise to a

> fresh obligation to investigate only if either the 'general connection' test or the 'Convention values' test…has been met".

[232] It thus would appear that there are limits to the scope of the revivalist doctrine.

Independent investigation as a feature of Article 2

[233] This is not a subject where the legal approach is in dispute between the parties. Where Article 2 (or 3) applies, in the context of the requirement of an effective official investigation, it is well established that the investigator must be independent of the executive and the party or parties under investigation. The point is made in the case of Al-Nashiri, which has already been discussed, in the context of Article 3 at paragraph 486 where it is stated that:

> "The investigation should be independent of the executive. Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms".

[234] This standard also applies to a revived investigation arising from the operation of the Brecknell doctrine. In Brecknell itself, the ECtHR said (at paragraph 72):

> "The extent to which the requirements of effectiveness, independence, promptitude and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case, and may well be influenced by the passage of time as stated above. Where the assertion of new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged".

[235] Moreover, in that case the court found that certain initial enquiries carried out by the police fell foul of the independence criterion as the investigating authority was drawn from the Royal Ulster Constabulary some of whose officers were under investigation in respect of collusion. This was held to have tainted the early stages of the enquiries and breached this aspect of what was required under Article 2: see paragraph 76.

[236] It appears to be established in this context that it is not necessary to prove that any particular investigator in fact lacked impartiality. A perception to this effect may be enough as one of the essential functions of independence as a criterion is that it tends to ensure public confidence: on this see R (Mousa) v Secretary of State for

Defence [2012] HRLR 6 where Kay LJ stated that "for the appellant to succeed in establishing a lack of independence, it is not necessary for him to prove that some element or person…actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellant Committee in Lawal v Northern Spirit Limited [2003] ICR 856, albeit in a different context, (at [14]):

> 'Public perception of the possibility of unconscious bias is the key'".

PART F

The court's assessment of the issues

Articles 2 and 3 – the Convention issue

[237] The first issue before the court is whether there has been a breach of the above articles of the Convention on the facts of these cases upon which a domestic court can rule.

[238] In order to deal with this issue the court will consider two questions which arise in its opinion: the first is whether it is likely that the ECtHR would find a breach and the second is whether it is open to this Court to hold that there is a breach.

[239] The first question inevitably involves a measure of speculation on the part of the court. The Strasbourg court is an international and not a domestic court and any prediction as to what it might or might not do is fraught with uncertainties. But be that as it may, it appears to the court from other recent Strasbourg and domestic law cases that it is justifiable, for the purpose of assisting in its overall assessment of these cases, for the court to pose this first question.

What would Strasbourg do on the facts of these cases?

[240] In line with the Grand Chamber's decision in Janowiec the court would expect the Strasbourg court, in cases of this type where a temporal problem exists, to consider whether the 'genuine connection' test is met, albeit against the reality that for present purposes the 'critical date' must be viewed not as the date when a State acceded to the Convention or agreed to the right of individual petition, but as the date when the HRA commenced *viz* 2 October 2000. This is certainly an artificial approach but it is one which is supported by both the first instance and the appellate decision in Finucane.

[241] There appear to be two aspects to the matter. Each must be assessed and each aspect must be met if the temporal problem is to be overcome. The first may be

described as the 'time factor'. The triggering event in these cases occurred in the early 1970s whereas the equivalent of the 'critical date', as already noted and as applied by the Northern Ireland Court of Appeal in Finucane, is 2 October 2000. In the context of the time factor, it appears clear that the lapse of time between these dates should be 'reasonably short', by which is meant a period not exceeding 10 years, though there may be, based on some Strasbourg authorities, some room for an element of flexibility on this point.

[242] On this aspect it appears clear to the court that the distance in time in the present cases is simply too long to establish the existence of a genuine connection.

[243] The gap is upwards of 40 years which exceeds by a wide margin the norm of 10 years, even if this period was made the subject of a generous extension.

[244] The second aspect relates to the balance of the process of investigation as between the period prior to the critical date and the period after it. While the approach on this aspect has not always been expressed in the same language, the essence involves the question of whether much of the investigation into the relevant event took place or ought to have taken place in the period following the critical date. If the balance favours the view that the majority of relevant actions have or should have taken place after the critical date, this aspect may be satisfied. On the other hand, if the balance is in the other direction, this aspect may not be satisfied.

[245] In these cases the court is of the opinion that this aspect of the genuine connection test is not satisfied. This is because, having regard to the chronology of what has occurred in these cases, it is the court's view that the great bulk of the activity in respect of the events here at issue occurred in the period 1971-78. Thereafter there was a long period when the issues were dormant and the court struggles to conclude that *post* 2014 there have been extensive investigative measures taking place. Given that the triggering events took place so long ago, the picture which emerges is much as would have been expected with the concentration of measures of investigation being in the period immediately following the event, as occurred here. Indeed, the steps taken at that time included two inquiries related to these events in the UK and an investigation carried out by the European Commission into the issue of whether the UK had breached the substantive provisions of Article 3 of the Convention, an issue later considered further by the ECtHR in the inter-State case. While it is true that these investigations and inquiries did not concentrate on the issue of identifying those responsible for the acts with a view to bringing them to justice, this reflected the prevailing legal situation at that time. What Articles 3 required at the time was the subject of exhaustive analysis in the course of the Strasbourg proceedings.

[246] The court therefore concludes that the two aspects of 'genuine connection' test, both of which would ordinarily have to be passed, have not been passed. This, however, is not the end of the inquiry.

The 'Convention values' test

[247] The purpose of the Convention values test is to deal with extraordinary cases which have failed the 'genuine connection' test. In effect, the Convention values test operates as an exception to it. Fulfilment of it will not be easily achieved and the description of it as constituting an 'extremely high hurdle' (by the Northern Ireland Court of Appeal in Finucane) appears to be justified.

[248] The language in Janowiec describing the sort of circumstances which may meet the test is inevitably general. What may constitute the underlying values of the Convention or what sort of action or behaviour would amount to a negation of its very foundations invites the application of ideas which are difficult to define. Moreover, there is little in the way of precedents, drawn from the Strasbourg jurisprudence, to serve as guidance.

[249] For these reasons, the court must tread warily but at the same time it should not be deterred from making its own judgment.

[250] In order to do so, and acknowledging that every case is likely to be different, the court must keep in mind the circumstances in their totality which gives rise to this issue. These have been set out at some considerable length in this judgment and it is not appropriate to set them out again at this juncture. However it is impossible not to recall that this case involved the state and state authorities establishing a secret interrogation centre and a system for the deep interrogation of detainees, using the five techniques already described. Moreover it cannot be left out of account that when what was occurring reached the public domain it produced such a reaction as to require the immediate establishment of the Compton Enquiry and that the events shortly became the subject of inter-State proceedings within the Convention system – both before the Commission and later the Court – leading to a finding of a breach of Article 3, in the case of the Commission, in respect of inhuman and degrading treatment and torture but, in the case of the Court, in respect only of inhuman and degrading treatment.

[251] Whether the Convention values test is met or not is a judgment which the court is arriving at today. In making that judgment it is not fixed with the outlook of yester-year. As is well known, the Convention is a living instrument and falls to be interpreted in the light of present day conditions.

[252] With this last point in mind, it seems likely to the court that if the events here at issue were to be replicated today the outcome would probably be that the ECtHR would accept the description of torture in respect of these events as accurate. This view was expressed by Lord Bingham in his speech in the House of Lords decision in A v Secretary of State for the Home Department (No 2) [2006] 2 AC 221 at paragraph [53] and the court is willing to give considerable weight to this pronouncement, given its source. But the court also recalls the views of the Strasbourg Court in Selmouni v France (2000) 29 EHRR 403 when it said that

"certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in future…the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (paragraph 101).

[253] In reaching its conclusion, the court also bears in mind that in recent times there is universal condemnation of torture and the principle of proscribing it is viewed as a peremptory norm which cannot be deviated from. Authority for this can be found in the A case (referred to above at paragraph [252]).

[254] These points support a conclusion that the sort of activity with which this case is concerned has a larger dimension than an ordinary criminal offence and would amount to the negation of the very foundations of the Convention.

[255] In view of this conclusion, it is evident that the court is unable to accept Dr McGleenan's submission to the contrary. While he rightly pointed out that there was no Strasbourg case in which a positive finding of breach of Convention values (for present purposes) was made, the court is disinclined to view this position as an effective argument against the conclusion it has reached, given that this aspect of the jurisprudence is relatively recent and there have been few cases which have raised the issue.

[256] Domestically, there have been findings both at first instance and in the Court of Appeal in Northern Ireland in the Finucane case that the Convention values test had been met in the context of the murder of a solicitor by paramilitaries, in which the state colluded, but the court sees little of a parallel on the facts between that case and the present.

[257] Finally, the court will make it clear that Mr Southey's invocation of the Rome Statute of the International Criminal Court in support of his client's position has not played a part in its reasoning. This statute was referred to because of the definition it provided of 'war crimes' which included reference to 'torture and inhuman and degrading treatment, including biological experiments'. This chimed, it was argued, with the language used in Janowiec at paragraph 150. However the court, having considered the full width of what is encompassed within the definition of war crimes at Article 8 of the statute would hesitate to view all that is encompassed in that definition as being within the intendment of the language of the Grand Chamber. In these circumstances it will pass over this point.

[258] In the court's judgment the Convention values criterion is passed on the facts of this case.

Is the Brecknell test met?

[259] The information which is said to cast new light on the events here at issue, for the purpose of the Brecknell doctrine, has already been described *supra* at paragraph [225] *et seq*. In essence, it involves materials which were exposed in the RTÉ broadcast of 2014 which tended to suggest that torture had been authorised at the time by a senior United Kingdom Minister and that the UK Government had withheld from the Strasbourg institutions evidence which undermined their case that the after effects of the use of the five techniques were not long-lasting or severe.

[260] The court reminds itself that it cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2. However, notwithstanding this, the court must apply the approach set forth at paragraph 71 of Brecknell and ask itself whether the new material can be said to come within the description of 'plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator'.

[261] The court is satisfied that the material within the broadcast, which in the court's opinion, encompassed more than the 'Rees memorandum', falls within the broad description referred to in Brecknell and, accordingly, is sufficient to cause, given that the Convention Values test has been surpassed, a revival of the obligation under Article 2 to carry out an effective official investigation.

[262] This conclusion, however, indicates no more than the existence of an obligation to take further investigative measures. The obligation engendered is on the authorities to take reasonable steps in the circumstances which have arisen. It, therefore, will plainly be a matter for them to determine how any further inquiries are to be conducted in the light of the lapse of time; the availability of witnesses; the ability of witnesses to recall events; and the credibility of the new evidence upon initial investigation. The prospects of the success of any prosecution in a case of this vintage also seems to the court to be a factor of no little importance.

[263] The court concludes that it is likely the ECtHR would regard these cases as ones in which the Articles 2 and 3 obligations remain to be fulfilled.

Is McKerr still good law?

[264] The legal background which gives rise to this issue has been the subject of discussion earlier in this judgment. The question is whether there is an obligation, to investigate in the context of Articles 2 and 3, as a matter of domestic law, in this sort of case where the key events took place prior to the commencement of the HRA.

[265] The court's outlook on this issue must encompass the fact that it is a court of first instance in an area where the higher courts have already been extensively involved.

[266] While the court acknowledges that few of the issues which arise in the context of the operation of the Article 2 (and 3) investigative obligations under the HRA in the context of pre-2 October 2000 events are clear cut, and while it accepts that there is a need for clarity to be achieved in this sphere, it considers it should follow the most recent approaches to the issue of the respective Courts of Appeal in England and Wales and Northern Ireland. Following these approaches in Keyu (in England and Wales) and Finucane (in Northern Ireland), leads, it seems to the court, to the conclusion that it should hold that McKerr remains to date the relevant governing authority. This will mean that in the present cases no obligation under Article 2 or 3 can be held to operate under the HRA as a matter of domestic law as the events the court is dealing with long pre-date 2 October 2000.

[267] This was the clear conclusion of the England and Wales Court of Appeal in Keyu, where a limited view was taken in relation to the Supreme Court's decision in McCaughey in the passages of Kay LJ's judgment which have already been cited at paragraph [224] above. Unequivocally, it seems to the court, the unanimous view of the Court of Appeal in Keyu was that, notwithstanding McCaughey, McKerr remained good law, by which the Court of Appeal was bound. The Court of Appeal appears to have regarded McCaughey as having a limited reach which applied only to the sort of circumstance arising in that case where there had already been an inquest commenced before the coming into operation of the HRA but where the major part of the enquiry was to take place after the 2 October 2000.

[268] Ordinarily, the courts in Northern Ireland will follow decisions of the Court of Appeal in England and Wales on matters involving the interpretation of national legislation, as in this case[3]. Accordingly, this court will approach the matter on the basis that this is what it should do, unless there is a good reason for adopting a contrary position.

[269] In terms of Keyu itself, it is the court's view that, insofar as the Supreme Court has expressed any view on this issue in that case, it seems not to have viewed McKerr as over-ruled: on this, see paragraph [97] in the judgment of Lord Neuberger who appeared to speak for the majority, quoted above at paragraph [219].

[270] In any event, the court considers that it ought to factor into its consideration what the court views as the *obiter* statement of Gillen LJ in the Northern Ireland Court of Appeal's judgment in Finucane which, it seems to the court, is plainly pointing towards the view that to date McKerr has not been overruled. On this, see, in particular, paragraph [208] of Gillen LJ's judgment with which the other members of the court agreed.

[3] The correct approach in this sort of situation was reviewed by Weatherup J (as he then was) in McCartney and McDermott's Application [2009] NIQB 62 at paragraphs [30]-[31]. This cites authorities of the Irish and Northern Ireland Courts of Appeal over a prolonged period. These indicate that when faced with a decision of the English Court of Appeal the Northern Ireland court is not strictly bound by them but afford great respect to them and will habitually follow them, even where the court considers the matter doubtful.

[271] Notably, the position of the Northern Ireland Court of Appeal was that it did not intend to rush in where the Supreme Court to date had feared to tread. The Court of Appeal was clearly minded to leave the resolution of the McKerr issue for another date in the Supreme Court (see paragraph [211]).

[272] Given the stance of the Court of Appeal in this jurisdiction, it seems to this court that the above approach applies *a fortiori* to this court, which therefore will adopt the same approach. On temporal grounds the court will, therefore, hold that for the time being McKerr remains good law and that it should apply to the matters before this court, even if the Strasbourg court would not take the same view.

[273] This will mean that there will likely be a discordance between the operation of the HRA in this area and the operation of the mirror principle – a situation contemplated in the Court of Appeal decision in Keyu - but on this issue (at least pending the resolution of the status of the McKerr decision by the Supreme Court) this court will apply the simple rule set in McKerr.

[274] The court determines the Convention issue in favour of the respondents.

Independence

[275] As the argument about the independence of the investigator derives from the jurisprudence of Articles 2 and 3 of the Convention, it must follow that if, as a matter of domestic law, Articles 2 and 3 are not engaged because of the temporal restriction on the operation of the HRA, as the court has just held, this ground of challenge must also fail, and similarly be determined in favour of the respondents.

[276] The court will express its provisional view on this point, in case it is wrong in its finding in respect of the McKerr point.

[277] If otherwise unconstrained by McKerr, the court would be minded to find that there is a problem in the area of independence in this case. At the moment, the investigator, insofar as there is one, is the Police Service of Northern Ireland but, as is well known, it is the successor police force to the Royal Ulster Constabulary. Even today, the PSNI has within its ranks officers who served in the RUC, including the Chief Constable. The question which arises is whether this compromises the requirement of independent investigation assuming that such a requirement must be met?

[278] In considering this issue the court considers that it should view the matters which fall for investigation broadly and not narrowly. While it might be suggested that investigations which concern allegedly unlawful conduct of those in government who authorised the use of deep interrogation techniques do not present any difficulty for the PSNI, as there is no hierarchical link, this is not an approach which commends itself to the court, given the wider historical perspective, which has already been the subject of discussion in this judgment. The better view, to the

court's mind, is that it is difficult to do other than view the circumstances in the round. If this is done, it appears that, at least to a substantial extent, those involved at the time had a common purpose so that it would be artificial today to seek to draw a rigid distinction for the purpose of an investigation between those who directed the use of deep interrogation both in London and Belfast and those who actually were engaged in the process of implementing what was directed. A single investigation, if an investigation is required, should embrace both aspects.

[279] What cannot be contested is that if a wide lens is used to consider this matter the RUC would be viewed as being significantly involved. The proposal that its now successor should be the investigator therefore is understandably controversial. The court doubts that if the proposal was that the RUC would be the investigator, anyone would see this as appropriate and as not infringing the independence criterion, both on grounds of lack of hierarchical independence and on grounds that public perception of unconscious bias would unacceptably damage public confidence in the outcome.

[280] The issue of whether the position of the PSNI can be said to sufficiently detached from the position of the RUC has been the subject of some consideration in the case of Re McQuillan's Application [2017] NIQB 28. That case involved the death of lady in 1972 in controversial circumstances. Initially it was believed that the death had resulted from shots fired by the IRA but new evidence emerged some 40 years or so later casting doubt on this and raising the issue of whether the death might have been at the hands of soldiers operating in the area in question at the time. In McQuillan there had been a concession that Article 2 applied to any further investigation and the applicant sought to argue that the PSNI, for a range of reasons, lacked the necessary element of independence to carry it out. Ultimately this court held that it should issue a declaration that PSNI lacked the requisite independence required by Article 2. In so holding the court did not follow the approach taken in Brecknell in which the ECtHR had held that the PSNI was institutionally distinct from the RUC, at least on the facts of the Brecknell case. In the court's eyes, the question of independence depended on the facts of each case and it held the facts of McQuillan were different for various reasons from the facts in Brecknell.

[281] The respondents in McQuillan have appealed but the appeal has yet to be heard. In these circumstances, the court has considered whether this judgment should be delayed so that it would have the benefit of the views of the Court of Appeal on the independence point. But, in view of the court's conclusions on the McKerr point, the court would not be anxious to delay its decision.

[282] For these reasons the court will advance its own view of the independence issue at least provisionally.

[283] In the court's view there is a likely breach of the independence requirement if the PSNI decide itself to investigate this case. The court reaches this view on the facts of this case bearing in mind that this is an area in which public confidence in

the investigation is a factor of some considerable weight. It reaches this provisional view for the following reasons:

(a) The fact remains that the RUC were extensively involved in the events here at issue and the PSNI still has a substantial number of officers who in the past have served in the RUC.

(b) There are officers of the RUC who might even be serving now in the PSNI who could be the subject of investigation. Certainly, such officers may well in the past have served in the PSNI with officers who may be charged with the investigation.

(c) Public confidence would best be served by transparent investigation. Moreover there are agencies in the State which can without great difficulty be utilised to carry out any investigation required. Indeed it would be expected that investigations into police officers who had served in the RUC and who now served in the PSNI would have their cases considered by the Police Ombudsman.

(d) Given the nature of the relationship at the time between the Northern Ireland and United Kingdom authorities and the relationship between the RUC and the PSNI, if the PSNI was to be the investigative agency in respect of those who authorised the deep interrogation process this, especially in Northern Ireland, would be detrimental to the goal of securing the requisite public confidence needed to sustain such an investigation.

(e) The position of the PSNI in dealing with legacy cases generally has been the subject of substantial question marks in recent years, in many cases long post-dating the approach of the Strasbourg court in Brecknell. The present case is one which involves a notorious chapter in the history of the troubles in Northern Ireland and the level of scrutiny required and the identity of the scrutiniser against this background requires heightened care. To invest the power to investigate in the hands of the PSNI in these circumstances is concerning.

(f) As McQuillan indicates, there has been considerable public concern about the quality of investigations into troubles related deaths, including investigations carried out by the Historic Enquiries Team, which is associated with the PSNI. This can be expected to continue and be to the fore in an investigation of this nature.

(g) The preliminary investigation carried out in 2014 in these cases, the court regrets to say, does not inspire confidence, as will be discussed later.

(h) The approach of the Secretariat of the Council of Ministers in the context of the McKerr group of cases should not be viewed, for the reasons referred to in

McQuillan at paragraph [126], as of more than of general interest and should not be viewed as precluding a finding of this nature.

[284] While its view is *obiter* in this case, the court is the view that if Article 2 (or Article 3) applied in this case and an effective official investigation remained to be delivered, the PSNI should be viewed as lacking the requisite independence to carry out necessary investigations into the issues in these cases.

The common law issue

[285] The matter can be dealt with succinctly.

[286] In essence the applicants claim under this head that quite apart from any issue of Convention law, there is an obligation of a broadly parallel nature at common law which requires an effective official investigation into a death or an event involving inhuman or degrading treatment or torture.

[287] In their skeleton argument a number of cases are cited in support of this proposition.

[288] The respondents deny the existence of any common law obligation of the sort contended for.

[289] The court has considered the issue but is not persuaded that there is a common law obligation of the nature contended for.

[290] The court is, moreover, conscious that this very issue was considered by the House of Lords in In Re McKerr. The argument that there existed a parallel common law obligation to Article 2 of the Convention's procedural obligation was rejected explicitly in four of the five speeches: see Lord Nicholl at [27]-[33]; Lord Steyn at [51]; Lord Hoffman at [70]-[71]; and Lord Brown at [91].

[291] The court sees no reason why the reasoning contained in McKerr should not equally apply to Article 3.

[292] The court in these circumstances will follow McKerr and will hold that at common law there is no parallel obligation as contended for in this case.

Has there been a breach of customary international law?

[293] While this issue featured in the skeleton argument of the second applicant, the court at the hearing was informed that, at least at the level of the High Court, this applicant was not going to pursue this aspect, insofar as it affected deaths, in view of the approach taken to it by the Supreme Court in Keyu. However, the second applicant adopted the position that, as regards torture, an issue arises as to whether

customary international law has the effect of requiring, as a matter of common law, a parallel effective official investigation.

[294] The respondents, in their skeleton argument, argued that the decision in Keyu applied generally and that its reasoning was relevant equally to issues of inhuman or degrading treatment or torture as it was to issues involving death.

[295] It is clear that in Keyu the Supreme Court found against the proposition that customary international law imposed an obligation at common law to investigate a death, at least on the facts of that case. The basis for this finding can most conveniently be found in the judgment of Lord Neuberger at paragraphs [111]-[122]. Two principal reasons emerge in these paragraphs for rejecting a common law form of investigative requirement based on customary international law. Firstly, Lord Neuberger was of the view that at the date of the killings he was concerned with, customary international law had not developed to the extent of requiring a form of public investigation into a suspicious death, even if there were strong reasons for believing that the killings constituted a war crime. In his view, any such obligation to carry out formal investigation into some deaths which was recognised by international law emerged only in much more recent times *viz* in the last 25 years. Secondly, he was of the view that even if international law required such an investigation, this could not be incorporated into the common law when the ground was occupied expressly by relevant statutory law. In respect of this last point, Lord Neuberger relied, in particular, upon the position adopted by the law lords in McKerr (*supra)*.

[296] As already noted the second applicant accepts that the approach in Keyu binds this court as regards cases of the investigation of a death but it is suggested that in cases of torture a different approach is required due to the special normative status of torture in the international order and other similar factors.

[297] The court is of the view that it should follow the reasoning in McKerr and now in Keyu, at least insofar as it precludes incorporation of an investigatory obligation as a matter of common law against the backcloth of statutory provisions which already regulate the obligation to investigate, in particular, the Human Rights Act itself. The court is of the view that the principle which has operated in the context of deaths should equally apply to conduct which would fall within the prohibition of torture or inhuman or degrading treatment. If the investigation of war crimes resulting in deaths is treated by the courts in this way, the court does not consider that a different approach is required in respect of the sort of matters which fall within Article 3, including torture. In the passage of the Human Rights Act, if not before, Parliament has pre-empted the approach which the second applicant has suggested this court should follow.

[298] The above approach, it is the court's view, renders the second applicant's reliance on other arguments set forth in her skeleton argument (which the court will not set out) unsustainable.

Rationality

[299] This head of challenge relates to the way in which the PSNI dealt with the events which occurred in the aftermath of the June 2014 RTÉ broadcast. The detail of what happened has been described earlier in this judgment. In short form, what occurred was that the question of police action following the broadcast arose before the Policing Board on 3 July 2014. A written question was asked by Gerry Kelly MLA to the Chief Constable. This was cast in terms of what the police intended to do about the assertion in official documents that Lord Carrington authorised the use of methods of torture at the relevant time. The Chief Constable responded in writing and said that the PSNI would assess any allegation or emerging evidence of criminal behaviour with a view, *inter alia*, to possible prosecution.

[300] On the same day there was an oral exchange along the same lines between Catriona Ruane MLA and the Chief Constable. On this occasion ACC Harris also became involved. He indicated that an investigation within Crime Operations had begun and that what the police were seeking to do was to actually source the document at the centre of the enquiry (which is the document earlier described as the 'Rees Memorandum'). The police, it was said, would then look for other documentation that would tend to confirm or clarify what was in the document which had been provided to them. This was an exercise which was said to be ongoing and it was expected that once it had been carried out the police would take advice from the PPS. A member of the HET staff had been nominated as the researcher for this purpose, as he had familiarly with this type of historical exercise.

[301] Thereafter what occurred is that the researcher carried out some research at the National Archives at Kew and ultimately he wrote two reports, the contents of which have been described above. In the researcher's view, his research led to the conclusion that, read in context, the Rees memorandum did not substantiate any allegation that Lord Carrington had authorised torture while he was in government. In the researcher's further view, no useful purpose would be served by taking the matter further.

[302] Ultimately the researcher's report was considered by senior officers who agreed with him. This is verified by two letters of October 2014 – one from ACC Harris and one from ACC Kerr. Both stated that the research had "not identified any evidence to support the allegation that the British Government authorised the use of torture in Northern Ireland".

[303] The applicant claims that this was an unreasonable decision which had the effect of bringing the investigation of the matter by the police to an end prematurely.

[304] Matters have not substantially moved on from this point, save that in an affidavit filed on behalf of PSNI in March 2016, reference is made to further materials being located by the Northern Ireland Office. In the light of this, the

deponent averred that the PSNI "will review and examine any additional material to identify whether it provides credible evidence of criminal offences having been committed and, if so, by whom, which may substantiate the allegations that Ministers or other persons were engaged in criminal behaviour".

[305] The outcome of any such review or examination has not been provided to the court and the court must therefore assume that it has either yet to take place or yet to conclude.

[306] It seems to the court that the above circumstances describe a sorry state of events. At the least, the investigation carried out by the researcher – which the court accepts was in the nature of a preliminary investigation - appears to have lacked focus. This may have been because of the way the matter had been presented by the Policing Board members in what they said initially *viz* they raised an allegation directed only at Lord Carrington as being the authoriser of methods of torture, or it may have been that the officers responsible for tasking the researcher limited his task more than they needed to.

[307] What should have been important, in line with what the Chief Constable himself had said, was that the investigation should have been aimed at identifying evidence of criminal behaviour. Viewed in that context, it is difficult to see why the investigation would not have examined the more general issue of, at minimum, the official authorisation of unlawful methods of deep interrogation, which were capable, in many instances, of being regarded as criminal assaults. Such an investigation would, in the circumstances, have involved the question of the involvement of Lord Carrington, but it would also have involved the role of others as well. An investigation which was much more widely drawn, in line with known information at the time, would have been the more obvious step for the PSNI to have initiated, rather that such a narrowly based inquiry as that which occurred.

[308] Given the narrowness of the inquiry which the researcher carried out, with the emphasis being placed so significantly on the use of the word 'torture' as its guiding light, it is perhaps not that surprising that a very limited outcome was arrived at.

[309] While the researcher possibly may have regarded himself as obliged to carry out no more of an inquiry than he did, it is difficult to see why senior officers, ultimately concerned with whether to end the investigation or to take it to the next stage, should have chosen the former course, given that it was plain that the methods used were unlawful and were capable of being viewed as criminal and given that no-one heretofore had been identified for potential prosecution in respect of this matter.

[310] In the court's opinion, the decision, in effect, to end the inquiry at the point when it was made was seriously flawed and was inconsistent with the broad approach which the Chief Constable had adopted. The PSNI decision makers

endorsed the researcher's work but this work, it seems to the court, was always far too narrowly based and did not evince any or any sufficient desire to resolve the broader issue of possible criminal conduct which, on a true analysis, arose in this case. Their decision seems to the court when anxious scrutiny is applied to it to have been unreasonable or the produce of a mis-direction.

[311] The court has asked itself whether the prospect of a review in the light of still further information which has come to light and which has been put before the court should cause it to withhold any remedy which it would otherwise be minded to provide. However, in the absence of any sign that any meaningful review is in progress, the better course is to quash the decision made in October 2014 so as to clear the field and enable a completely fresh decision process to begin.

Legitimate Expectation

[312] The applicant has also claimed that in the circumstances just described he can rely on a legitimate expectation engendered by what the Chief Constable had said, as quoted above. It is argued that what he had said was in the nature of a promise which had not been fulfilled, a situation which smacked of an abuse of power.

[313] In view of the court's conclusion on the rationality argument, the court does not consider that it need finally decide whether in fact this is a case of breach of an enforceable legitimate expectation.

[314] On one view, what the Chief Constable said amounted to little more than a statement of what was his duty, come what may. He effectively was saying that he would do his duty. As doing his duty would involve making an assessment of the material available, it seems to the court that the outcome inevitably would relate to how his judgment was exercised. The real issue, therefore, may be better viewed as whether the judgment made (by him or on his behalf) was one which could be viewed as lawfully arrived at and within the ambit of his discretion. As the court has already held that it has failed this test, it is difficult to see how the concept of legitimate expectation, as additional ground of judicial review, adds anything of substance.

The issue of whether the European Commission and Court of Human Rights were misled

[315] This issue has been raised in the second applicant's case only. As the court has already indicated, the Irish Government has applied to the Strasbourg court to re-open the inter-State case to consider this very issue. The process of responding to that request is currently before the ECtHR.

[316] In these circumstances the considered view of this court is that the Strasbourg court is by far in a better position than this court to make an assessment

of this matter. Accordingly, this court declines to deal with this issue and offers no comment on it.

PART G

Conclusions

[317] Given the conclusions which the court has arrived at, the court will declare that the decision made on behalf of the PSNI in October 2014 – in effect, not to take further steps to investigate the question of identifying and, if appropriate, prosecuting those responsible for criminal acts – should be quashed. This will mean that this question should be revisited. The court will not be prescriptive as to how this issue should be taken forward.

[318] As regards the other matters raised in this judicial review, the judgment of the court will speak for itself. This will mean that all other grounds of judicial review against the respondents are dismissed.