INVESTIGATING LETHAL FORCE DEATHS IN NORTHERN IRELAND

The Application of Article 2 of the European Convention on Human Rights

By FIONA DOHERTY and PAUL MAGEEAN

NORTHERN IRELAND HUMAN RIGHTS COMMISSION

February 2006
ISBN 1 903681 53 7

Temple Court, 39 North Street
Belfast BT1 1NA

Tel: (028) 9024 3987
Fax: (028) 9024 7844
Textphone: (028) 9024 9066
Email: information@nihrc.org
Website: www.nihrc.org

FOREWORD

The Northern Ireland Human Rights Commission is pleased to publish this report on the role of the inquest system in Northern Ireland in investigating deaths by lethal force. Article 2 of the ECHR requires the state to conduct an effective investigation of any death caused by lethal force or in a situation where the person is in the custody or care of the state. Allegations that the state has at times failed to adequately investigate breaches of Articles 2 and 3 of the ECHR have been raised in correspondence and meetings with the Commission by a range of individuals and groups, including bereaved families and support groups from diverse sources. The level of outstanding inquests – some of them delayed by years – has been of great concern both to the Commission and to the public.

The report forms part of a series examining the implementation of Articles 2 and 3 (the first report in the series related to deaths in hospital). The Commission has also published short guides to Articles 2 and 3 (ECHR). This publication of this report is timely, particularly since the government has indicated that the inquest will usually be the forum by which the state's Article 2 obligations are discharged.

The inquest is a very difficult experience for those who have been bereaved and it is important that the system works effectively to minimise distress for the family and to meet its expectations. The Commission hopes that this report will add to public knowledge of the problems in the system and point to ways of addressing these problems so that human rights can be upheld. The report discusses up-to-date case law relevant to Article 2 and looks at how the inquest system has operated in Northern Ireland in relation to lethal force cases. It contains the views of coroners from different parts of Northern Ireland on what the problems have been in the system.

The report was co-authored by Fiona Doherty, a practising barrister, and Paul Mageean, a solicitor with many years experience, recently appointed as an Inspector with the Criminal Justice Inspectorate of Northern Ireland (both are writing in a personal capacity). Their remit included making recommendations to the Human Rights Commission about how best to continue monitoring this issue and these are included as Appendix 2. Paul and Fiona have produced a thorough report and we thank them for their conscientious work.

Monica McWilliams
Chief Commissioner
February 2006

THE AUTHORS

Fiona Doherty

After studying law at Trinity College Dublin, Fiona Doherty was awarded a Masters Degree in Human Rights Law with distinction from Queen's University, Belfast. She is a practising barrister, having been called to the Northern Ireland Bar in 1997 and the Bar of Ireland in 2001.

Fiona acted as counsel in the right to life cases of *Kelly and others v UK*, *Shanaghan v UK*, *McShane v UK* and *Finucane v UK* before the European Court of Human Rights and represented the interests of the families of three deceased and two wounded before the Bloody Sunday Inquiry. She specialises in public law, human rights law and coronial law.

Fiona has been a member of the executive committee of the Committee on the Administration of Justice (CAJ) since 1997 and held the post of chairperson of the organisation between 2001 and 2003.

Paul Mageean

Paul Mageean qualified as a solicitor in 1991. He spent almost five years working with well-known local criminal defence firm, PJ McGrory and Co, during which time he worked on the written submissions in the McCann case, which led to the first finding of a violation of the right to life by the European Court of Human Rights in 1995.

In 1994, Paul received a Masters in International Human Rights Law from the Queen's University of Belfast.

In 1995 Paul became Legal Officer at the Committee on the Administration of Justice (CAJ). He took a number of ground-breaking cases to the European Court of Human Rights including *Kelly and others v UK, Shanaghan v UK and McShane v UK*. He led CAJ's successful lobbying campaigns at the UN. He also worked closely with the families involved in the Cory process leading to public inquiries in a number of cases including that of Rosemary Nelson. After a short period as Acting Director, Paul left CAJ in 2004 to take up a post as head of the Criminal Justice Secretariat in the NI Court Service. His responsibilities there included ensuring that the Court Service implemented the recommendations of the Criminal Justice Review. He also had responsibility for human rights training within the organisation.

Paul was recently appointed as an Inspector with the Criminal Justice Inspectorate in Northern Ireland.

CONTENTS

EXECUTIVE SUMMARY

1. Article 2 of the European Convention on Human Rights (the 'right to life') requires the state to conduct an effective investigation of any death caused by lethal force or where the individual is in the custody or care of the state.

2. This report examines the extent to which the inquest system in Northern Ireland meets the State's obligations under Article 2 of the European Convention on Human Rights (ECHR). While the scope of this review is limited to the use of lethal force by the security forces, the jurisprudence of the European Court of Human Rights has expanded the impact of the procedural aspect of Article 2 considerably beyond this relatively narrow range of deaths.

3. The report contains four chapters: introduction; analysis of relevant jurisprudence at the European level; analysis of domestic case law; and discussion of the views of coroners interviewed.

4. The European Court of Human Rights made clear, as far back as May 2001, that the system for investigating controversial deaths in Northern Ireland was still failing to meet the minimum standards set by Article 2. The inquest system in Northern Ireland is facing a backlog of cases, some dating back to the early 1990s.

5. Through a series of 'landmark judgments' the European Court has ruled that the UK has breached the 'procedural aspect' of Article 2 on the basis of:

   - lack of independence of the police investigation, which applies to police killings (Jordan, McKerr), army killings (Kelly), and cases of alleged collusion (Shanaghan)
   - refusal of the Department of Public Prosecutions (DPP) to give reasons for failing to prosecute
   - lack of compellability of witnesses suspected of causing death
   - lack of verdicts at the inquest
   - absence of legal aid and non-disclosure of witness statements at the inquest
   - lack of promptness in the inquest proceedings
   - limited scope of the inquest, and
   - lack of prompt or effective investigation of allegations of collusion.

6. In addition, the Court made clear that in each case involving the use of lethal force by agents of the state, Article 2 requires that the state establish an effective investigation 'of its own motion'. The investigation must be independent, prompt, effective and adequately involve next-of-kin.

7. In September 2002, the UK government presented a 'package of measures' to the Council of Europe outlining the steps it had taken to implement the judgment of the Court to ensure that future investigations comply with Article 2. In February 2005 the Council of Europe, while welcoming the initiatives already taken, stated that further measures were still needed and that rapid action was necessary to address deficits in investigations.

8. Recent changes to the overall investigation system include:

- the establishment of the Police Ombudsman's office
- arrangements to facilitate the 'calling in' of other police forces to investigate deaths - the establishment of the Serious Crimes Review Team (Police Service of Northern Ireland)
- new practices relating to verdicts of coroners' juries at inquests and developments regarding disclosure at inquests
- legal aid for inquests
- measures to give effect to recommendations following reviews of the coroners' system, and
- legislation through the Inquiries Act.

9. The Human Rights Act 1998 has provided a domestic framework for the enforcement of the 'investigative' aspect of the right to life. In Northern Ireland, the majority of Human Rights Act cases relating to Article 2 have concerned the conduct of inquests into deaths caused by the security forces or deaths where collusion is alleged.

10. However, the usefulness of the Act in dealing with past deaths has been thrown into doubt by a recent decision of the House of Lords. In ***Re McKerr*** (2004), the Lords ruled that the Human Rights Act could not be used to force the state to hold an Article 2 compliant investigation into a death that occurred before the Act came into force.

11. Leave to appeal to the House of Lords has been granted in the **Jordan** and **McCaughey** cases. The House of Lords is being asked to decide finally on this issue.

12. Should the decision in the **McCaughey and Grew** case stand, it is clear that there will be no domestically enforceable obligation on public authorities to comply with Article 2 in the investigation of deaths that occurred before the Human Rights Act came into force.

13. This could lead to the situation where families concerned with the large number of outstanding inquests in this jurisdiction will make applications to the European Court of Human Rights, further delaying the process.

14. In addition, it would mean that death investigations and inquests in particular, are conducted differently according to the date of death.

15. Interviews and correspondence with five coroners in Northern Ireland highlighted the following concerns about the inquest system which remain to be addressed:

- delays in the system
- lack of formal protocol between coroners and the police in relation to the opening of inquests and the provision of material by the police to the coroner
- inadequate resourcing for the coronial system both in terms of staffing and recording facilities, and
- gaps in the investigative process (for example, in relation to the investigation of deaths caused by the army or other deaths, which may not be independently investigated by the Police Ombudsman).

16. In an attempt to deal with delayed inquests, the Belfast Coroners convened a series of hearings in relation to reported deaths where there had been a delay with the aim of addressing the backlog. The Coroner's Office plans to hold further similar hearings. However, the hearings did not specifically address those deaths that could be described as Article 2.

17. Coroners in the study suggested that a new coronial regime could include the publication of an annual report to include statistics on deaths, deaths engaging Article 2 and cases in which recommendations had been made.

18. Recommendations are made to the Human Rights Commission in terms of following up on this research (Appendix 2).

1. INTRODUCTION

The late Stephen Livingstone, Professor of Law at Queen's University of Belfast, described law in Northern Ireland as being a contested site for most of the past thirty years.[1] If that is true, then some of the most protracted conflict took place in the field of coronial law. Inquests examining disputed or controversial deaths, particularly those involving agents of the state, have been, and remain sites of acute legal conflict.

The protection of the right to life is of fundamental importance both in terms of its standing as a right guaranteed in international law and as a touchstone for public confidence in the rule of law. In this context, Article 2 of the European Convention on Human Rights (ECHR) has assumed a great deal of legal and political significance in Northern Ireland over the course of the last ten years. In particular, the protections, both explicit and implicit, contained in Article 2 are now key in determining the state's response to incidents involving the use of lethal force.

While the European Court of Human Rights made clear, as far back as May 2001, that the system for investigating controversial deaths in Northern Ireland was failing to meet the minimum standards set by Article 2, relatives are still facing significant hurdles, in outstanding cases, in trying to discover how their loved ones died. The inquest system remains clogged with old cases (at the end of 2001 there were 1,897 deaths still awaiting an inquest) some dating from as far back as the early 1990s.[2] The higher courts in Northern Ireland and Great Britain are still struggling with the implications of rulings from Europe and the incorporation of the European Convention into domestic law. Four years after the European rulings, the coronial system is still not functioning effectively in cases where Article 2 of the ECHR is engaged.

Some attempts to improve the situation are being made with the publication of the Northern Ireland Court Service's plan for the reform of the coronial system: *Modernising the Coroners Service – the Way Forward*.[3] However, this has not addressed the key concerns identified in this report. It is clear that more fundamental change is needed to ensure,

---

[1]Livingstone S and Morison J (eds) (1990) *Law Society and Change* Gower, Aldershot. See also Livingstone S and Morison J (1995) *In Place of Fear* Democratic Audit Paper No 5 Human Rights Centre University Essex and Charter 88 Trust.

[2]Luce T (2003) *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* Cm 5831 TSO, London (The Luce Review) Chapter 17 para 30.

[3] Northern Ireland Court Service (April 2005) *Modernising the Coroners Service: The Way Forward* NICS, Belfast.

in particular, that coroners have the necessary powers to compel the production of documents which are relevant to an inquest. A recent decision by the Northern Ireland Court of Appeal has highlighted the inadequacy of the current arrangements.[4]

This report examines the extent to which the inquest system in Northern Ireland meets the state's obligations under Article 2 of the ECHR. Specifically, the study examines the extent to which the requirement inherent in Article 2 properly to investigate incidents involving use of lethal force is being met, focusing on the inquest system as the primary means of investigation.

[4] *Police Service of Northern Ireland v Owen McCaughey and Pat Grew* [2005] NICA 1 (14 January 2005).

2. ARTICLE 2 JURISPRUDENCE AT EUROPEAN LEVEL

Context

Article 2 of the European Convention on Human Rights

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

    a. In defence of any person from unlawful violence;

    b. In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

    c. In action lawfully taken for the purpose of quelling a riot or insurrection.

The European Court of Human Rights (the Court) has stated that:

> 'Article 2 ranks as one of the most fundamental provisions in the Convention, to which no derogation is permitted. Together with Article 3, it also enshrines one of the most basic values of the democratic societies making up the Council of Europe.'[5]

Despite the central importance attached to Article 2, scant jurisprudence existed in relation to it until the 1990s. This was despite ongoing and significant civil strife in Northern Ireland and Spain since the late 1960s, accompanied by instances of the use of lethal force by the security forces in both jurisdictions.

[5] See *McCann and Others v UK* (1995) 21 EHRR para 147; *Soering v UK* (1989) 11 ECHR 439 para 88; *Andronicou and Constantinou v Cyprus* (1977) 25 EHRR 491 para 171; *Gul v Turkey* (2002) 34 EHRR 719 para 76; *Jordan v UK* (2003) 37 EHRR 52 11 BHRC 1 para 102; *Kelly v UK* App No 30054/96 Judgment of 4 May 2001 para 91.

Article 2 was pleaded in a number of cases in the 1970s and 80s. In ***Ireland v UK***,[6] the Irish government complained about a number of deaths at the hands of the security forces in Northern Ireland, which it claimed, were not justified under Article 2. Although ***Ireland v UK*** was ultimately considered by the Court, the aspect of the case involving Article 2 was declared inadmissible by the European Commission of Human Rights (the Commission) on the grounds that Ireland had failed to provide evidence to the Commission of an administrative practice in this regard.

Article 2 was pleaded in another interstate case, this time involving Cyprus and Turkey,[7] following the Turkish invasion of Cyprus in 1974. While on this occasion the Commission declared admissible alleged violations of Article 2, the Court was not given the opportunity to consider the claims because Turkey did not accept the jurisdiction of the Court. Nevertheless, the Council of Europe's Committee of Ministers did find a violation of Article 2.

The Court was also deprived of the opportunity of considering Article 2 in three further cases, all emanating from the conflict in Northern Ireland. The first of these, ***Farrell v UK***,[8] concerned the shooting dead of three robbers by British soldiers who claimed they thought the three were terrorists. The case was the subject of a friendly settlement following the Commission's consideration of the matter.

In ***Stewart v UK***,[9] a 13 year-old boy was killed after being hit on the head by a plastic bullet fired by a soldier in Belfast during what the military claimed to be serious rioting. The Commission, in a controversial decision, accepted the facts as determined by the High Court in Northern Ireland and found that the force used was 'absolutely necessary' in terms of Article 2(2)(c).

The final unsuccessful case emerging during this period from Northern Ireland was ***Kelly v UK***.[10] In that case, a 17 year-old 'joy rider' was shot dead by soldiers after his car drove through an army checkpoint. Once again, the Commission uncritically accepted the version of events as found by the High Court in Northern Ireland and declared the case inadmissible, finding the soldiers had acted within Article 2(2)(b).

---

[6] *Ireland v UK* (1978) 2 EHRR 25 ECtHR.
[7] *Cyprus v Turkey* (1976) 4 EHRR 482.
[8] 30 DR 96 (1982) Admiss; 38 DR 44 (1984) (1983) 5 EHRR 466.
[9] App No 10044/82 (1984) 39 DR 162 EcommHR.
[10] *Kelly v UK* App No 17579/90 Judgment of 4 May 2001.

The development of the procedural protection

In 1995, 45 years after the drafting of Article 2, the Court had its first substantive opportunity to apply it in a case involving the use of lethal force. In 1988, three members of the IRA were shot dead by the SAS regiment of the British Army in the British colony of Gibraltar. The relatives of those killed lodged an application with the Strasbourg authorities and the Court, in a ground breaking judgment, found that the UK had violated Article 2. There were a number of significant elements to the decision of the Court in ***McCann v UK***.[11]

The Court said that in cases involving the use of lethal force by the state, it would apply a higher standard of scrutiny than that normally employed when considering state action which may violate the ECHR:

> 'In this respect the use of the term 'absolutely necessary' in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is necessary in a democratic society under paragraph 2 of Articles 8-11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.'

The Court also significantly extended this scrutiny not only to the actual use of force but also to the planning of the operation which resulted in the use of force. The Court found that the planning of the operation of Gibraltar was defective. This was an important development because it incorporated Article 2 into decision-making in advance of a security operation. In addition, however, and crucially for the purposes of this paper, the Court expanded its scrutiny to what happens after the use of lethal force as well, examining the procedures in place for investigating the use of such force.

The Court noted that:

> '… a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities.'[12]

Notwithstanding the fact that so such violation was found in ***McCann*** itself, the duty to investigate was firmly established by the Court and was

[11] *McCann,* note 5 above.
[12] At para 161.

further elaborated upon in subsequent judgments, many emerging from another area of considerable political strife – south eastern Turkey. A leading commentator and author of the Northern Ireland Human Rights Commission's intervention before the European Court of Human Rights in ***Jordan et al***, described the approach of the Strasbourg judges in the case of ***Kaya v Turkey***[13] where the Court:

> '[…] commenced by recalling that the legal prohibition on arbitrary killing would be meaningless if there existed no procedure for reviewing the lawfulness of the use of force by States. Thus, the obligations of Article 2 of the Convention allied with the State's general duty under Article 1 mandate that a State *must* carry out an effective official investigation when an agent of a State is involved in the exercise of lethal force. The Court emphasised that the right to life was only meaningful where procedural protections were in place to ensure that the exercise of force was subject to independent and public scrutiny. The Court also rejected the State view that in a case of 'clear cut' lawful killing by the security forces, the State was dispensed from having to comply with anything other than the minimal legal formalities. In an approach that was augmented in the ***Jordan et al*** decision, it focused on the minutiae of the investigative process. It was critical of the lack of thorough scene of crime analysis, the failure to take statements from the soldiers at the scene of the incident, and the absence of collaboration from villagers who might have heard or seen the incident. Failures in all these respects were pivotal to the finding of an Article 2 breach.'[14]

The notion that failure to satisfy the procedural aspect of Article 2 could in and of itself constitute a breach of Article 2 was confirmed in a number of further Turkish cases. In ***Gulec v Turkey***[15] the Court again found a violation of Article 2 on the grounds that the investigation of the killing was 'not thorough nor was it conducted by independent authorities'.[16] The Commission had found that the authorities responsible for the investigation of the case lacked the 'requisite independence and impartiality'.[17]

---

[13] (1999) 28 EHRR 1, paras.86-92. See Kurdish Human Rights Project Press Release 29 March 2000: 'This ruling provides vital evidence of the level of state involvement in and indifference to the indiscriminate attacks on Kurds in south east Turkey around the beginning of the 1990s. It vindicates the claims by so many that, repeatedly, the Turkish authorities failed in their positive duty to protect the lives of those threatened', available at: www.khrp.org/news/pr2000/proo.htm [26 September 2005].
[14] Ní Aolain F (2002) 'Truth Telling, Accountability and the Right to Life in Northern Ireland' [2002] *European Human Rights Law Review* 572 at 578.
[15] (1999) 28 EHRR 121.
[16] Above, para 82.
[17] Above, para 76.

The day after the ***Gulec*** judgment, the Court delivered judgment in the case of ***Ergi v Turkey***.[18] In it, the Court said that it attached 'particular weight' to the procedural element implicit in Article 2[19]. Finding another violation of Article 2 on these grounds, the Court noted, in a comment relevant for Northern Ireland that:

> '… neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces…'[20]

The jurisprudence of the Court on the procedural protection implicit in Article 2 by this stage had identified a number of important features which an investigation into a suspicious killing must possess in order to comply with Article 2. These include the need for such an investigation to be public (***Kaya v Turkey***), independent (***Gulec v Turkey***), effective (***Ergi v Turkey***), thorough (***Gulec v Turkey***) and prompt (***Aytekin v Turkey***).[21] Perhaps most importantly, it must be able to determine the lawfulness of the actions of the security forces responsible for the death (***McCann v UK***).

In the more recent cases of ***Kelly v UK***,[22] ***Shanaghan v UK***,[23] ***Jordan v UK***[24] and ***McKerr v UK***,[25] the Court took the opportunity to clarify further the exact parameters and criteria required for an investigation to comply with Article 2 of the ECHR. The Northern Ireland Human Rights Commission successfully applied to make an intervention in these cases, arguing for an expansive interpretation of the Article 2 obligations.

Jordan and ***McKerr*** related to killings by the police while ***Kelly*** involved the killing of a large number of individuals by the army. ***Shanaghan*** involved allegations of collusion between the police and paramilitary groups.

[18] (2001) 32 EHRR 18.
[19] Above, para 82.
[20] Above, para 85
[21] Judgment of 23 September 1998.
[22] *Kelly v UK* App No 30054/96 Judgment of 4 May 2001.
[23] *Shanaghan v UK* App No 37715/97 Judgment of 4 May 2001.
[24] *Jordan v UK* (2003) 37 EHRR 52.
[25] *McKerr v UK* (2002) 34 EHRR 20.

In the 'landmark judgment[s]',[26] the Court made specific reference to various provisions of UN 'soft law'[27] and, in summary, concluded that the UK had breached the procedural aspect of Article 2 on the basis of the:

- lack of independence of the police investigation, which applies to police killings (***Jordan, McKerr***), army killings (***Kelly***), and cases of alleged collusion (***Shanaghan***)
- refusal of the DPP to give reasons for failing to prosecute
- lack of compellability of witnesses suspected of causing death
- lack of verdicts at the inquest
- absence of legal aid and non-disclosure of witness statements at the inquest
- lack of promptness in the inquest proceedings
- limited scope of the inquest, and
- lack of prompt or effective investigation of the allegations of collusion.

In addition the Court made it clear that, in each case involving the use of lethal force by agents of the state, Article 2 requires the state to establish the investigation of its own motion, once the matter has come to its attention. The state cannot rely on the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.[28]

The investigation must be independent – in hierarchical, institutional and practical terms. Therefore, for instance, police investigation of the deaths caused by the army in ***Kelly*** did not meet this exacting standard, because the army acted in support of the police in that operation. The investigation must also begin promptly. Such promptness was regarded by the Court as essential in maintaining public confidence in the

[26] Amnesty International News Report, AI Index EUR 45/010/2001. See also comment by Nuala O'Loan, Police Ombudsman for Northern Ireland, *Irish Times*, 11 October 2001, p8: that this judgment 'will be the greatest challenge to most existing police complaints system[s] in Europe. … Recent events in London, with the Lawrence case, and in Ireland, with the Abbeylara case, have shown that there is a demand for openness, transparency and independence in the investigation of allegations of misconduct by the police. I believe this can lead to an enhanced police service.'

[27] See *Kelly v UK* App No 30054/96 Judgment of 4 May 2001. Reference was made to the UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (UN Force and Firearms Principles) paras 21 and 22; to the UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* paras 9, 10-17; and to the 'Minnesota Protocol' (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*), Section B 'Purposes of an Inquiry'.

[28] *Kelly v UK* App No 30054/96 Judgment of 4 May 2001 para 94. See also *Ilhan v Turkey* (2002) 34 EHRR 869 para 63.

'maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.[29]

The next-of-kin of the deceased in such cases must be adequately involved in the investigative proceedings 'to the extent that it safeguards his or her legitimate interests'.[30]

The Court also rejected the notion that civil proceedings could be taken into account when assessing a state's compliance with Article 2, saying that 'the obligations of the state under Article 2 cannot be satisfied merely by awarding damages.'[31]

Building on the judgments in the ***Jordan et al*** cases, the Court has also delivered further judgments in cases emerging from Northern Ireland including ***McShane v UK***[32]and ***Finucane v UK***[33] To a large extent these have followed the reasoning in ***Jordan et al*** and not added significantly to the elaboration of the procedural protection under Article 2.

UK government response to judgments

Responding to the applications before the Court, the UK had argued that a combination of the police investigation, the review of the case by the Department of Public Prosecutions (DPP), the inquest system and the possibility of civil proceedings satisfied the procedural requirement of Article 2. However, the Court said that while a combination of remedies could indeed satisfy Article 2, the remedies available in Northern Ireland did not do so in these cases. While it would of course be open to the UK to construct a completely separate mechanism for the investigation of lethal force type cases in order to ensure compliance with Article 2, it seems more likely that what will be envisaged will be improvements to the current system to address the various criticisms made by the Court.

Responsibility for the implementation of Court judgments lies with the Committee of Ministers of the Council of Europe in Strasbourg. In September 2002 the UK Government presented the Committee with a 'package of measures' outlining the steps it had taken to implement the

[29] *Kelly v UK* above para 97.
[30] *Gulec v Turkey* (1999) 28 EHRR 121 (see para 82, where the father of the victim was not informed of the decisions not to prosecute); *Ogur v Turkey* (2001) 31 EHRR 40 para 92.
[31] *Kelly v UK* App No 30054/96 Judgment of 4 May 2001 para 105.
[32] *McShane v UK* (2002) 35 EHRR 23.
[33] *Finucane v UK* (2003) 37 EHRR 29.

judgment of the Court so as to ensure that future investigations comply with Article 2.

The Human Rights Commission considered that the package was inadequate and would not produce Article 2 compliant investigations. In February 2005, the Committee of Ministers produced its response to the 'package of measures'.[34] The Committee noted steps being taken including: the establishment of the Police Ombudsman's Office; arrangements allowing for the 'calling in' of other police forces to investigate deaths; the establishment of the Serious Crimes Review Team (PSNI); the option for families to judicially review decisions not to prosecute; new practices relating to the verdicts of coroners' juries at inquests and developments regarding disclosure at inquests; legal aid for inquests; measures to give effect to recommendations following reviews of the coroners' system; and the Inquiries Bill.[35]

The Committee welcomes the Government's intention to address the issues arising from the Court judgments but considered that 'certain general measures remain to be taken and that further information and clarifications are outstanding with regard to a number of other measures, including, where appropriate, information on the impact of these measures in practice'.[36] The Committee called on the Government 'rapidly to take all outstanding measures and to continue to provide the Committee with all necessary information and clarifications to allow it to assess the efficacy of the measures taken, including, where appropriate, their impact in practice'.

Changes to the investigation system

The changes that have been made to the overall investigation system since the judgments in ***Jordan et al*** and the coming into force of the Human Rights Act 1998 are addressed in more detail in the next section, which relates to the right to an effective investigation in domestic law. Here they can be summarised as follows:

[34] Council of Europe (2005) Action of the Security Forces (case of McKerr against the United Kingdom and five similar cases.) Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix III (Adopted by the Committee of Ministers on 23 February 2005 at the 941st meeting of the Ministers' Deputies). Interim Resolution Res DH (2005) 20.
[35] Now in legislation as the *Inquiries Act.*
[36] Above.

Investigation

In the event that an incident involving the use of lethal force by the security forces were to occur now in Northern Ireland, it would be incumbent on the authorities to have it investigated independently. While the establishment of the office of the Police Ombudsman for Northern Ireland probably means that the independence requirement is satisfied for the purposes of the use of lethal force by the police, no mechanism exists to independently investigate the use of such force by the army. This remains a potential source of Article 2 violations.

In addition, while beyond the scope of this paper, the ***Shanaghan*** case clearly indicates that where allegations of collusion between the security forces and paramilitaries exist, investigation must also be independent. It is unclear how this could be achieved under the present system given that evidence of collusion may not begin to emerge until some time after the death when many of the important investigative steps will already have been completed.

While *post hoc* processes established to investigate collusion have laboured under this difficulty, the findings by the Stevens investigation into the murder of Patrick Finucane, and the results of the Cory process examining collusion in a number of high profile cases, nevertheless seem to vindicate the view of the European Court that independent investigation is the key to uncovering the truth of such allegations.

Role of the Director of Public Prosecutions

It is clear from the Court's rulings that the Director of Public Prosecutions (DPP) would be obliged in any future case to provide reasons for any refusal to prosecute those responsible for a death caused by the use of lethal force by the police or army. While the Attorney General, on behalf of the DPP, has indicated that guidelines have now been agreed with the DPP's office to ensure that such decisions are taken in accordance with Article 2 obligations,[37] the authors are not aware of any occasion on which these have been used. A determination of the extent to which practice will have changed within the DPP's office to comply with Article 2 will therefore have to be made following any lethal force incident.[38] In 2003, Neil McConville was shot dead by members of a special police unit

[37] Statement issued by the Attorney General in the House of Lords, 1 March 2002.
[38] Following the European judgment in his favour, the father of Pearse Jordan again asked the DPP for reasons for the failure to prosecute a police officer for the murder of his son. The DPP refused to provide such reasons on the basis that he was not obliged to do so given that the relevant decisions predated the coming into force of the Human Rights Act 1998. An application for judicial review and subsequent appeal by Mr Jordan were unsuccessful *Re Jordan's Application for Judicial Review* [2004] NI 198 (CA).

following the ramming of the car in which he was travelling. His death is currently being investigated by the Police Ombudsman but may ultimately be the first case to test the new policy of the DPP in relation to the giving of reasons in Article 2 cases.

Inquests

Inquests which are held into incidents of the use of lethal force in future in Northern Ireland will need to be significantly different creatures from their predecessors. It may be that implementation of the Luce recommendations[39] will meet many of the requirements of the Article 2 judgments. Nevertheless, the strict standards laid down by the Court are legal imperatives which the UK is obliged to follow regardless of what happens with regards to the Luce review. Five of these standards are relevant here: promptness of inquest, compellability of witnesses, scope, verdicts and the public nature of the hearing.

1. Promptness

Future inquests into deaths involving the use of lethal force should be held promptly. While there is some doubt as to exactly what length of time would have to elapse to fall foul of the promptness requirement, it is nevertheless clear that delays of a number of years (for instance four-and-a-half years in ***Shanaghan***) are prohibited.

2. Compellability

Those responsible for the deaths must be compellable witnesses at the inquest. The law in Northern Ireland has in fact been changed to reflect this aspect of the rulings so that those responsible for the death must now attend to give evidence.[40] However, it is possible that, having attended as witnesses, they may well refuse to answer questions on the grounds that their answers may be self-incriminatory. If allowed to escape scrutiny in this way by coroners, it is possible that, in spite of the change in the law, a violation of the procedural aspect of Article 2 will still occur.

The Court criticised the failure of those responsible to attend inquests in the following terms:

> 'This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. It

[39] Luce T (2003) *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* Cm 5831 TSO, London (The Luce Review).
[40] *Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland)* 2002.

> detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention.'[41]

Therefore, the attendance of a witness who is responsible for the death, but who maintains silence, is unlikely to fulfil the requirements set out by the Court.

3. Scope.

While, according to the Court, scope is a matter to be determined by the particular circumstances of each case, it is clear from the ***Shanaghan*** judgment that domestic courts should interpret scope more widely than they have done in the past in order that relevant evidence can be considered. This applies both to coroners' courts but also to higher courts which in the past have often, on application by the police and/or army restricted the cope of the inquest. This extension of the scope of the inquest has been confirmed by the judgment of the House of Lords in ***Middleton*** (see below).

4. Verdicts

The absence of a verdict under Northern Ireland coronial law led the Court to conclude that the inquest played no useful role in the identification or prosecution of any criminal offences and consequently feel short of the standard requirement required by Article 2. In light of this and the recent decisions in ***Middleton***[42]and ***Jordan***[43](see below) the inquest system will have to either provide for verdicts or allow some process whereby the hearing will contribute towards the identification and prosecution of offences.

5. Public nature of hearing

The Court found that the absence of legal aid and the non-disclosure of witness statements prior to the appearance at the inquest of those who had made those statements, prejudiced the ability of the applicant to participate in the inquest and contributed to long delays in the proceedings. The UK has introduced changes which should go some way to addressing these matters in terms of improved access to legal aid but also importantly in the area of pre-inquest disclosure (see below). It may

[41] *Kelly v UK* App No 30054/96 Judgment of 4 May 2001 para 121.
[42] [2004] 2 All ER 465.
[43] Judgment of Girvan J (with which McCollum LJ agreed) [2004] NICA 29; Judgment of Nicholson LJ [2004] NICA 30 (10 September 2004).

be, however, that further measures will have to be taken to meet the requirement that families be included in and informed about the investigation.

Implications for non-lethal force cases

While the scope of this review is limited to the use of lethal force by the security forces, it is important to note that the jurisprudence of the Court has expanded the impact of the procedural aspect of Article 2 considerably beyond this relatively narrow range of deaths. We have already seen for instance that one of the four landmark judgments from Northern Ireland involved allegations of state collusion in the murder of Patrick Shanaghan, who was killed by loyalist paramilitaries. This was reinforced in the ***Finucane*** judgment dealing with a similar factual situation.

In addition the Court in the case of ***McShane*** has applied Article 2 to a situation where the death was caused by an army vehicle crushing the deceased during the course of public disorder.

In a number of judgments (***Edwards v UK***,[44] ***Douglas Williams v UK***[45]) the Court has indicated that Article 2 applied to cases involving deaths in police or prison custody. Indeed, in a number of admissibility decisions (***Erikson v Italy***,[46] ***Sieminska v Poland***[47]) the Court also recognised that the procedural aspect could extend to negligence in public hospitals.

In a further extension of this aspect of Article 2, the Court said in ***Menson v UK***[48] that there must be some form of effective official investigation when there was reason to believe that a person had sustained life-threatening injuries in suspicious circumstances even in the absence of any involvement by agents of the state.

The Court has also made clear that the existence of campaigns of violence do not release the government from the obligations of Article 2. This defence was pleaded in ***Ergi v Turkey,*** mentioned above, and was also argued by the UK in the ***Shanaghan*** case but no weight was attached to the argument by the Court.

[44] Judgment of 14 March 2002 (2002) 35 EHRR 19.
[45] App No 56413/00.
[46] (2000) 29 EHRR CD152.
[47] App No 37602/97 Judgment of 29 March 2001.
[48] App No 47916/99 Judgment of 6 May 2003.

3. THE RIGHT TO AN EFFECTIVE INVESTIGATION IN DOMESTIC LAW

Context

In order to understand fully the state's responsibilities under Article 2, it is also necessary to examine domestic case law. The coming into force of the Human Rights Act 1998, together with the clarification of the content of the Article 2 procedural right in the judgments of the European Court of Human Rights,[49] have provided a domestic framework for the enforcement of the procedural or 'investigative' aspect of the right to life.

This section therefore provides an analysis of domestic jurisprudence relating to the investigation of deaths which engage the state's responsibilities under Article 2 of the ECHR. While the delineation employed in this paper between European and domestic jurisprudence may until recently have appeared somewhat forced, this approach is now necessary to reach an informed understanding of Article 2 since the House of Lords decision in ***Re McKerr***.[50] In that case, it was unanimously agreed that the ECHR and the Human Rights Act represented two sets of co-existing but separate rights.

The main issues arising for decision in the domestic courts since the *Human Rights Act 1998* came into force relate to:

- the scope of the rights and obligations *i.e.* whether section 6 of the Human Rights Act 1998[51] applies to the investigation of deaths which occurred before the coming into force of that Act ('retrospectivity'), and

- what section 6 requires of public authorities in relation to Article 2 investigations.

[49] *Kelly v UK* App No 30054/96, *Shanaghan v UK* App No 37715/97, *Jordan v UK* App No 24746/94, 11 BHRC 1; *McKerr v UK* App No 28883/95 (2002) 34 EHRR 20.
[50] [2004] 2 All ER 409. The House of Lords distinguished between rights arising under the Convention and rights created by the 1998 Act by reference to the Convention. The former sort, not the latter, applied to events occurring before 2 October 2000.
[51] Section 6 (1) states: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'.

'Retrospectivity'

The recent decision of the House of Lords in ***Re McKerr***[52]appeared to have finally clarified the position in relation to the status of the rights created by section 6 of the Human Rights Act 1998 and, in particular, the rights created in domestic law by the 'incorporation' of Article 2 of the ECHR.

The case that reached the House of Lords was a continuation of the application that was before the European Court of Human Rights. After the Court decided that the investigation in terms of the death of Gervaise McKerr were inadequate in terms of the requirements of Article 2, Jonathan McKerr (son of the deceased) attempted by way of judicial review proceedings in the High Court of Justice in Northern Ireland, to compel the holding of an effective investigation into his father's death.

His application for judicial review was unsuccessful at first instance, but that decision was overturned on appeal. Finally, the case came before the House of Lords, where the principal issue to be decided was whether Mr McKerr could force the state to hold an Article 2 compliant investigation into his father's death.

The kernel of the case proved to be whether such an action could be successful where the death occurred before the coming into force of the Human Rights Act. The decision of the House was unanimous in deciding that it could not. Lord Nicholls said:

> '… the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. … If the death itself 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. … The event giving rise to the Article 2 obligation to investigate must have occurred post-Act.
>
> 'I think this is the preferable interpretation of section 6 in the context of Article 2. … Parliament cannot be taken to have intended that the Act should apply differently to the primary obligation (to protect life) and a consequential obligation (to investigate a death.) For this reason I consider these judicial review proceedings are misconceived so far as they are sought to be founded on the enabling power in section 7 of the 1998 Act.

[52] Note 50 above. The Northern Ireland Human Rights Commission successfully applied to make an intervention in this case.

> 'I respectfully consider that some … courts, including the Divisional Court in Hurst's[53] case and the Court of Appeal in Khan's[54] case, fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act. It by no means follows that the continuing existence of a right arising under the Convention in respect of an act occurring before the Human Rights Act came into force will be mirrored by a corresponding right created by the 1998 Act. Whether it finds reflection in this way in the 1998 Act depends upon the proper interpretation of the 1998 Act.'[55]

The effect of the decision is therefore that:

- the right under Article 2 exists only on the international plane, that is, it is enforceable only against the state before the supervisory organs of the European Convention on Human Rights. There is no means by which this right can be enforced in domestic law,

- there is, however, another analogous right created by the coming into force of the Human Rights Act 1998. This right exists at domestic level and is enforceable through the domestic courts under the Human Rights Act 1998,

- it is the date of the death at issue that determines whether such a domestically enforceable right exists. If the death occurred before the coming into force of the Human Rights Act 1998 (that is, 2 October 2000) then there is no such enforceable right, and

- this is the case even where investigations into a 'pre-incorporation' death were ongoing at the time the Act came into force.

---

[53] [2003] EWHC 1721
[54] [2003] EWHR 1414.
[55] [2004] UKHL 12.

The House of Lords delivered rulings in appeals in the cases of ***Middleton***,[56] ***Sacker***[57] and ***McKerr*** on the same day (11 March 2004). Each of the three cases involved deaths that had occurred before 2 October 2000. In each of the cases, the inquest had concluded. Article 2 was the basis for the complaint in each of the cases.

Middleton and ***Sacker*** were heard together. In ***Middleton*** the claimant succeeded in part. In the case of ***Sacker*** a new Article 2 compliant inquest was ordered. In only one of the three cases, ***McKerr***, did the authorities raise the issue of retrospectivity. The fact that his father's death pre-dated the coming into force of the Human Rights Act 1998 defeated Mr McKerr's claim for the establishment of an Article 2 compliant investigation. The opinion in Middleton's case contained the following paragraph:

> 'In this appeal no question was raised on the retrospective application of the Human Rights Act 1998 and the Convention. They were assumed to be applicable. Nothing in this opinion should be understood to throw doubt on the conclusion of the House in ***In Re McKerr*** [2004] 1 WLR 807.'[58]

The opinion in ***Sacker*** contained a statement to the same effect.[59]

The disparity in these decisions was noted by the Court of Appeal in Northern Ireland in ***Re Jordan's Application***.[60] In his judgment in that case Girvan J, when referring to the approach taken in the cases of ***Middleton*** and ***Sacker*** on the one hand and ***McKerr*** on the other, said:

> 'We received no real explanation how it came about that the state authorities were taking opposite views on the applicability of the Convention in the English cases and the Northern Ireland case. *McKerr* and *Sacker* are in apparent conflict unless they can be reconciled in some way.'[61]

---

[56] [2004] 2 All ER 465.
[57] [2004] 2 All ER 487.
[58] [2004] 2 All ER 465, 486 at para 50.
[59] [2004] 2 All ER 487, 500 at para 29. 'It should be noted that, although the inquest took place after 2 October 2000 when the relevant provisions of the 1998 Act came into operation, the death occurred before that date. The respondent's contention in her claim for judicial review that this was a case of an ongoing breach of art 2 has not been challenged at any stage in these proceedings. But there has been no decision on the point, and nothing that has been said in this opinion should be taken as having had that effect'.
[60] Judgment of Girvan J (with which McCollum LJ agreed) [2004] NICA 29; Judgment of Nicholson LJ [2004] NICA 30 (10 September 2004).
[61] [2004] NICA 29 at para 11.

McKerr was a case concerning the application of section 6 of the Human Rights Act 1998. The Court of Appeal in Northern Ireland had occasion in ***Re Jordan's Application***, to consider the application of section 3 of that Act which provides:

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'[62]

The Court decided that section 3 of the Human Rights Act is not tied, as section 6 is, to the engagement of the rights of parties to the relevant litigation but rather is of general application.[63] Girvan J said:

> 'From the speeches in ***McKerr*** we must conclude that the House has definitively ruled that the obligation to carry out an Article 2 compliant investigation did not apply where the death had occurred before the Act came into force. That case, however, was not dealing with a situation which applies in the present case where there was an ongoing and incomplete inquest in respect of the deceased which falls to be completed subsequent to the commencement of the Human Rights Act. The ongoing inquest falls to be conducted in accordance with domestic law but the questions which arise are how is the domestic law to be interpreted and applied and whether section 3 of the Human Rights Act 1998 has the effect of leading to a re-interpretation of the Coroners Act (Northern Ireland) 1959 in relation to the nature of the inquest to be conducted.
>
> 'I do not read ***McKerr*** as precluding this approach. In ***McKerr*** there was no question of an ongoing incomplete inquest. Lord Rodger stated that the next of kin in that case had no right to an investigation deriving from an Article 2 Convention right. What the next of kin in the present case have is a right to an inquest under the Coroners Act (Northern Ireland) 1959. The coroner must conduct that inquest in accordance with domestic law but the domestic law duties of the coroner and the jury fail to be interpreted in a manner which is consistent with the Convention. This conclusion is in accordance with the decisions in ***Middleton*** and ***Sacker*** though the point was not argued in those terms.'[64]

---

[62] At section 3(1)

[63] See discussion of *Re Jordan's Application* below. Section 3 (1) of the Human Rights Act 1998 provides: 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.

[64] At para 23.

The section 3 duty therefore is one that arose on the coming into force of the Human Rights Act 1998 and continues. By this means, the Court of Appeal in ***Re Jordan's Application*** appeared to have ensured that one of the possible implications of the decision in ***McKerr***, namely that a 'twin-track' inquest system would emerge dependent on the date of death of the deceased, has been avoided.

It is difficult to see, however, how the Court of Appeal's conclusion in ***Jordan*** could be said to be 'in accordance with the decisions in ***Middleton*** and ***Sacker***' given that in both those cases there was, as in ***McKerr*** 'no question of an ongoing inquest'.

A differently constituted Court of Appeal in Northern Ireland has, since the decision in ***Re Jordan's Application***, again considered the operation of section 3 of the Human Rights Act and Article 2 of the Convention in another inquest case ***Re McCaughey and Grew's Application for Judicial Review***.[65]

In ***Re McCaughey and Grew***, the Court of Appeal noted that the effect of Girvan J's judgment in ***Re Jordan's Application*** was 'to declare that Mr Jordan was entitled to have the inquest into the death of his son conducted in compliance with Article 2 notwithstanding that the death occurred before 2 October 2000'.[66] The Court continued:

> 'This was to be achieved by requiring the Coroners Act to be interpreted in a manner that complied with the convention. The flaw in this approach, in our opinion is that section 3 only applied where convention rights are in play. Neither the appellant in ***Jordan*** not the respondents in the present appeal have access to convention rights in the domestic setting because of the non-retrospective effect of HRA. Section 3 is not triggered unless compatibility of convention rights is in issue. It was not in issue here, nor was it in ***Jordan***, because the deaths involved occurred before the Act came into force.'[67]

The Court's conclusion that section 3 of the Human Rights Act did not apply and that there was no obligation to hold an Article 2 compliant investigation into the deaths was surprising, coming as it did, just four months after the decision in ***Re Jordan***.

[65] Police Service of Northern Ireland v Owen McCaughey and Pat Grew [2005] NICA 1 (14 January 2005).
[66] At para 44.
[67] At para 44.

Leave to appeal to the House of Lords has been granted in both cases. However, since those decisions were handed down, further confusion has been created by two decisions in England. In ***Jean Pearson v HM Coroner for Inner London North***[68] a Divisional Court decided that:

> 'The Human Rights Act does not require a Coroner now investigating a death which occurred before the coming into force of the Act to conduct an inquest in an Article 2 compliant manner. It may be that his failure to do so may be actionable in international proceedings in Strasbourg, just as the failure of the Secretary of State resulted in a successful application to Strasbourg in McKerr. However, that does not assist the claimant in the domestic context.'[69]

In his judgment in that case Lord Justice Maurice Kay expressly indicated his preference for the decision in ***McCaughey and Grew*** over that in ***Jordan***.[70]

Since that decision the Court of Appeal in England and Wales has handed down its decision in ***The Commissioner of Police for the Metropolis v Christine Hurst***.[71] The case concerned a pre-Human Rights Act death in respect of which an individual was convicted of manslaughter. The mother of the deceased asked a coroner to re-open the inquest into the death once the criminal proceedings had concluded, to investigate the question of whether there had been failings on the part of various public authorities to protect her son from the known hostility and propensity to violence of the man convicted of his manslaughter.

In his judgment Lord Justice Buxton expressly disagreed with the conclusion in ***Pearson v HM Coroner***.[72] He held that there was 'every reason for giving section 3 [of the Human Rights Act] a limited retrospective application in order to bring about the resumption of the inquest'.[73]

In deciding whether that conclusion could be reconciled with the decision in ***McKerr***, he concluded that section 3 imposed on the courts '…an obligation to give effect to this country's international obligations, and not merely to its domestic obligations as created by the HRA'.[74] This obligation, he held, stemmed from the interpretation of the Human Rights Act itself:

---

[68] [2005] EWHC 833 (Admin) (Hearing 9 March 2005).
[69] At para 10.
[70] At para 10.
[71] [2005] EWCA 890 (21 July 2005).
[72] At para 63.
[73] At para 54.
[74] At para 61.

> 'Section 1(1) provides that in the HRS, and thus in section 3, 'the Convention rights' means the rights and fundamental freedoms set out in [various articles of] the Convention: meaning thereby the ECHR. Those obligations exist and have force because of the United Kingdom's adherence to the ECHR rather than because of the passage of the HRA. … What ***McKerr*** holds is that Mrs Hurst does not have the right in domestic law created by section 7 of the HRA to claim that the coroner has acted unlawfully under section 6 of the HRA by not respecting her Article 2 right to a proper investigation into her son's death. But that says nothing about her rights against the state in international law created by the United Kingdom's adoption of the ECHR: and it is to those rights that section 3 relates.'[75]

Lord Justice Sedley, who delivered the other judgment in the case, recognised the 'unspoken but self-evident policy consideration' that applied in the ***McKerr*** case namely that 'if the McKerr inquest had to be reopened in order to comply with art.2, so would countless others, reaching back indefinitely.'[76]

The decision in the present case was that the inquest had been adjourned indefinitely pending the criminal proceedings and the coroner had to decide whether or not to resume it. Sedley LJ said '… the law which governs his decision is now required by section 3 to be read through the prism of Convention rights, with consequences which are not in dispute. This situation, as it seems to me, bears no element of retrospectivity on its face.'[77]

In Lord Justice Sedley's opinion, the factor that distinguished ***Hurst*** from ***McKerr*** was the existence of ongoing proceedings and the fact that ***Hurst*** concerned 'a post-October 2000 statutory decision-making process.'[78] On this basis there was 'no true issue of retrospectivity: s3 has since 2 October 2000 required coroners' decisions, including the one we are considering, to be Convention-compliant except where the contrary is dictated by or under statute.' He continued 'But if I am wrong, I do not consider that such retrospectivity as is involved in the respondent's case is sufficient to defeat it.'[79] For this final conclusion he relied, as did Girvan J in ***Re Jordan***, on the decision of the Lords in ***Wilson*****.**

[75] At paras 44 and 45.
[76] At para 67.
[77] At para 68.
[78] At para 70.
[79] At para 72.

The House of Lords is being asked to decide finally on this issue.[80] Should the decision in McCaughey and Grew's case stand, it is clear that there will be no domestically enforceable obligation on public authorities to comply with Article 2 in the investigation of deaths that occurred before the Human Rights Act came into force. This state of affairs could lead to the highly undesirable situation where families concerned with the large number of outstanding inquests in this jurisdiction will make applications to the European Court of Human Rights, further delaying the process. In addition it will mean that death investigations and inquests in particular are conducted differently according to the relevant date of death.[81] This dichotomy is well illustrated by the comments of Lord Justice Maurice Kay in ***Jean Pearson v HM Coroner for Inner London*** when he said:

> 'I wish to associate myself with the deep sympathy expressed by the Coroner. I well appreciate that the claimant, as a loving parent, will continue to feel aggrieved by the scope of the inquest. It will be no consolation to her that if Kelly had died after 2 October 2000 different considerations would have applied to the parameters of the inquest. Sadly, however, the less generous law which applies to the inquest in the present case fails to provide her with all the answers to which she, understandably, feels entitled.'[82]

What does the domestic law right require?

Where a death occurred on or after 2 October 2000, the question of what the 'domestic right' under the Human Rights Act 1998 requires is the principal question, as this is the right that is enforceable at domestic level.

This issue has been the subject of litigation in a number of cases. In Northern Ireland, the majority of Human Rights Act cases relating to Article 2 have concerned the conduct of inquests into deaths caused by the security forces or deaths where collusion between paramilitaries and the security forces is alleged. In England, most of the cases have concerned deaths in prison.

It should be noted that in many, if not all, of the cases decided to date, the relevant death occurred before Human Rights Act came into force.

---

[80] Leave to appeal to the House of Lords has been granted in the Jordan and McCaughey cases. It appears that an application may also be made to have an appeal in the Hurst case heard at the same time.

[81] Whatever the position in domestic law, the obligation for the state to comply with Article 2 still exists on the international plane. Where an Article 2 compliant investigation is not provided at domestic level and all domestic legal options have been exhausted, an application against the state can be made to the European Court of Human Rights.

[82] [2005] EWHC 833 (Admin) at para 14.

Despite this fact, the 'retrospectivity' point decided by the House of Lords in ***Re McKerr*** was not argued and did not prevent the applicants in those cases from succeeding in their cases based on Article 2 and the Human Rights Act. However, following the decision in ***Re McKerr***, it appears clear that although such decisions are helpful as to what is required by the domestic law right they have not, strictly speaking, been correctly decided insofar as they apply to deaths that occurred before 2 October 2000

It has been held in a number of such cases that an 'Article 2 compliant' investigation has not taken place.[83]

The content of the right

The principal case in this area is the decision of the House of Lords in ***R v Secretary of State for the Home Department ex parte Amin***.[84] In the leading judgment, Lord Bingham confirmed that the European Court of Human Rights in ***Jordan v UK*** and ***Edwards v UK*** had laid down minimum standards for Article 2 investigations, 'which must be met, whatever form the investigation takes'.[85]

The decision in ***Amin*** makes it clear that, in accordance with the European jurisprudence, such an investigation must be:

- thorough and effective (that is, it should investigate all relevant areas and collect all relevant evidence)
- independent (of those who carried out the killing, both in terms of direct connection and connection in the chain of command)
- prompt (what is prompt may vary from case to case)
- public (there has to be a public dimension – given the public concern that inevitably arises where deaths are caused by the state), and
- accessible to the family of the deceased (who must have input to the investigation and be kept informed of progress).

[83] *R v Secretary of State for the Home Department ex parte Amin* [2003] 4 All ER 1264 [HL]; *R v HM Coroner for the Western District of Somerset ex parte Middleton* [[2004] 2 All ER 465 [HL]; *R (on the application of Khan) v Secretary of State for Health* [2003] 4 All ER 1239 [EWCA]; *Re Mary Louise Thompson's Application* (unreported judgment of Kerr J) NIHC QBD, 28 February 2003.
[84] The Northern Ireland Human Rights Commission successfully applied to make a written and oral intervention in this case.
[85] [2003] 4 All ER 1264 1280 at para 32.

The inquest as an Article 2 compliant investigation

It is now settled law that:

> 'In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under Article 2'.[86]

The many ways in which the inquest system in Northern Ireland was incompatible with the requirements of Article 2 ECHR have been comprehensively outlined in the jurisprudence of the European Court of Human Rights.[87] Those deficiencies included the following:

- the person suspected of causing the death was not a compellable witness[88]
- the scope of the inquest was limited. Its remit was to determine who the deceased was and how, where and when s/he died.[89] In accordance with earlier case law, 'how' the deceased died was interpreted narrowly, as meaning 'by what means' rather than 'in what broad circumstances'[90]
- lack of pre-inquest disclosure
- lack of funding for representation at inquests, and
- delay in holding inquests.

In order to bring the inquest system into line with Article 2, the Government has, since the judgments in ***Jordan & ors v UK***, introduced an amendment to Rule 9(2) of the Coroners (Practice and Procedure)

---

[86] *R v HM Coroner for the Western District of Somerset, ex parte Middleton* [2004] 2 All ER 465 485 para 47. This was also recognised in *Re Grew and McCaughey's Application for Judicial Review* (unreported judgment of Weatherup J) [2004] NIQB 2, paras 7, 29 and 30.

[87] See chapter 2 above and the cases of *Jordan, McKerr, Kelly & ors, Shanaghan v UK.* See also *McShane v UK and Finucane v UK.*

[88] Rule 9(2) of the *Coroners (Practice and Procedure) Rules (NI) 1983* provided 'Where a person is suspected of causing the death, or has been charged or is likely to be charged with an offence relating to the death, he shall not be compelled to give evidence at the inquest.'

[89] Rule 15 of the *Coroners (Practice and Procedure) Rules (NI) 1963.*

[90] *HM Coroner for Western District of East Sussex ex parte Homberg and others* (1994) 158 JP 357; *R v North Humberside and Scunthorpe Coroner ex parte Jamieson* [1994] 3 All ER 972; *In Re Bradley and Larkin's Application* (unreported judgment of Carswell LJ) NIHC QBD 7 April 1995.

Rules (NI) 1963. This amendment ensures that a person suspected of causing a death can now be compelled to appear as a witness at an inquest.

Another issue that arose at domestic level as a result of the European jurisprudence was the question of whether, in order to be Article 2 compliant, an inquest must always result in a verdict. This issue arose principally in the case of ***R v HM Coroner for the Western District of Somerset ex parte Middleton***.[91]

Again, that case involved a prison suicide. The principal issue was 'whether he [the prisoner] should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life;[92] and therefore whether, as a result of the inquest, there should be 'a formal public determination of the responsibility of the Prison Service for the death of the deceased'.[93]

The House of Lords concluded:

> 'To meet the procedural requirement of Article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the hear of the case.'[94]

The Lords further stated that:

> 'In some cases the state's procedural obligation may be discharged by criminal proceedings. This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted … or the issue at trial is the mental state of the defendant … because in such cases the wider issues will probably not be explored.
>
> 'In some other cases short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest. *McCann* has already been given as an example … Similarly, verdicts of unlawful killing in *Edwards* and *Amin*, although plainly justified, would not have enabled the jury to express any conclusion on what would undoubtedly have been the major issue at any inquest, the procedures which led in each case to the deceased and his killer sharing a cell.

[91] [2004] 2 All ER 465.
[92] [2004] 2 All ER 465 485 at para 45.
[93] [2004] 2 All ER 465 483 at para 44.
[94] [2004] 2 All ER 465 477 at para 20.

> '… the conclusion is inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed does not meet the requirements of the Convention …'[95]

In order to address the incompatibility between the domestic law enshrined in the inquest system and the Article 2 requirements the House of Lords indicated that the interpretation of 'how' the deceased met his/her death should be altered from the more restrictive meaning of 'by what means' to 'by what means and in what circumstances'.[96] The decision further states that:

> 'This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others. In the latter class of case, it must be for the coroner, in the exercise of his discretion, to decide how best in the particular case, to elicit the jury's conclusion on the central issue or issues. This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of Schedule 4 to the Rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner…'[97]

In Northern Ireland, where the inquest system does not provide for verdicts at all, but merely 'findings', the Court of Appeal in ***Re Jordan's Application***[98] decided that Article 2 does not require a coroner or a coroner's jury to have the possibility of delivering a formal verdict, such as is available in England and Wales.

In that case, which had already been the subject of a successful application to the European Court of Human Rights, the Court of Appeal used the 'interpretative obligation', under section 3 of the *Human Rights Act 1998*, to conclude that section 31(1) of the *Coroners Act (Northern Ireland) 1959* to investigate 'how' the deceased died, in the broader sense of the word as outlined by the House of Lords in ***Middleton.***

In his judgment in ***Jordan***, Girvan J (with whom McCollum LJ agreed) stated:

---

[95] [2004] 2 All ER 465 480 at paras 30 to 32.
[96] [2004[2 All ER 465 481 at para 35.
[97] [2004] 2 All ER 465 481 at para 36.
[98] Judgment of Girvan J (with which McCollum LJ agreed) [2004] NICA 29; Judgment of Nicholson LJ [2004] NICA 30 (10 September 2004).

> 'Kerr J [the judge at first instance] (which as noted pre-dated ***Middleton***) considered that a proper investigation into the facts relevant to the lawfulness of the force that caused the death of the deceased was possible within the existing rules. The unavailability of a verdict of unlawful killing did not undermine the proposition. I agree with his conclusions although the law requires to be analysed in a somewhat different way in the light of ***Middleton***. The obligation of the coroner's jury to fully investigate the circumstances of the death and to reach facts or conclusions in relation thereto is an overriding duty arising out of the duty to investigation [sic] "how" the deceased died (interpreting "how" in the wider ***Middleton*** sense)…'[99]

While that case must now be analysed in the light of the subsequent decision of the NI Court of Appeal in ***Police Service of Northern Ireland v McCaughey & Grew***,[100] there is no reason to suppose that the law, as it was stated in ***Middleton***, would not apply.

Another issue that affects the general compatibility of the inquest system with Article 2 and its ability to deliver an effective investigation also arose in the case of **McCaughey and Grew's Application for Judicial Review**.[101] In that case, the question of the duties on the police to provide material to the coroner for the purposes of an inquest was discussed.

It is clear that, in order for a coroner to conduct an independent, effective and thorough investigation into a death he or she must have access to all relevant material concerning that death. Such material is generally collected in the course of a criminal investigation into a death by the police. It has been said that:

> 'As a matter of sensible public administration it seems essential that the Coroner should have the material obtained by the police so that he, the Coroner, can decide what witnesses to call and to investigate the matter generally.'[102]

In ***Re McCaughey and Grew's Application***, Weatherup J found that section 8 of the *Coroners Act (Northern Ireland) 1959* should not be given

---

[99] [2004] NICA 29 at para 26. This has already been acknowledged by HM Coroner for Greater Belfast, who in at least two recent inquests asked the jury to answer a series of questions relating to how the deceased died.
[100] [2005] NICA 1 (14 January 2005).
[101] *In the Matter of an Application by Owen McCaughey and Pat Grew for Judicial Review* Judgment of Weatherup J [2004] NIQB 2 (20 January 2004).
[102] *Peach v Commissioner of Police of the Metropolis* [1986] 2 All ER 129 at 138 (per Fox LJ).

a limited interpretation and that its effect is that the police are required 'to support the Coroner's investigation with relevant material'.[103] In the light of this, he decided that the police report to the prosecuting authority and the unredacted versions of intelligence reports should be supplied to the coroner for the purposes of their investigation, as potentially relevant to the task.[104]

Weatherup J's decision was overturned on appeal.[105] The Court of Appeal did not agree with his interpretation of section 8 of the *Coroners Act (Northern Ireland) 1959* and held that there was no legal obligation on the police to provide material to a coroner, beyond that provided immediately after the death, in order to allow him to conduct an inquest.[106]

The Court accepted that the police had 'hitherto considered themselves under an obligation to provide relevant information to the coroner'[107] and commented that:

> 'It cannot be satisfactory that information beyond that provided immediately after the death is supplied to the coroner on the basis of an understanding or an informal arrangement. It appears to us that if the coroner is to carry out his statutory function effectively he must have the power to require the production of relevant information from those who have it.'[108]

The Court therefore suggested that 'urgent consideration should … be given to the need to provide coroners with statutory power to require the police to provide information necessary for the proper conduct of an inquest.'[109]

---

[103] Section 8 provides: 'Whenever a dead body is found, or an unexpected or unexplained death, or a death attended by suspicious circumstances, occurs, the [superintendent] within whose district the body is found, or the death occurs, shall give or cause to be given immediate notice in writing thereof to the coroner within whose district the body is found or the death occurs, together with such information also in writing as he is able to obtain concerning the finding of the body or concerning the death'.

[104] See paras 13 and 25. The judge also found that these documents should be disclosed pursuant to the PSNI's duty under Article 2 of the ECHR. However, the deaths involved occurred in 1990 and the judgment in this case was delivered before that of the House of Lords in *Re McKerr's Application.*

[105] [2005] NICA 1 (14 January 2005). Leave to appeal to the House of Lords has been granted.

[106] At para 32.

[107] At para 36.

[108] At para 32.

[109] At para 33.

The deaths at issue in the ***McCaughey and Grew*** case occurred before 2 October 2000. The Court of Appeal did also say:

> 'It is likely that the police will be legally obliged to provide information in relation to deaths occurring after 2 October 2000 because the inquest will normally be the means by which the state complies with its obligation under Article 2 of ECHR.'[110]

It therefore appears that the implications of the decision are confined to cases in which deaths occurred before the *Human Rights Act 1998* came into force.

Accessibility of inquests

Pre-inquest disclosure

The issue of pre-inquest disclosure has been a live issue in inquests in Northern Ireland for many years. Traditionally, the next-of-kin of the deceased did not receive any pre-inquest disclosure.[111]

This position changed somewhat as a result, not of Article 2 of the ECHR, but of the MacPherson report into the murder of Stephen Lawrence. A Home Office Circular issued after the publication of that report, in 1999, provided that pre-inquest disclosure should be given to next-of-kin in all cases where an individual dies in police custody or where a death results from the actions of a police officer acting in the course of duty.[112]

This circular was adopted and has been implemented by the Chief Constable of the PSNI. It now appears that pre-inquest disclosure is being provided in such cases. While this is a positive development, it must be remembered that the reach of the circular is limited to deaths which take place in policy custody or result from the actions of a police officer in the course of his duty.

---

[110] At para 33.

[111] *R v HM Coroner at Hammersmith ex parte Peach* [2980] 2 All ER 7; *In Re Mailey* [1980] NI 102; *In re Devine and Breslin's Application* [1988] 14 NIJB 10. See also Leckey J and Greer D (1998) *Coroners' Law and Practice in Northern Ireland* SLS Legal Publications (NI), Belfast, paras 10-06 to 10-13.

[112] Home Office Circular HOC 20/1999 [Online] Available at: http://www.homeoffice.gov.uk/docs/hoc31_2002.pdf [4 July 2005].

Similar guidance has been issued in relation to deaths in prison. It is not yet clear that the Northern Ireland Prison Service considers itself bound by this guidance.[113]

Funding for representation at inquests

Another impediment to the proper participation of next-of-kin in inquests has been the lack of funding for legal representation in connection with such proceedings. Although there was provision in the Legal Aid, Advice and Assistance (NI) Order 1981[114] for funding of legal representation at inquests, the relevant provision was never brought into force. In ***Re Sharon Lavery's Applications***,[115] an attempt to compel the bringing into force of this provision was unsuccessful.

In 2000, an extra-statutory scheme to enable the grant of funding for legal representation at inquests was introduced by the Lord Chancellor's Department.[116]

Specific provision for the public funding of legal representation at inquests has not been made in the *Access to Justice (NI) Order 2003*. However, the Lord Chancellor has issued a direction under article 12(8) of that Order which now provides for funding for next-of-kin for representation at inquests.[117] It remains to be seen how this scheme will operate in practice.[118]

That Article 2 requires that next-of-kin be publicly funded in appropriate cases is clear from ***R (on the application of Khan) v Secretary of State for Health***.[119]

---

[113] Prison Service Order PSO 1301 Investigating a Death in Custody Amended A [Online] Available at: http://pso.hmprisonservice.gov.uk/PSO%201301%20-%20Deaths%20in"20Custody [27 January 2005].
[114] Schedule 1 Part 1 para 5.
[115] *Re Lavery's Application for Judicial Review* [1999] NIJB 181, *Re Lavery's Application for Judicial Review (No 2)* [1999] NIJB 184.
[116] A challenge to certain aspects of this scheme was brought, unsuccessfully. *In the Matter of an Application by Collette Hemsworth for Judicial Review (No 1)* [2003] NIQB 5 (unreported judgment of Kerr J) NIHC QBD 7 January 2003. See also: [2005] NICA 12 (9 March 2005) judgment of Campbell LJ and [2005] NICA 12_2 (9 March 2005) judgment of Girvan J.
[117] Northern Ireland Legal Services Commission press statement 01/04 'Lord Chancellor's Direction to the Legal Services Commission', full Direction [Online] Available at: http://www.nilsc.org.uk/uploads/publications/documents/consolidated%20%20LC%20Direction%2023404.pdf.
[118] See: *In the Matter of An Application By Collette Hemsworth for Judicial Review (No, 2)* [2004] NIQB 26 (26 April 2004) judgment of Weatherup J.
[119] [2003] 4 All ER 1239 [EWCA]. However, see also: *R (Chandeller) v Legal Services Commission* [2004] EWHC 925.

Promptness in the holding of inquests

Other cases before the Northern Ireland courts have been concerned with delay in holding inquests. In the case of ***Mary Catherine Doris***, a coroner conceded that there had been undue delay in the holding of the inquest into the death of the applicant's son, Tony Doris, who was killed along with two others in June 1991. The inquest into their deaths has since opened but at the time of writing has not progressed beyond preliminary issues.

Similarly, in the case of ***Paul McIlwaine***[120] it was held that there had been undue delay on the part of a coroner in opening the inquest into the death of the applicant's son. Mr McIlwaine's son was murdered on 19 February 2000 and the inquest had not been held by the time his case was taken in November 2003.

A later decision, which concerned deaths after the coming into force of the Human Rights Act 1998, is that of ***R (on the application of Mazin Jumaa Gatteh Al Skeini and others) v Secretary of State for Defence***.[121] The deaths at issue were those of six civilians in Iraq, five of whom were shot in separate armed incidents involving British troops and a sixth who died in a military prison in British custody.

The primary issue in the case was whether the deaths took place within the jurisdiction of the United Kingdom so as to engage Convention rights under the Human Rights Act. The Court held that the Act applied only in the case of the individual who died in custody.

In that case, the death occurred on 14 or 15 September 2003. The Special Investigations Branch (SIB) of the Army was called in to investigate. A post mortem examination was conducted by a Home Office pathologist and an Iraqi doctor was present on behalf of the family. The SIB investigation concluded in April 2004 and a report was distributed to the relevant army unit's chain of command but not made public. The hearing before the Court was held at the end of July 2004 and the Court noted in its judgment:

> 'As for its timeliness, Mr Greenwood submits that the complaint under this heading is premature: but we are unable to accept this submission now nearly a year after Mr Mousa's death … For the same reason, we are unable to accept that the investigation

[120] Unreported judgment of Kerr J, NIHC QBD, 21 November 2003. The Northern Ireland Human Rights Commission successfully applied to intervene in this case. At time of writing an appeal in this case is being heard by the Northern Ireland Court of Appeal.
[121] [2004] EWHC 2911 (Admin) 14 December 2004.

> has been open or effective. Other than in the early stages and at the autopsy, the family has not been involved. The outcome of the SIB report is not known. There are no conclusions. There has been no public accountability. All this in a case where the burden of explanation lies heavily on the United Kingdom authorities.'[122]

For these reasons, the court held that there had been a breach of the procedural investigative obligation under Articles 2 and 3 of the ECHR.[123]

[122] At para 332.
[123] This case is currently under appeal.

4. STUDY OF THE VIEWS OF CORONERS

Methodology

As part of this study it was considered important to obtain the views of serving coroners. During the course of this study (fieldwork in 2004), the authors interviewed three serving coroners and corresponded with two others. The focus of the interviews and correspondence was to ascertain the views of coroners on the operation of the current system and the extent to which it meets the criteria laid down in domestic and European jurisprudence for the investigation of the use of lethal force by the security forces. The coroners who took part in the study had varying degrees of experience of presiding over such cases. A draft questionnaire was provided in advance of discussion with the coroners (see Appendix).

Although this was a small-scale study, it is hoped that the views of coroners, with their unique experience of how the system operates in practice, are useful in highlighting the deficits needing to be addressed in order to create an effective system for investigating those deaths in Northern Ireland raising Article 2 issues.

The key themes from the interviews are discussed below.

Findings

Promptness

The coroners acknowledged that there is often delay between the date of a death and the opening of an inquest. They indicated that reasons for this may vary and can include the following:

- delay in the provision of material relating to the death from the police,
- delay in the provision of a post mortem report (on occasion up to three years), and
- delay due to ongoing litigation in other cases, the outcome of which will affect the conduct of inquests generally.

The coroners indicated that there is no hard and fast rule as to how long after a death occurs an inquest should be held. They themselves do not

have any informal time limit within which they try to ensure inquests are held or, at the very least, opened.

In addition, they explained that there is no protocol between coroners and the police in relation to the opening of inquests and the provision of material by the police to the coroner. All is done on the basis of informal contact and the process tends to rely on inquiries made by the Coroners Office to the police officer in charge of the investigation into the death. Often the police will indicate to the coroner that their inquiries are ongoing and that they would rather an inquest did not open at that time.

It appears that there is considerable difficulty in this informal liaison between the PSNI and the coroners. The coroners indicated that they were very dissatisfied with the present situation in terms of their contact with police. Coroners are experiencing delays in the provision of even basic information. They attribute this to the number and experience of police officers available and to their shift patterns.

One coroner indicated that, in his experience, police tend to inform the coroner of progress in investigations to suit their own convenience. This Coroner also said that if police investigations are ongoing, it is generally the case that coroners have to 'fish' for information, for example, in cases where there may be a prosecution. Other coroners indicated that while this is their experience in relation to some inquests, in other cases the relevant police officer will be diligent with regard to liaison with the coroner.

One coroner indicated that a suggestion had been made to the police service that there should be a dedicated coroners' liaison officer within the PSNI for each district command unit. The police response was that they did not have the resources to provide these officers. According to the coroners, such officers do exist outside of Belfast where, in at least one coronial area, an officer, usually a sergeant within the CJU in each district command area fulfils this role. The coroner then need only liaise with one police officer in relation to all cases within that area and that officer then follows up with other relevant police officers.

In support of such a role, one coroner cited a specific example where attempts to make contact with an investigating officer by letter over some period had been unsuccessful. It transpired that the officer had been on long-term sick leave and letters addressed to him personally were not opened by anyone else but left aside until his return. Coroners expressed concern that there does not appear to be adequate supervision or management of police officers in connection with coroners' cases.

One coroner had a clear impression that, where a death had involved actions by soldiers, the relationship between the Special Investigations Branch of the army and the police was not an easy one and that this may cause difficulties in preparing for an inquest.

The Coroners acknowledged that there are delays in all inquests. In an attempt to deal with inquests that have been delayed for some time, the Belfast Coroners convened a series of hearings in relation to reported deaths where there had been a delay in either their provision of the post-mortem report or statements from the police. However, these hearings "did not specifically address those deaths that could be described as 'Article 2'".[124] All deaths, which occurred before 2 October 2000, will be listed and progress reports obtained. In October 2004, all cases older than six months in the list were to be listed for the police or pathologist to explain why not all the relevant material/post mortem report has been made available.

The coroners agreed that the law in this area has changed considerably in recent years since the decisions of the European Court of Human Rights in ***McKerr, Jordan, Kelly & others and Shanaghan v UK***. Most recent inquests raising Article 2 issues, once opened, were delayed to await the House of Lords' decision in ***Middleton***. In Northern Ireland, further delay was a result of coroners awaiting the outcome of the appeal in ***Re Jordan's Application***.[125]

One coroner indicated that delay might also occur, following the opening of an inquest, where there are applications for a public interest immunity certificate and anonymity. The coroner explained that he understands that government lawyers will not approach ministers for a certificate until an inquest is close to hearing. A date then has to be set for the inquest. If a certificate is issued, there will inevitably be a hearing about whether public interest immunity should be granted, which in turn almost always leads to the inquest hearing being adjourned.

[124] Correspondence from HM Coroner for Greater Belfast, 28 November 2005. The aim of the hearings was to address the backlog and expedite the hearing of outstanding inquests. A further series is planned.

[125] Judgment was delivered by the Northern Ireland Court of Appeal on 10 September 2004. Judgment of Girvan J [2004] NICA 29; Judgment of Nicholson LJ [2004] NICA 30. Leave to appeal to the House of Lords has been granted in this case in relation to the decision of a differently constituted Court of Appeal in the case of *Police Service of Northern Ireland v Grew and McCaughey*. Significant further delay is therefore expected.

Investigation

The coroners in the study indicated that they would be in favour of having their own staff to carry out investigations.[126] One coroner commented that, where an investigation is carried out by the police the papers can often be deficient in that there is nothing or very little in the papers from the family of the deceased. Police officers explain this by saying that the family would not engage with them, a problem of particular relevance in cases involving the use of lethal force by the security forces. On occasion, the coroner may have to see the family him/herself in order to ascertain what lines of inquiry might be raised. One coroner indicated that he had done this in a particular case and significant matters of evidential value emerged as a result.

Another coroner commented that if coroners had their own staff under their control, investigations could be more focused. Coroners' officers would know what questions to ask. The same coroner stated that police officers are not adequately trained or advised in relation to coroners' cases.

On this point, one coroner indicated that he could not understand why there is absolutely no input from the Northern Ireland coroners into police training, nor have any Northern Ireland coroners been approached by any of the police tutors in this regard. He is aware, however, that a coroner and a pathologist from England, where the procedure is different, have been brought over to assist in police training.

Another coroner considered that dedicated Coroners' Officers would speed up the whole process. He also felt that such officers would be more acceptable to the public than police officers, citing the example of cases investigated by the Northern Ireland Police Ombudsman's office, which in his view commanded greater public confidence than investigations carried out by the police.

Despite this, however, the coroners expressed the view that if provision is made for Coroners' Officers they should be given adequate powers. They were unclear, however, as to whether Coroners' Officers would be given all the powers of a constable.[127]

---

[126] See also comments of East Tyrone Coroner, Roger McLernon, as reported on BBC News website 'Coroner call over killings' [Online] 16 March 2004 Available at: http://news.bbc.co.uk/1/hi/northern_ireland/3516080.stm [4 July 2005].

[127] Both the Luce Review and the subsequent proposals for change from the Northern Ireland Court Service envisaged the possibility of Coroners Officers being granted investigatory powers, although the Court Service paper expressed some concern about duplication of investigatory efforts.

The coroners agreed that there may still be gaps in the investigation process in relation to the investigation of deaths caused by the army or deaths involving collusion which cannot be dealt with by the Police Ombudsman.[128] Such investigations, where they are carried out by the PSNI, are unlikely to be 'independent' as required by Article 2. If the coroners had their own investigative staff, it may resolve this issue.

There is also a grey area in relation to interaction between coroners and the Police Ombudsman. However, the coroners indicated that a draft protocol has been prepared governing the provision of documentation to coroners by the Police Ombudsman's office and it is hoped that this will be finalised shortly. The Police Ombudsman's office has already provided investigation papers to the Coroners and families' legal representatives on an informal basis only. The coroners consider that the Ombudsman's powers and duties in this area may require legislation.

Infrastructure and support[129]

The Court Service made it clear to the coroners that, once a decision was delivered by the Court of Appeal in the case of ***Jordan*** and inquests could proceed, resources would be provided to enable this to happen speedily.[130]

One coroner indicated that provision for the recording of evidence is not good at present in his area. Rule 19 of the *Coroners (Practice and Procedure) Rules (Northern Ireland) 1963* states:

[128] In its evidence to the inquiry conducted by the Northern Ireland Affairs Committee into the work of the Police Ombudsman's Office, the Northern Ireland Human Rights Commission recommended that the relevant legislation be amended to confer on the Police Ombudsman the power to investigate complaints against the army relating to the use of lethal force.

[129] Although it was not discussed with coroners, a case recently decided in the High Court in Northern Ireland has implications in this area. In *Re HM Coroner for South Down's Application* [2004] NIQB 86 (21 December 2004) judgment of Weatherup J, a part-time coroner sought, *inter alia*, 'An order of mandamus [a writ] directing the Lord Chancellor and/or the Court Service to increase the Applicant's salary to a rate which reflects *pro rata* the salary paid to full-time coroners within Northern Ireland'. The application for judicial review was dismissed on the basis, *inter alia*, that judicial review was not the appropriate forum for resolution of the issue, given that it was in the 'nature of an industrial dispute involving substantial factual issues such that proceedings by way of Judicial Review are rendered inappropriate'.

[130] In fact, this has not yet happened due to the fact that an application for leave to appeal to the House of Lords has been submitted in that case and in the other case of *Police Service of Northern Ireland v McCaughey and Grew.*

> 'The Coroner shall make, or cause to be made, a note of the evidence of each witness, and such note shall be signed by the witness and also by the coroner.'

The present procedure in some areas is that the coroner him/herself makes a note of the evidence given by a witness on the deposition, which is then signed by the witness after it is read over to him or her. Some assurances have been given that recording facilities will be provided and it is hoped that the present procedure of preparing depositions can be dispensed with and witnesses examined from police statements – as happens in England and Wales.

One solicitor is employed by the Court Service as solicitor to the coroners. This post is part-time.

The coroners were also asked about the recommendation in the *Report of the Fundamental Review into Death Certification and Investigation in England, Wales and Northern Ireland*, which was, that a High Court judge sitting as a coroner should undertake a small number of 'exceptionally complex or contentious' inquests.[131] They found it difficult to envisage how this proposal would work in practice. Depending on that judge's remit, there are potentially a very large number of cases that could be assigned to him or her. The coroners also expressed concern that a lot of the 'hands-on' work they do, such as personal contact with police and interested parties, would not be carried out by a judge. They were not convinced that there would be more co-operation from the police on issues such as disclosure if a High Court judge were involved.

One coroner raised the question of how the existing workload (including the backlog caused by inquests adjourned pending the outcome of the ***Middleton*** and ***Jordan*** cases) would be prioritised once the law is clarified and inquests can proceed.

The coroners have had general training on the Human Rights Act through the Judicial Studies Board and specific Article 2 training from a High Court judge. The Home Office also runs more focussed courses that they will be attending.

[131] Luce T (2003) *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* Cm 5831 TSO, London (The Luce Review) Chapter 21, at Recommendation 39.

Coroners' recommendations to other public bodies

Rule 23(2) of the Coroners (Practice and Procedure) Rules (NI) 1963 states:

> 'A coroner who believes that action should be taken to prevent the occurrence of fatalities similar to that in respect of which the inquest is being held, may announce that he is reporting the matter to the person or authority who may have power to take such action and report the matter accordingly.'

In addition, if it appears to a coroner from the circumstances of a death that a criminal offence may have been committed, article 6(2) of the Prosecution of Offences (Northern Ireland) Order 1972 provides that the coroner shall ' as soon as practicable furnish to the Director a written report of those circumstances'.

None of the coroners has made a recommendation in a lethal force case involving the security forces. They have made them in other cases and have received no response beyond an acknowledgment, although one coroner did indicate that there appeared to be an improved attitude from other public authorities in this regard and that they were trying to be slightly more proactive and take such recommendations onboard.

The coroners suggested that a new coronial regime could include the publication of an annual report to include statistics on deaths, deaths engaging Article 2 and cases in which recommendations had been made. Copies of the letters sent by coroners making such recommendations and any responses received could be appended to the report.

The coroners indicated that they would welcome specialised training on developments in relation to Article 2 or other relevant international human rights standards.

APPENDIX 1

Draft questionnaire for coroners

The following list indicates the questions which we wish to ask. Obviously, it may be the case that follow-up questions may prove necessary to clarify aspects of answers given but those questions will be within the broad parameters set below.

While we welcome the opportunity to discuss these matters with all coroners, the focus of this research is on lethal force cases. It is unlikely that interviews with coroners without experience of such cases (or those involving allegations of collusion) will prove useful.

General

a) Have you had experience of dealing with cases involving the use of lethal force by members of the security forces or cases involving allegations of collusion?

Delay and disclosure

a) In your experience, do you find there is a significant time gap between the date of death and the opening of an inquest in cases relating to the use of lethal force by the security forces?
b) If so what are the usual reasons for the delay?
c) Have you found that there is delay in the provision of material by the police to the Coroner in such cases?
d) How does the relationship with the police work in practice in terms of the provision of material?
e) Aside from the Home Office Circular, are you aware of any guidelines or procedures in existence which govern the provision of information/material concerning deaths to Coroners by the police? If so, we would be interested to receive a copy.
f) If no such guidelines exist, do you think the system would benefit from reform and/or clarification of the police role in relation to the timing and content of disclosure? What changes do you think would be of benefit?

Investigation of lethal force/collusion cases

a) Would you find it useful to have your own staff to carry out investigations?
b) Do you think that any gaps exist in the investigation process in such cases, for example, even with the establishment of the Office of the Police Ombudsman a gap may still exist in relation to the investigation of lethal force cases concerning the military and/or allegations of collusion.

Infrastructure and support

a) In this area we would be interested to know what you consider are the shortcomings of the present system, if any?
b) What are your views on the current staffing and administration arrangements and support for coroners?
c) We are aware that the consultation period for the proposals for administrative redesign of the coronial service has recently passed. What are your views on the proposals and what do you see as the best outcome of that process?
d) Have you received training on the Human Rights Act, Article 2 of the Convention and its associated jurisprudence or any additional human rights standards? Would you welcome such training, perhaps in the form of annual updates?

Recommendations made by coroners

a) Have you, in any case in which you have been involved made a recommendation or reference to other public authorities such as the DPP, the police or the army?
b) If so, in what broad circumstances and what response was received, if any?

Conclusion

a) Would you have any objection to the Commission being informed of the receipt of cases at the Coroner's Office which raise Article 2 concerns in order to assist monitoring of such cases?

Appendix 2

Authors recommendations to the Human Rights Commission

As part of this study the Commission requested ideas as to a pilot study by which at least one part of the investigative process following the use of lethal force might be monitored to ensure compliance with Article 2.

In light of the above it appears that the most appropriate mechanism for such a study is the inquest. As noted above, coroners now maintain a list of outstanding cases raising Article 2 issues. This list includes cases which involve the use of lethal force by servants or agents of the state as well as cases which raise other Article 2 concerns. The coroners have indicated that the list is added to when new cases emerge.

Liaison with the Northern Ireland Court Service should ensure that the Commission can be provided with a copy of the list, thereby receiving information as to the number of cases in the system and what issues those cases raise. The Commission should therefore approach the Court Service with a view to obtaining that list and also to make arrangements to ensure that in future the Commission is notified when any new case is added to that list. The following action could be taken by the Commission on the basis of the list:

a) The list can form the basis of a database of Article 2 cases which are still extant within the Coronial system.

b) The Commission should use the list and any additions to it to monitor the number and types of cases as they come before Coroners courts, thereby assessing to what extent deaths continue to be caused by the (direct or indirect) actions of servants and agents of the state, and whether action is needed to reduce the occurrence of such deaths.

c) The Commission should further use the list to ensure that the state is discharging its obligations in respect of the investigation of deaths in Northern Ireland and, where appropriate, to offer advice and assistance to the families concerned and/or their lawyers.

d) The proper monitoring of the cases within the coronial system should also allow the Commission an insight into the extent to which other aspects of the investigative process (police, DPP, etc) are

meeting their Article 2 obligations. The Commission could intervene with those other agencies as and when appropriate.

e) The Commission should continue the dialogue with coroners started in this study and offer them appropriate training.

f) The Commission could begin to make interventions now on some of the matters raised by the coroners which they perceive as being problematic in terms of their obligations under Article 2.