



THE COURT OF APPEAL

CIVIL

Neutral Citation Number [2020] IECA 141

[2018 No. 37]

**The President.
Edwards J.
McCarthy J.**

BETWEEN

THOMAS FOX

APPLICANT

AND

**THE MINISTER FOR JUSTICE AND LAW REFORM,
THE ATTORNEY GENERAL AND IRELAND**

RESPONDENTS

JUDGMENT of the President delivered on the 22nd day of May 2020

1. This is an appeal from a decision of the High Court (Faherty J.) of 14th December 2017, refusing an order of mandamus compelling the respondents to establish two Commissions of Investigation into the murder of Seamus Ludlow on 2nd May 1976.
2. The background facts are set out in very considerable detail in the course of an extremely comprehensive and careful judgment delivered by Faherty J., her recital of the facts runs to some 34 pages. In the circumstances, I do not propose to set out the facts in detail once more, and to the extent that an appreciation of the facts is required, this judgment should be read in conjunction with the judgment of the High Court.
3. For our purposes it is sufficient to note that nobody has ever been charged in relation to the killing of Seamus Ludlow. The applicant, a nephew of the murdered man, and other members of Mr. Ludlow's family, have campaigned for many years, seeking an inquiry arising out of concerns that the Garda investigation, certainly the initial Garda investigation, into the murder was flawed.
4. While it seems to be the case that in the immediate aftermath of the murder, that an investigation team was established, headed by a superintendent from Dublin Castle, and comprising some 30 detectives from Dublin and Dundalk, it is contended on behalf of the family of the late Mr. Ludlow, and does not seem to be seriously disputed, that the investigation was stood down or suspended after some three weeks. It is the family's case that an important line of enquiry was not pursued, but rather, ignored, this being the

possibility that Mr. Ludlow was murdered by Loyalist paramilitaries or individuals linked to British State Security Services in a case of mistaken identity. According to this theory, those involved mistook Mr. Ludlow, an unmarried forestry worker with no connections to paramilitary activity or subversion, for a senior figure in the Provisional IRA.

5. The Oireachtas Sub-Committee made a number of recommendations which were, in turn, adopted by the Oireachtas Joint Committee. The Sub-Committee was of the view that:

“[a] further inquiry is essential in order to ensure justice is both done and seen to be done. It is also necessary to address the potential damage to the rule of law that would occur if the investigation into the murder of any citizen of the State is not treated in a thorough and professional manner, as is the right of every citizen.”

In these circumstances, the Sub-Committee recommended that a Commission of Investigation be established to investigate the following:

- (i) Whether the evidence collected at the scene of the murder of Seamus Ludlow in 1976 was available in 1979, and if not, why not?
- (ii) Why were credible leads given to the Gardaí by the Northern Ireland police force not followed up?
- (iii) Why were the four named suspects not interviewed?
- (iv) Was there a policy in existence not to interview suspects in Northern Ireland for crimes committed in this jurisdiction?
- (v) Was a decision taken not to actively pursue investigation of the murder of Seamus Ludlow, and if so who took that decision and why?

The Sub-Committee commented:

“[t]he Sub-Committee is deeply concerned that, yet again [this would seem to be a reference to issues that had arisen in the context of inquiries into the Dublin and Monaghan bombings] important and relevant documents and files are missing. As noted in the Barron Report, some Gardaí files are either missing or were never brought into existence. The relevant security intelligence files also are either missing or non-existent. Files in the Murder Investigation Unit were also found to be incomplete and there appeared to be no contemporaneous file on the murder of Seamus Ludlow in the Department of Justice.”

In those circumstances, the Sub-Committee recommended a second Committee of Investigation be established to investigate the following:

- (a) What documents were created or maintained by An Garda Síochána, including security intelligence C3 Section in relation to the murder of Seamus Ludlow?
- (b) Where are those documents?

- (c) If those documents are not available for inspection what is the reason for this?
 - (d) What documents were created or maintained by the Department of Justice (and Departments of An Taoiseach, Foreign Affairs and Defence in respect of the Cabinet Sub-Committee on Security), in relation to the murder of Seamus Ludlow?
 - (e) Where are those documents?
 - (f) If those documents are not available for inspection, what is the reason for this?
6. Following the publication of the Oireachtas Sub-Committee Report, An Garda Síochána carried out a review of the Seamus Ludlow case and of the earlier investigations. A Superintendent from the Garda National Bureau of Criminal Investigation reviewed the entirety of the information available. This involved liaising with their counterparts in the PSNI, contacting retired Gardaí who had been involved in the case previously, and re-engagement with some of the named suspects in Northern Ireland. A file was submitted to the DPP who subsequently forwarded a "Formal Request for Mutual Legal Assistance in Criminal Matters" pursuant to the European Convention on Mutual Assistance in Criminal Matters to the authorities in Northern Ireland in respect of the interview of two suspects. This was acceded to, and members of An Garda Síochána were present at an interview of the suspects in Northern Ireland. However, ultimately, the DPP directed that it was not possible to advance a prosecution in this jurisdiction. The position, therefore, is that both Directors, the DPP for Northern Ireland and the Irish DPP, have directed that there should be no prosecutions.
7. Despite the recommendations of the Oireachtas Joint Committee, neither of the proposed Commissions of Investigation were established. Indeed, no Commission of Investigation was ever established. This was a source of great disappointment to the family members of Mr. Ludlow who continued to press their case with successive office holders, and indeed, successive administrations.
8. In June 2014, family members met with the then Minister for Justice, Frances Fitzgerald TD. In the aftermath of that meeting, the Minister sent a letter dated 25th February 2015 which was to prove highly significant in the context of the present proceeding, so significant that it is appropriate to quote from it *in extenso*:

"I write further to my meeting with the relatives of Seamus Ludlow and you in June last and subsequent correspondence with me in the matter of the murder of Seamus Ludlow in 1976, at which the family members set out their concerns and their demand for the immediate establishment of a Commission of Investigation into the Garda handling of the original murder investigation.

At our meeting I committed to examine the material which you provided to revert to you on the family's call for a Commission of Investigation. This process has taken some time but I hope you will understand this was inevitable in order to give the issues at hand a full and proper consideration.

The callous brutality with which Seamus was killed is a particularly sad feature of this case. I am struck by the late Judge Henry Barron's characterisation of Seamus' murder as '...a random, sectarian killing of a blameless Catholic civilian by loyalist extremists'. I have no doubt whatever that the death of this innocent man at the hands of a gunman is the cause of untold grief to his family and friends and I convey my sympathy once again to Seamus' [...] family on their loss.

Against this background, I regret that what I have to say in this letter will most likely prove a disappointment to Seamus' [...] relatives who have been so affected by his murder. However, having considered in detail the matters raised, I must conclude that nothing put forward in the document which you gave me represents new or substantial information which would in the public interest warrant an inquiry of the kind that is sought. I am keenly aware that Seamus' [...] relatives will find it difficult to accept this conclusion readily but I feel it is right to explain, as best I can why I came to this conclusion.

I have had a full review carried out by my Department of the papers which you sent to me following our meeting, other material already held on file in the Department, the Barron Inquiry's report and the report and hearings of the sub-committee of the Joint Oireachtas Committee. The review also involved consultation of the Garda Authorities.

At the outset I would say that the lack of follow-up of the information provided by the RUC to the Garda Authorities in 1979 cannot be considered to have been anything other than a serious regrettable failure on the part of the Garda Síochána. It was rightly found to be so by Judge Barron and the sub-committee of the Joint Oireachtas Committee. Importantly, it was also accepted as such the former Garda Commissioners who gave evidence to the Barron Inquiry and at the hearings sub-committee of the Joint Oireachtas Committee.

For my part, I reiterate the apology to Seamus's family. The handling for the Garda investigation – what happened was inexcusable and should not have happened.

The report of the sub-committee of the Joint Oireachtas Committee recommended the establishment of two Commissions of Investigation into events surrounding Seamus' [...] murder. One Commission was to examine the conduct of the Garda investigation and co-operation with the police in Northern Ireland in this regard; the other was to examine issues relating to the absence of relevant documentation.

It is to be noted that the matters which were recommended by the sub-committee of the Joint Oireachtas Committee for a Commission of Investigation into the Garda investigation were, in fact, central to Judge Barron's inquiries in this case. Indeed, '[t]he nature, extent and adequacy of Garda investigations, including co-operation with and from relevant authorities in Northern Ireland' was one of the Barron Inquiry's four terms of reference for its report on the killing of Seamus Ludlow.

It is clear from the Barron Inquiry's report that Judge Barron explored the conduct of the Garda investigation in great detail both through his examination of the documentation available and through his interviews with such witnesses as were available to him at that time. It is evident also that his inquiry was hampered to some degree by a lack of contemporaneous documents, by the [death of] potential witnesses, by the impact of the passage of time on the recollection of others.

Although it was not possible for Judge Barron to be conclusive on the matter, he found that the most credible explanation for the lack of follow-up on the information received from the RUC was that a direction was given which led the investigating Garda not to pursue this line and that such a direction was given by a former senior Garda.

In the interest of fairness, I should say that the former senior Garda in question emphatically denied giving any such direction.

It is clear that the sub-committee of the Joint Oireachtas Committee devoted suitable time to examining the conduct of the Garda investigations into Seamus' [...] murder. The report of the sub-committee makes clear that despite its detailed examination of the issues, it could not advance any further the questions surrounding the failures in the investigation.

I appreciate that you and the Ludlow family make the point that a Commission of Investigation could be a superior avenue of inquiry and that it would have powers of compellability as to persons and documents which were not available to the Barron Inquiry and which, it is assumed, could require or reveal more information than has been made available to date.

However, I note that in his report, Judge Barron made clear his view that he had received the full co-operation of the Garda Síochána. In his evidence to the sub-committee of the Joint Oireachtas Committee, Judge Barron, when asked whether the absence of powers of compellability were a shortcoming in his inquiry, said:

'I do not think so. The people we spoke to seemed willing to tell us what they knew. It is obvious we were not given the full picture by one or more people but, generally speaking, we were given the full picture'.

The McEntee Commission of Investigation was established after the Barron Inquiry to look, inter alia, into the issue of missing/unavailable Garda and departmental documentation relating to the Dublin and Monaghan bombings of 1974. Mr. McEntee's final report in March 2007 is critical of deficiencies identified with regard to record keeping and file management, particularly with regard to some sensitive Garda intelligence records. The file management systems in the Garda Síochána examined by Mr. MacEntee pre-dated Seamus Ludlow's murder by only two years and were those still in operation in the Garda Síochána at that time.

However, Mr. McEntee did not identify any deliberate suppression or withholding such material in the context of the Barron Inquiry into the Dublin and Monaghan bombings and there is no reason to suggest a different approach was adopted with regard to Judge Barron's inquiry into the shooting of Seamus Ludlow.

While I agree that due weight must be accorded to the recommendation of the sub-committee of the Joint Oireachtas Committee, in the circumstances where:

- an independent judicial inquiry has already been carried out which focused in great detail on the question of the conduct of the Garda investigation and found that it could not advance the issues to a conclusive outcome;
- the independent judicial inquiry did not consider the absence of powers of compellability to be a shortcoming to its work;
- an Oireachtas committee has carried out an examination of the same issues and found also that it could not conclusively address questions relating to the Garda Investigation;
- a Garda review of the original investigation and the original evidence (in effect a re-investigation) has been conducted;
- the Director of Public Prosecutions directed that no prosecution should be brought, and
- a public apology for Garda failings in the investigation has been made with the Ludlow family by a former Garda Commissioner and a former Justice Minister.

[I]t is not clear to me that the question of why the 1979 information was not more rigorously followed up at that time can be answered any more conclusively at this point than when Judge Barron and the sub-committee of the Joint Oireachtas Committee enquired into the matter.

While this is regrettable, it is not apparent that more might be gained from the establishment of a Commission of Investigation in further resolving these issues nor can I conclude there is a significant public concern at issue sufficient to merit the establishment of one.

I have considered also the possibility that the matters arising in this case might be considered by the independent review panel which I established last year to review certain allegations of Garda misconduct, or inadequacies in the investigation of certain allegations, which have been made to the Minister for Justice and Equality or the Taoiseach, with a view to determining to what extent and in what manner further action may be required in those cases. However, the independent review panel was established specifically in order to examine more contemporary cases which had been brought to the attention of the Taoiseach or the Minister or to public attention owing the recent controversy examined in the Guerin Report and which is to be the subject of a commission of investigation.

It is not envisaged that the independent review panel be charged with or in a position to deal with or specific issues which arises in relation to historical/or Troubles-related cases. For these reasons I do not propose to refer this case to the independent review panel.

You will be aware, of course, that on the more general question of dealing with matters relating to the legacy of the troubles in Northern Ireland, the Stormont House Agreement, established in December 2014 by the parties in Northern Ireland and the Irish and British Governments, contain a serious (sic) of valuable measures.

The process of implementation of the Stormont House Agreement is now underway with the detailed nature and scope of the mechanisms to be elaborated under it remains to be established. I hope that...those mechanisms may provide an opportunity for Seamus's relatives to access further information about his murder.

I have no doubt, and it is a matter of regret to me, that my conclusion will be a disappointment to Seamus Ludlow's family members and, indeed, to you having campaigned on their behalf for many years. I do hope, however, they will understand the reasoning behind my decision and that I have not taken it lightly.

I know that Deputy Peter Fitzpatrick has taken an interest in this case and I am aware also that you have been in contact also with the Taoiseach's office. I trust you will understand, therefore, that out of courtesy, I have copied them on this reply."

9. The then solicitors for the family responded to the Minister's letter with a letter of their own dated 2nd April 2015. They contended that the Minister's decision was wrong. It was said that the Minister had failed to acknowledge that at the conclusion of lengthy processes, the Barron Inquiry and the Joint Oireachtas Committee Process, a cross-party group of experienced parliamentarians, who had seen many of the relevant witnesses personally, had recommended the establishment of two Commissions of Investigation. In a further letter dated 6th June 2015, having received a formal acknowledgement in the meantime, the then solicitors stated that it was their understanding that the Minister "continue[s] to review the family['s] request for the establishment of a Commission of Investigation", and that "the point remains that despite the apparent antiquity of the Ludlow case, those who had the opportunity of seeing witnesses first hand, namely, the Minister's Parliamentary colleagues, formed the view that a Commission of Investigation was required". The letter stated that the family believed that it was appropriate that the Minister would reconsider the decision.
10. On 10th July 2015, the applicant's present solicitors wrote, advising that they had recently taken instructions and would welcome an update on the position. There was also correspondence between the applicant's solicitors and the then Taoiseach, Enda Kenny. A letter of 25th November 2015 from the Taoiseach included a statement as follows:

"[t]he Taoiseach is aware that the Minister wrote to the family earlier this year setting out the conclusion that she could not recommend the establishment of a Commission of Investigation in this case and detailing her reasoning in this regard. The Taoiseach understands that this was, inevitably, a disappointment for the family. He is aware that the family has written to the Minister again to request a re-consideration of the matter, and that the Minister is in the process of finalising that consideration. The Taoiseach has asked to be kept updated on any developments in relation to this matter and the family will be contacted as soon as possible once these considerations are complete."

The applicant attaches some significance to this letter and says that the letter is of importance in establishing that the application for a judicial review is not out of time, or, if the view was taken that the letter of 25th February 2015 constituted the decision and that therefore the challenge was out of time, that the letter is highly relevant to the question of whether time should be extended as the family was being led to believe that the matter was being actively reconsidered.

The High Court Proceedings

11. On 18th January 2016, by order of the High Court (Humphreys J.), the applicant was granted leave to apply, by way of judicial review, for:

- An order for mandamus compelling the respondents to establish two Commissions of Investigation as per the recommendations made in March 2006;
- A declaration that the respondents establish the said Commission of Investigation in the manner and with Terms of Reference that are compliant with the State's obligation and the applicant's rights pursuant to Article 2 of the European Convention on Human Rights ('ECHR' or 'the Convention'), the Constitution and at common law;
- An order of mandamus requiring the respondents to take all necessary steps to establish the said Commission of Investigations forthwith;
- A declaration that the continuing failure by the respondents to establish the said Commission of Investigation is unlawful by reason of being in breach of State's obligations and the applicant's rights pursuant to Article 2 ECHR, the Constitution and at common law; and
- An order of certiorari by an application for judicial review of the decision of the respondents not to establish the said Commission of Investigation.

[Reliefs taken from High Court judgment at para. 73]

In the course of the High Court hearing, the then applicant, now appellant, indicated that he was not seeking relief by way of mandamus.

12. In the course of her judgment in the High Court, Faherty J. first identified a number of preliminary issues for determination, those being, whether a decision refusing to establish the recommended Commission of Investigation was in fact made by the first named respondent, and if so, whether the applicants had delayed in challenging such a decision. The High Court dealt with these preliminary issues by treating the letter dated 25th February 2015 as the decision. She concluded that the applicants were not time-barred. In that context, she had regard to the letter dated 25th November 2015. She accepted that the letter could not be construed as resetting the clock for the applicants, but she felt there was sufficient information in it to forgive the applicant's tardiness in challenging the decision of 25th February 2015.
13. In the High Court, the challenge was distilled down to four broad headings: Legitimate Expectation, Common Law Fairness, the Irrationality of the Decision, and Issues Arising by Reference to Article 2 of the European Convention of Human Rights.

Legitimate Expectation

14. In addressing the question of legitimate expectation, the High Court found assistance in the decision of Smyth J. in *McStay v. The Minister for Health* [2006] IEHC 238, a case that related to demands for an inquiry into unlawful organ retention. In the course of his judgment in that case, Smyth J had commented:

"66. The starting point, in my judgment, is to ask whether there is evidence of a 'clear or unambiguous' representation by the Minister or anyone else, that there would be a public inquiry of the sort for which the plaintiff contends. In my judgment, no, there is no such evidence. The material relied on by the plaintiff makes it clear that no such representation was ever made. The authorities suggest that the existence of a clearly defined practice may suffice to satisfy this requirement.

[. . .]

71. In regard to the third element identified by Fennelly J. [in *Glencar*], it is, in my submission, fatal to the applicants' case because the obstacle to the plaintiff's legitimate expectation claim is that the establishment of an inquiry of the nature sought by the plaintiff is simply not within the power of the Defendants. For an inquiry to be conferred with statutory powers set up either under the Tribunals of Inquiry (Evidence) Acts, or the Commission of Inquiry Act requires a determination of that effect of the Houses of the Oireachtas. That is a matter for judgment for that institution and not for the Court.

72. In my judgment, the public interest remains the overriding consideration. While Fennelly J referred to the principle that freedom to exercise properly a statutory power is to be respected, it is clear that the same principle applies to the exercise of [non-statutory] powers by the Executive, the Court must be careful not to fetter unduly the Executive's freedom of decision."

15. Faherty J. concluded this aspect of her judgment in the court below as follows:

“119. In the present case, the respondents submit that the applicant cannot satisfy the first of the conditions set out by Fennelly J. in *Glencar*, as, effectively, the representation founding the legitimate expectation upon which the applicant relies came from an Oireachtas Joint Committee, a body that has no statutory role, not even a limited one, in the establishment of a commission of investigation. I find that I have to agree with this submission. Whatever way one looks at the matter, there is no lawful basis for the applicant to seek to bind the first named respondent by virtue of the recommendations of the Oireachtas Joint Committee, having regard to the doctrine of the separation of powers, and more particularly, having regard to the provisions of s. 3 of the 2004 Act. Thus, even if it had been established (and I am not satisfied it has, from the history outlined in this judgment) that a clear or unambiguous promise or representation had emanated from the first respondent or her predecessors, upon which the applicant relied, the fact of the matter is that the power to establish a Commission of Investigation is vested in the Houses of the Oireachtas and not in the first respondent. While the 2004 Act provides that the initiating step is to be taken by ‘a Minister’ (in this case, the first respondent) by means of bringing a proposal, duly approved by the Minister for Finance, to Government, the mere fact that, as would be the case here, the first respondent would have such a statutory role in bringing a proposal to Government is a far remove from what is ultimately required for the establishment of a Commission of Investigation under the 2004 Act.

120. On the clear ratio of *McStay*, the establishment of a public inquiry under the 1921 Act, or a Commission of Investigation under the 2004 Act, is a matter for the Houses of the Oireachtas and not the courts. Accordingly, even if an expectation could be said to have been created by virtue of what was recommended by the Oireachtas Joint Committee in March, 2006, I find that that it cannot bind the first respondent, given that the power of establishment of a Commission of Investigation is vested in the Houses of the Oireachtas and not the first respondent. Accordingly, the legitimate expectation ground is not made out.”

16. As far as this issue of legitimate expectation is concerned, I find myself in complete agreement with the approach of the High Court judge. In the course of the appeal hearing, it emerged that the appellants see the high point of their case based on legitimate expectation as being found in a letter dated 26th March 2002 from Paul McGarry of the Northern Ireland and International Division of the Department of the Taoiseach. The said letter confirmed that Barron J. would be setting out the results of his examination in a report and that report would be submitted to Government. The letter continued that:

“[a]s of now, and subject to the outcome of the Supreme Court decision in the *Abbeylara* case, it is proposed that:

- (i) [t]he report will be examined in public session by the Joint Oireachtas Committee on Justice, Equality, Law Reform, Defence and Women’s Rights or

a Sub-Committee of that Committee. Because of the separation of powers between the Executive and the Legislature, it is not possible for the Government to direct the Oireachtas or a Committee thereof to take a particular action. However, the Government would do everything within its power to ensure that the Committee took this action, and as cross-party support is expected for this approach, the Government are confident that matters would unfold along the lines envisaged.

- (ii) The Joint Oireachtas Committee would direct that the report prepared by Judge Barron would be submitted to it, in order for it to advise the Oireachtas as to what further action, if any, would be necessary to establish the truth of what happened.

. . . .

As the Government see the matter, there would be three approaches open to the Committee:

- (i) advise that the report achieved as far as possible the objective of finding out the truth and that no further action would be required or fruitful;
- (ii) advise that the report did not achieve the objective which could only be done through a public Inquiry; or
- (iii) advise that the report did not achieve the objective and the Committee or a Sub-Committee of the Committee should examine the matters further (as outlined previously, the options available to such committees or sub-committees include public hearings and powers to send for persons, papers and records)."

- 17. What is entirely absent is any statement that the Government would accept whatever the recommendation was and implement it. It seems to me that such a statement, in clear and unambiguous terms, would be the absolute minimum required. There are further difficulties that face the applicant. Since the letter was written in 2002, there have been numerous changes of Government and even more numerous changes in the identity of those who have held office as Minister for Justice. The extent to which one Government can bind its successor, or one office holder bind future successors, is clearly problematic. Further, there is the fact that insofar as the applicant is placing reliance on views expressed by an Oireachtas Sub-Committee, that body has no statutory role in relation to the establishment of a Commission of Investigation.
- 18. It seems to me that the height of what the applicant can say is that he would have hoped that the Oireachtas Sub-Committee's intervention would have led to the establishment of a Commission of Investigation. This is a world away from meeting the requirement of legitimate expectation.

Failure to take Relevant Considerations into Account, Unfairness and Irrationality

- 19. In the High Court, Faherty J. dealt with this issue by first reviewing the submissions that were made to her by both sides. Firstly, she dealt with the complaint that the decision was procedurally unfair and found no substance in this. She then addressed the argument

that in making the decision that it did, the respondent failed to take into account the legitimate expectations of the family, that if answers were not forthcoming, that investigative process would be followed through. She was not persuaded that the first respondent's decision should be assessed within the parameters of a proportionality-type assessment in the sense outlined in the case of *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701. Instead, the judge found it necessary to consider whether the decision was vitiated by unreasonableness or irrationality. She was of the view that notwithstanding the applicant's submissions to the contrary, that the reliance placed by the Minister on the findings of Barron J. was not irrational. Neither did he believe she was irrational when considering the efficacy of a further inquiry to have regard to Barron J.'s findings that he was hampered to some degree by a lack of contemporaneous documents, by the fact that potential witnesses had died, and by the impact of the passage of time on the recollection of others. The judge took the view that the death of possible witnesses and the impact of the passage of time were factors rationally to be considered by the Minister in 2015.

20. For my part, once more I find myself in agreement with the approach of the High Court. Indeed, I find it all but impossible to see how it could be suggested that a failure to establish a Commission of Investigation into events that occurred in 1976 could possibly be regarded as irrational. The fact that none of those who had ministerial responsibility since 2006 took the step to establish a Commission is not without significance. It seems to me that the Minister was entitled to have regard to the extent to which matters have been enquired into and information unveiled previously. It also seems to me that the Minister was fully entitled to have regard to the steps that had already been taken in assessing how productive any further inquiry would be. I do not ignore, but am unimpressed by the argument that without a further inquiry, one will never know what might emerge. While I would not go so far as to say that no other conclusion could have been arrived at, I do find that the decision arrived at is one that is entirely understandable, and in my view, justifiable.

Article 2 of the European Convention of Human Rights

21. It seems to me that consideration of this issue begins with a recognition of the fact that the ECHR has said, in the most explicit terms, that its temporal jurisdiction as regards compliance with Article 2 in respect of deaths that occurred before the critical date (relating to the ratification of the Convention or acceptance of the jurisdiction of the Convention institutions) is not open-ended. The jurisprudence of the European Court of Human Rights is clear that where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date fall within the Court's temporal jurisdiction. Secondly, there must exist a genuine connection between the death and the entering into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to apply.
22. On behalf of the applicant, it is submitted that there is a procedural duty to investigate the death of Mr. Ludlow. A procedural duty of this kind, to investigate a death which occurred before the European Convention on Human Rights Act 2003 came into force on

31st December 2003, arises where a significant proportion of the procedural steps to determine the cause of death and hold those responsible to account have taken place after the critical date. It is said that this approach is mandated by the jurisprudence of the European Court of Human Rights in cases such as *Silih v. Slovenia* [2009] 49 EHRR 996, and *Janowiec v. Russia* [2013] 58 EHRR 792. Counsel on behalf of the applicant says that the Irish courts should mirror the jurisprudence of the European Court of Human Rights and conclude that there is an obligation on the respondent Minister under domestic law which includes an obligation under Article 2 of the Convention to offer an effective investigation.

23. On behalf of the applicant, it is also said that this is a case where only insignificant procedural steps were taken prior to the critical date of 31st December 2003, that an obligation on the State authorities arises where plausible, credible allegations or pieces of evidence or items of information come to light which is relevant to the identification and eventual prosecution or punishment of those responsible for the death. The applicant points to the fact that the Barron Report was published in November 2005, while the Justice Committee produced its final report in March 2006. Particular attention drawn the fact that the Justice Committee, at para. 207 of its report, had expressed the view that it had the gravest of concerns about the role collusion played in the murder because it was undisputed that two of the suspects identified by the RUC were serving members of the UDR at the time of the murder. Thus, on behalf of the applicant, it is said that the provisions of Article 2 can be relied upon, even though the murder of Mr. Ludlow occurred long before the coming into force of the 2003 Act.
24. The respondent, on the other hand, has argued that the attempt by the applicant to place reliance on Article 2 is misplaced since there is no freestanding application of the Convention under Irish law, save to the extent provided for in the 2003 Act. The respondent's position is that the applicant's claim has to be based upon domestic law and cannot be seen as a case under ECHR simpliciter. The respondent says that the applicant is required to establish both a breach of Article 2 and also that he is entitled to be successful under the ECHR Act 2003. The respondent says that the applicant cannot establish a breach of Article 2 such as would succeed in Strasbourg, as he is long time-barred in that respect, and fundamentally, the inquiry sought is not of a type mandated under Article 2. Such rights as exist under Article 2 are to an effective investigation into the death, there is no right to an investigation into the effectiveness of an investigation into a death. The respondent further says that the applicant cannot obtain relief under the 2003 Act as the death occurred long before the Act came into force and is not retrospective, and the need for an investigation has not been revived by the discovery of new relevant evidence. The case of *Re McKerr* [2004] UKHL 12 saw a unanimous House of Lords conclude that Article 2 did not mandate an inquiry into a death occurring before the enactment of the United Kingdom Human Rights Act 1998. The decision was clear and unequivocal.
25. However, the *Silih* judgment of the European Court of Human Rights gave rise to requests to the UK courts to readdress *McKerr*. The matter came before the UK Supreme Court in

the case of *In Re McCaughey* [2011] UKSC 20, where what was in issue was the procedures that would be followed at an inquest to be held into the deaths of Martin McCaughey and Dessie Grew who had been shot and killed by members of the British Army in October 1990. An appeal from the Court of Appeal of Northern Ireland was allowed, with the UK Supreme Court concluding that the decision of the European Court had extended the effect of Article 2 of the Convention so that it now imposed a free-standing and autonomous procedural obligation in relation to the investigation of a death which could arise where the death had preceded the Court's assumption of jurisdiction if a significant proportion of the procedural steps which Article 2 would require took place after that date: that, therefore, if the UK authorities decided to hold an inquest into a death which had occurred before 2nd October 2000, the Convention imposed an international obligation to ensure that it complied with the procedural obligations of Article 2, at least insofar as that was possible under domestic law, that it would not be satisfactory or achieve the object of the 1998 Act if the Coroner were to conduct an inquest which did not satisfy the procedural requirements of Article 2 and left open the possibility of the claimants making a claim against the United Kingdom before the European Courts.

26. This issue was the subject of further consideration by the UK Supreme Court in the case of *R (Keyu) v. The Foreign Secretary* [2015] UKSC 69. It arose out of events that occurred in what is now Malaysia, during the course what has become known as 'The Malayan Emergency'. In particular, it related to events that occurred on 11th and 12th December 1948 at a village known as Batang Kali. There, 24 unarmed rubber plantation workers were shot dead by British soldiers, members of The Scots Guards. The issue in the appeal was whether the Secretary of State for Foreign and Commonwealth Affairs was required to hold a public inquiry into the events that occurred. The appellants, who were, for the most part, relatives of one or other of the victims, some of them were children in the village at the time, contended that what occurred on 11th/12th December 1948 amounted to unjustified murder, and that the United Kingdom authorities have subsequently wrongly refused to hold a public Inquiry. The UK Supreme Court held that having regard to the jurisprudence of the European Court of Human Rights, the duty to protect life under Article 2 of the Convention gave rise to the autonomous and detachable duty to provide an investigation into a death occurring in suspicious circumstances: that, while the Convention did not generally have retrospective effect, the European courts' jurisprudence obliged a State to investigate a death which had occurred before the critical date, namely, the date of entry into force of the Convention with respect to that State, where:
- (i) There existed relevant acts or omissions after the critical date; and
 - (ii) There was a genuine connection between the death, as the triggering event, and the critical date, so long as the period between the two did not exceed ten years: that, since there had been no full or public investigation into the deaths prior to 1970 and, until 1969, no publicly-available evidence from any member of the patrol to suggest that the deaths had been unlawful, and since evidence to that effect had

first come to light in 1969 and was weighty and compelling, the first criterion was satisfied, but that (Baroness Hale dissenting) the critical date was not 1953, when the United Kingdom had signed up to the Convention and extended it to the Malaysian Federation, but in 1966, when the United Kingdom had first recognised the right of individual petition to the European courts, and that since (per Lord Neuberger, Lord Mance, Lord Kerr and Lord Hughes), the deaths had occurred more than ten years before the critical date, the claim based on Article 2 failed.

27. Before moving on from this review of persuasive authorities from neighbouring jurisdictions, it is necessary to refer to the decision of the Court of Appeal in Northern Ireland in the case of *In Re Edward Barnard* [2019] NICA 38 where the judgment was delivered by Lord Chief Justice Morgan on appeal from Tracey J, as he then was. The background facts are complex and not all that easy to put in context. A 13-year old boy, Patrick Barnard, his brother was the applicant, was killed by a bomb placed by the UVF outside the Hillcrest Bar in Dungannon on St. Patrick's Day 1976. A number of other people were killed in that attack. In December 1980, Garnett James Busby was arrested for the bombing. During interview, he admitted to his involvement in the Hillcrest Bar bombing, his membership of the UVF, and also admitted his involvement in a number of other murders and bombings. Busby named three other UVF members as having been involved in the Hillcrest bombing. The Court of Appeal of Northern Ireland commented that it was common case that the three individuals named by Busby were "highly likely to have been part of the bomb gang".
28. In May 2001, the European Court of Human Rights delivered a judgment in *McKerr v. UK* (Application no. 28883/95), a case that was in some ways a precursor of the House of Lords decision of *In Re McKerr*. The judgment dealt with the form of an effective official investigation required when individuals had been killed as a result of the use of State force. The judgment was transmitted to the Committee of Ministers to supervise its execution. The UK Government set in train a 'Package of Measures' to address the identified breaches of the Article 2 procedural obligations. This led to the establishment of a number of investigative units. The Barnard judgment involved one of those units, the HET (Historical Enquiries Team). Originally, the HET was set up with two teams; a team of police officers seconded from police forces outside Northern Ireland, and another that was staffed by a mix of police officers and staff recruited from both the PSNI and externally.
29. Between 2006 and 2007, a third team was established known as "the White Team" which was based in England, the function of which was largely analytically driven and directed towards examining issues of collusion between terrorists and members of the Security Forces and police service. The Committee of Ministers was informed in relation to these arrangements and signed off on them. Part of the process involved the HET producing a Review Summary Report for each family which had engaged with it. In fact, the Barnard family had not engaged, but the families of others killed in the Hillcrest bombings had. These reports indicated that there was no evidence of collusion in the Hillcrest bombing, but that the HET would continue to assess the Hillcrest case and other cases as part of its ongoing investigation into the 'Glenanne Series'. This was a reference to a significant

number of murders and other serious crimes committed by the Mid-Ulster UVF which were the subject of consideration by the White Team. Some of these murders were linked by personnel or with weapons, and in some cases, there was direct evidence of the involvement of members of the Security Forces. Many of the affected families, including the applicant, liaised with the Pat Finucane Centre which carried out a study of 51 separate murders and serious crimes committed in South Armagh between 1972 and 1978. The Pat Finucane Centre published a report in 2004, and following that, arranged for the conduct of an investigation by the Centre for Civil and Human Rights at Notre Dame Law School in America. There followed a series of meetings between the Pat Finucane Centre and the Director of the HET. The HET had indicated that it was going to look at each case individually and then do what was described as a larger thematic report which would put things in context.

30. At a meeting on 15th June 2011, between the PFC and the HET, it was indicated that substantial work had been done on the thematic report and it was believed that it might be possible to complete it by the end of that year. In the course of the proceedings before the Courts of Northern Ireland, disclosure was made of a draft unfinished report entitled 'South Border Security Situation Report' which introduced itself as the HET overarching report into its review of a number of terrorist-related deaths in the South Border area of Northern Ireland between 1972 and 1978. In 2013, the Chief Constable of the PSNI decided, against a background of criticisms of the HET, to suspend any further work by it, and it was disbanded the following year. Its work was transferred to the Legacy Investigation Branch (LIB) of the PSNI. In the case of *In Re Margaret McQuillan* [2019] NICA 13, the Court of Appeal concluded that the LIB did not have practical independence in respect of the conduct of legacy investigations for the purpose of Article 2, but concluded that the HET arrangements secured practical independence. In the High Court, Tracey J analysed a number of representations and concluded that there was a substantive legitimate expectation that a thematic report, including the examination of collusion in the Glenanne Series, would be provided. The Court of Appeal was satisfied that the High Court judge had been correct.
31. The contrast between the clear and specific representations in issue in *Barnard*, and the somewhat open-ended and aspirational messages in the present case from which the applicant seeks to draw comfort, should be noted. In a situation where the Hillcrest bombing, which resulted in the death of Patrick Barnard and others, occurred on St. Patrick's Day 1976, some 24 years before the Human Rights Act came into force, the Court of Appeal addressed the temporal issue. It did so in a situation where the temporal jurisdiction of the separate obligation to carry out an investigation by virtue of Article 2 was considered by the European Court of Human Rights, with the Court concluding that there had to be a genuine connection between the investigation and the death. The Court identified three limitations on the jurisdiction to examine pre-ratification claims. First, the duty arose only in relation to procedural acts which were capable of discharging the investigative duty. Second, the genuine connection between the death and the critical date was primarily a temporal one and should not exceed ten years. Third, in exceptional circumstances, it may be justified to extend the time limit further, on condition that the

requirements of the Convention values test have been met. The Court of Appeal was of the view that despite the submissions of the respondent, it was clear from the judgment of Lord Kerr in *Finucane* [2019] UKSC 7, that these tests also apply to any proceedings seeking to enforce the investigatory duty in respect of a death which occurred prior to the commencement of their Human Rights Act.

32. Here, a substantial part of the investigation occurred between 1976 and 1981, as a result of which Busby was convicted. This, therefore, was not a case in which it could be said that the vast bulk of noteworthy enquiry into the death had taken place since the Human Rights Act came into force, and that the exercise conducted by the HET largely consisted of the rehearsing of materials that was already available. The Court of Appeal commented “the promise in this case relates to an analysis of the material which had been generated as a result of the investigation of the other cases, rather than some fresh investigative material”.
33. The Court of Appeal concluded that it was difficult to see any proper basis upon which the Genuine Connection Test could be established in relation to the death of Patrick Barnard which had occurred more than 24 years prior to the commencement of the Human Rights Act. Submissions were made to the Court of Appeal that the Convention values test was engaged in this case. However, the Court referred to case law from the European Court of Human Rights which indicated that the Convention Values Test was engaged when the triggering event amounted to the negation of the very foundations of the Convention, examples being serious crimes under international law, such as war crimes, genocide, or crimes against humanity. The Court of Appeal did not consider that this test was met in the case, and accordingly, concluded that there was no Article 2 duty enforceable in domestic law in this case. In the present appeal, it is common case that the Convention Values Test does not arise for consideration.

The Treatment of this Issue in the High Court

34. The High Court began its consideration of this issue by indicating that it had identified the issue to be decided as whether the applicant had a valid claim on Article 2 grounds under the laws of the State for the establishment of the two Commissions of Investigation. The High Court judge referred to the fact that in support of his argument, the applicant relied on the jurisprudence of the European Court of Human Rights in *Silih* and *Janowiec* (the case relating to the massacre by Soviet authorities of more than 21,000 Polish Prisoners of War in the Katyn Forest).
35. With regard to the contention on behalf of the applicant that the Irish Courts’ approach to the Article 2 invocation should mirror the jurisprudence of the European Court of Human Rights, adopting a similar approach to the UK Supreme Court in *Keyu*, the judge felt that it was appropriate to first address the status of the Convention in Irish law. She felt that issue had been comprehensively considered in the Supreme Court in *JMcD v. PL* [2009] IESC 81. She pointed out that the question of the extent to which provisions of the Convention were justiciable in Irish law fell to be considered in *Byrne v. An Taoiseach* [2011] 1 IR 190, a case brought by relatives of victims of the Dublin and Monaghan bombings of 1974. They were dissatisfied with the investigations and enquiries of the

Gardaí, the Barron Inquiry, and the subsequent Oireachtas Sub-Committee Report. They contended that these investigations had not been compliant with the State's domestic law obligations under, *inter alia*, Article 2 of the ECHR, and they contended that there was a continuing process of investigation, and that accordingly, as of 31st December 2003, they were entitled to insist on a Convention-compliant procedure. Laffoy J. concluded that there was no basis on which any provision of the Convention was directly justiciable as a matter of domestic law. Relying on *JMcD v. PL*, the judge was of the view that provisions of the Convention were enforceable under domestic law only insofar as they were statutorily enforceable under the provisions of the 2003 Act. Laffoy J. acknowledged the divergence between the approach of the House of Lords in *Re McKerr* which saw the procedural obligation inherent in Article 2 as being an ancillary obligation, rather than a separate and autonomous obligation, as identified in *Silih v. Slovenia*.

36. The High Court judge, in this case, pointed out that what the applicant wants is the establishment of two Commissions of Investigation, one to examine substantive failures which attached to the investigation into the death of Seamus Ludlow, and the other to investigate what documents might have been created by the State authorities in respect of the murder. The judge commented that the respondents argue that the Convention does not admit such a right and that she was constrained to agree with them.
37. As I will make clear, I, too, would agree with the position urged by the respondents, but insofar as the judge in the High Court made these observations in the context of a demand for two Commissions of Investigation, I think it only fair to point out that before this Court, the applicant adopted a somewhat more flexible approach, indicating that what was sought was an inquiry that would be Article 2-compliant, without being prescriptive as to what form that would take. Moreover, Faherty J. felt that it was a case where it would be difficult for the applicant to succeed before the European Court of Human Rights on Article 2 grounds in view of the extent of the lapse of time, some 27 years that had elapsed between the trigger date, or murder date, 2nd May 1976, and the critical date, 31st December 2003. The judge felt that there was a question mark as to whether the circumstances of the case would satisfy the "Genuine Connection Test" as set out by the European Court of Human Rights in *Silih* and *Janowiec*. The High Court judge found the reliance placed by the applicant on the decision in *Breknell v. United Kingdom* [46] EHR 957 misplaced, quoting from the European Court of Human Rights judgment as follows:

"[t]he Court takes the view that where there is a plausible or credible allegation, piece of evidence or item of information relevant 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. The steps that it would be reasonable to take will 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. Such an investigation may, in some cases, reasonably, be restricted to verifying the credibility of the source or of the purported new evidence. The 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 prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings.”

The last sentence of the quotation seems particularly apposite. Relying on the decision in *Byrne v. An Taoiseach*, the High Court ultimately came to a similar conclusion.

38. I agree with the High Court that the arguments advanced in relation to Article 2 by the applicant fail. It seems to me that it is necessary to consider what is the nature of the right given by Article 2. It is a right to an effective investigation into a death. It is clear from many of the authorities that what is involved is an identification of perpetrators, leading to prosecutions and punishment. Article 2 is not concerned with investigations into investigations. In this case, the applicant believes that he knows the perpetrators. Certainly, suspects have been identified, but given the decisions taken by the Directors of Public Prosecutions on either side of the Border, he is resigned to the fact that a prosecution at this stage is unlikely. He is also aware of the fact that the Garda investigation remains open and can be advanced if further information comes to light. It is true, at this remove, that is unlikely, and is becoming more unlikely with the further passage of time, but it is not something that can be totally excluded. It is noteworthy that in *Janowiec*, similar to *Silih*, the applicant placed particular reliance in stressing the separate and autonomous nature of the duty to investigate. At para. 143, the European Court of Human Rights commented:

“t]he Court further considers that the reference to ‘procedural acts’ must be understood in the sense inherent in the procedural obligations under Article 2 or, as the case may be, Article 3 of the Convention, namely, acts undertaken in the Framework of Criminal, Civil, Administrative or Disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an aware of compensation to the injured party . . . this definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth.”

39. If the applicant is to be successful, he would need to be in a position to establish an entitlement to an Article 2-compliant inquiry under both the Convention and under the domestic law. However, his difficulty is that the Irish courts have made clear, repeatedly, in cases such as *JMcD v. PL* and *Dublin City Council v. Fennell* [2005] 1 IR 604, that the 2003 Act does not have retroactive effects.
40. For my part, I find the reasoning in *Re McKerr* very clear and persuasive and I would be very slow to depart from it. In that context, I am particularly struck by the submissions of John Larkin QC, the Attorney General for Northern Ireland, intervening in the case of *Keyu v. The Foreign Secretary*, which I find very persuasive indeed. His submissions were to the effect that any proceedings which did not have as its object the identification and punishment of those responsible, or an award of compensation for an injured person, falls outside the procedural limb of Article 2: neither an Inquest nor an Inquiry under the provisions of the Inquiries Act 2005 has that objective, and accordingly, they fall outside

the scope of the Article 2 procedural duty. To interpret that obligation as requiring the State to invest significant resources to investigate circumstances of death in which there is no real possibility of any effective remedy or of holding any person to account in a criminal, civil or disciplinary sense is not consistent with the essential purpose behind the procedural obligation. There is no right to truth detachable from an independent of the Article 2 justice obligation. The procedural limb of the Article is thus set in the context of effective enforcement of the criminal law, which the trial envisaged as the latter stages of the proceedings as a whole. According to John Larkin QC, the procedural limb is therefore the initial stage of a process leading to the holding of persons to account. For my part, I am very happy to adopt these submissions as expressing my view.

41. It does seem to me that we cannot ignore the fact that at this stage, there have been four separate Garda investigations; the initial, and I hasten to add, deeply flawed investigation, that in 1979/1980, that in 1996/1999, and that following the Barron Report. Barron J. named four individuals as persons believed to be present at the murder of Seamus Ludlow and suspected of being its perpetrators. It is entirely understandable that the applicant would believe that he knows the perpetrators. It is hard to see what more could be hoped to be achieved by a further inquiry. Realistically, the very most that could be hoped for would be some further information as to why the initial inquiry was so inadequate and so curtailed. However, one could not be at all confident that anything significant would be achieved in that regard. Barron J. felt that he had sufficient cooperation from the Gardaí. No doubt, those urging a still further inquiry would point to the fact that he did not have powers of compellability. It is true that if a further Inquiry or Tribunal was to be established, there would be every expectation that compellability powers would be attached, but on the other side of the coin, a further 16 years have passed. It is now 44 years since the murder of Mr. Ludlow and how many people can there be available who exercised directing roles or leadership roles initially, or indeed, in 1979/1980 and would be in a position to assist?
42. I realise, of course, that there have been demands for inquiries after even longer periods. The cases referred to earlier in this judgment include cases relating to events that occurred in what is now Malaysia in 1948, and further back again, in the Kaytan Forest in April/May 1940. There have also been many demands for Inquiries into violent deaths during 'the Troubles' in Northern Ireland, whether the deaths occurred in Northern Ireland or in this State. Deciding to direct an inquiry in any such case must involve balancing competing interests. It seems to me that the role for the courts in compelling the institution of an Inquiry must be very limited indeed.
43. My view is this is an area where courts should tread extremely reluctantly has a particular resonance in Ireland where the doctrine of the Separation of Powers is deeply entrenched. Decisions in relation to the establishment of Commissions of Investigation are, by statute, entrusted to members of the Executive and to the Oireachtas. Courts should not entrench on the jurisdiction of the other organs of State. It is instructive to have regard to the manner in which the applicant's claim is pleaded. The reliefs sought in the Notice of Grounds had included an order of mandamus compelling the respondents to establish two

Commissions of Investigation as well as an order of mandamus requiring the respondents to take all necessary steps to establish the Commission of Investigation forthwith. For good measure, there is the rather curious hybrid relief where what is sought is “a declaration that the respondents establish the said Commissions of Investigation in a manner and with Terms of Reference that are compliant with the State’s obligations and the applicant’s rights pursuant to Article 2 of the European Convention on Human Rights, the Constitution and at common law”. It is true, and must quickly be acknowledged, that in the High Court, the applicant indicated that he was not pursuing the claim for mandamus. However, drawing attention to the somewhat unhappily drafted Statement of Grounds is not to make a pleading point, but to make the point that the proceedings seek to tempt the courts into forbidden territory. The notion that Ireland could be compelled to establish Commissions of Investigation, whether by way of a traditionally-framed order for mandamus, or the hybrid declaration that it and the other respondents establish the Commission of Investigation in a particular way and with particular Terms of Reference is quite misconceived. The Attorney General has no specific role in relation Commissions of Investigation and Tribunals of Inquiry, though, no doubt, he would ordinarily offer advice to the Executive. In my view, the difficulties that are manifest are serious, and, from the perspective of the applicant, insurmountable.

44. Overall, I have come to the view that these proceedings are essentially misconceived and amount to an invitation to the courts to trespass. What is called for here is the exercise of what is quintessentially a political judgment. It is a judgment to be exercised, in accordance with statute, by designated members of the Executive and by the Oireachtas.
45. In these circumstances, I am obliged to dismiss the appeal and affirm the decision of the High Court. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Edwards J.

I agree.

McCarthy J.

I also agree.