

The ECHR and the future of Northern Ireland's past



Keynote Speech by John Larkin QC

Foreword by Lord Brown of Eaton-under-Heywood



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John Larkin QC is Attorney General for Northern Ireland. Educated at Queen's University Belfast, he was called to the Bar of Northern Ireland in Michaelmas Term 1986 and later to the Bar of Ireland. Between 1989 and 1991 he was Reid Professor of Criminal Law in Trinity College Dublin. He took silk in Michaelmas term 2001 and in the last ten years his practice has been mainly in Constitutional and Administrative Law and Human Rights. Following the transfer of policing and criminal justice powers to Northern Ireland he was appointed Attorney General for Northern Ireland on 24 May 2010. He is the first person to hold the office separately since its functions were assumed by the Attorney General for England and Wales in 1972.

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Foreword

Lord Brown of Eaton-under-Heywood, cross-bench peer and former Supreme Court Justice and Law Lord

John Larkin's Policy Exchange lecture was a tour de force: stimulating and challenging, teeming with ideas and insights, both generally with regard to the development (some would suggest the impermissible expansion) of Convention jurisdiction and jurisprudence, and more particularly from his own perspective as Northern Ireland's Attorney General.

The lecture ranges far and wide, focusing principally upon violent deaths and their investigation arising from conflicts both here and abroad but touching on many other issues too. Whilst personally I would not agree with every thought and proposal advanced, the lecture indisputably provides a solid basis for full and informed discussions on a large number of issues. These include critical questions such as whether the Human Rights Act 1998 should be amended both temporally (so as not to apply to pre-October 2000 deaths, or indeed other pre-Act events, let alone to create freestanding procedural obligations arising from them), and territorially (so as to restrict its application to the UK with only very limited exceptions such as British embassies, UK registered vessels and UK military bases), all as foreshadowed in Policy Exchange's valuable 2019 paper *Protecting Those Who Serve*.

To those who may regard even these modest proposals as a step too far in limiting (although, of course, only within domestic law) the reach of the Convention, I would point out that Lord Bingham of Cornhill, dissenting on this issue in *Al-Skeini*, thought the Act on its true construction territorially limited to the UK anyway; and similarly Lord Rodger of Earlsferry, dissenting in *Re McCaughey*, thought it limited in point of time to deaths, and the requirement to investigate them, after October 2000 (as we had earlier held in *Re McKerr*). Some of the other issues discussed in the lecture would now appear to have been, if not overtaken, at least cast in a fresh light by the government's striking new legislative proposals for time-limiting both prosecutions and civil claims arising out of armed conflict. Certainly one would hope for a future in which aged servicemen, long since retired, are spared prosecution for alleged murder following a mistaken killing in the discharge of their military duties nearly half a century earlier. And one hopes too that the use of force in armed conflicts abroad would in future, as in the past, be judged by international humanitarian law (notably the Geneva Conventions, the law of war) rather than by the ECHR as Strasbourg now dictates. Whether derogation from the Convention is required and appropriate for this is yet another issue for further consideration.

And not even all that exhausts the important questions thrown up by Mr Larkin's lecture. What is the scope of the "manifestly without reasonable foundation" test applied to discrimination claims and how final is it? More fundamentally still to my mind, there remains for consideration the question whether the Attorney General for Northern Ireland should have, as does his England and Wales counterpart, responsibility for superintending the Director of Public Prosecutions, not least to ensure that a public interest test and not merely a sufficiency of evidence test is applied to prospective prosecutions.

In the consideration and discussion of all these many vital issues Policy Exchange may be expected to continue playing the important role they have played hitherto.

It is both an honour and a pleasure to give this lecture at Policy Exchange. The Judicial Power Project of Policy Exchange has been both a first responder as well as a specialised giver of care in a critical case of constitutional *malaise*. If our constitution recovers a healthy sense of balance, that is to say, its traditional balance, it will owe an enormous debt to this project, and to Policy Exchange as a whole.

Few would now think that the besetting fault of our time was a tendency to over-praise the traditional constitutional order of the United Kingdom. It is much more common to find lawyers and others praising the recommendation of some unaccountable UN committee, or a judicial decision drawing on such a committee, than, for example, the work of the Commons or Lords.

But it must surely be said that the constitutional history and tradition of the United Kingdom shows a commitment to remove abuses and redress grievances that need fear comparison with no other European state, and this history and tradition tend, surely, to disprove the existence of any need, far less an urgent or pressing need, for the United Kingdom to receive enforceable moral addresses from any international institution.

One quick example will suffice: Muslim women in the United Kingdom are free to wear a face-covering veil in the public square without fear of prosecution. This is not true of France and Belgium. Muslim women in the United Kingdom have not needed the ECHR to avoid being penalised for this sartorial expression of faith; and, as we know from *S.A.S v France*¹ and later cases², the European Court of Human Rights has been no help to Muslim women in France and Belgium who run the risk of penalisation for wearing garments that their faith, in their view, requires of them.

To say this is not (of course) to claim that the institutions of the United Kingdom have always acted justly or that the justice system and the political process between them have always succeeded in removing abuses or redressing well-founded grievances. Nor is it to claim that we have nothing or little to learn from other states or from international institutions. Nor, yet, is it to claim that we should not accept help from our friends, and refuse to act jointly with them when our common interests call for us to do so.

My starting point is, so it seems to me, a modest one: there is reason to believe, based on our constitutional experience and tradition, that in the United Kingdom we have, demonstrably, the capacity to deal fairly and well with the issues and problems that arise within this polity.

From that starting point I want to look at an aspect of an important provision of the European Convention on Human Rights, the procedural obligations under Article 2, and what that might mean for how policy for the legacy of the Northern Ireland Troubles is to be made. That is the core of this lecture. I want to precede that core reflection on Article 2 and

1. *S.A.S v France* Application No. 43835/11, July 1 2014 [GC]

2. For example, *Dakir v Belgium* Application 4619/12, 11 July 2017 [Second Section]

what it means for The Troubles with some discussion of the more general problems that have arisen from ‘bringing rights home’, that is the partial domestication of the ECHR that was effected through the Human Rights Act 1998. I then want to end with some suggestions about what might now be done.

II

As is well known the title of the October 1997 white paper which accompanied the Human Rights Bill of that year (later, of course, the Human Rights Act 1998) was, “Rights Brought Home: The Human Rights Bill”.

With the passage of time it has become clearer that the Human Rights Act has been less important as a conveyor ‘home’ of rights under the ECHR than as a tool for the domestic judicial expansion of those rights, with the result that there are cases or legal arguments which the United Kingdom would win in Strasbourg that public authorities will lose in London and Belfast.

That is, at least in part, for two reasons. The first is that the meaning of any provision of the European Convention on Human Rights that is also included in schedule 1 to the Human Rights Act 1998 is subject to two layers of interpretation. The first layer is the Strasbourg layer: by Article 32³ of the ECHR the European Court of Human Rights has jurisdiction to interpret the Convention in all cases properly before it, and, by Article 32.2 the Court has competence to decide if it has jurisdiction or not. Under the Convention, at least in its present form, the European Court of Human Rights has the last word on the meaning and application of the words making up the Convention.

But, as Lord Kerr explained in *Commissioner of Police of the Metropolis v DSD*, “The HRA introduced to the law of the United Kingdom the European Convention on Human Rights and Fundamental Freedoms by making the Convention part of national law so that the rights became domestic rights. Because the rights are domestic, they must be given effect according to the correct interpretation of the domestic statute. (Note that phrase: *the correct interpretation of the domestic statute.*) As Lord Hoffmann said in *re G (Adoption: Unmarried Couple)* [2008] UKHL 38 para 34 “[the courts’] first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg”.”⁴

Lord Kerr went further: “Reticence by the courts of the UK to decide whether a Convention right has been violated would be an abnegation of our statutory obligation under section 6 of HRA.”⁵ In saying this in 2018 he was echoing his own extra-judicial words in a 2012 lecture: “Section 6 of the Human Rights Act leaves no alternative to courts when called upon to adjudicate on claims to a Convention right. ... That statutory obligation, to be effective, must carry with it the requirement that the court determine if the Convention right has the effect claimed for, whether or not Strasbourg has pronounced upon it.”⁶

3. See the commentary on this Article in William A Schabas *The European Convention on Human Rights A commentary* (Oxford, 2015) pp. 715-722
4. *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 paragraph [75]
5. *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 paragraph [78]
6. Lord Kerr *The UK Supreme Court the modest underworker of Strasbourg?* https://www.supremecourt.uk/docs/speech_120125.pdf This formulation does not, it seems, distinguish between (1) the act of determining whether the duty under section 6 of the Human Rights Act has been breached and (2) the decision to interpret and apply a Convention right so as to give a particular effect to it in circumstances in which the Strasbourg Court has not done or would not do. (1) may be a judicial duty; (2) is not.

In that 2012 lecture Lord Kerr said that “the court [that is, the national court] must choose the interpretation that most closely accords with its reasoned view of the content of the Convention right. It should not be deflected from a “more generous” interpretation, if it considers that such an interpretation is the right one, solely because the matter can always be put right by Strasbourg.”⁷

The reference to the matter being put right by Strasbourg is, perhaps, a nod to what Lord Brown said in *R (Al-Skeini and others) v Secretary of State for Defence*⁸ where he set out the principled objection to the domestic courts going ahead of Strasbourg in interpreting the ECHR for themselves. Lord Brown said this: “There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an Applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg.”

To my mind there is no ready or satisfactory answer to this juridical lop-sidedness, identified by Lord Brown, as the consequence of domestic judges going further than Strasbourg in the interpretation or application of the ECHR. The product of this lop-sidedness consequential on a domestic readiness of surpass Strasbourg is a doctrinal ratchet in which a domestic advancements beyond the then extant Strasbourg line of authority will never be repudiated by the Strasbourg Court and the absence of repudiation by Strasbourg forms a notch from which still further domestic advances will ratchet forward.

This takes me to the second problem with bringing rights home: the willingness of domestic courts to find that domestic measures that would fall within the United Kingdom’s margin of appreciation at Strasbourg, need not, by virtue of that, survive national judicial scrutiny. In *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] AC 1016, para 54 Lord Mance said: “At the domestic level, the margin of appreciation is not applicable, and the domestic court is not under the same disadvantages of physical and cultural distance as an international court. The fact that a measure is within a national legislature’s margin of appreciation is not conclusive of proportionality when a national court is examining a measure at the national level: *In re G (Adoption: Unmarried Couple)* [2009] AC 173; *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 675, per Lord Neuberger PSC at p 781, para 71, Lord Mance JSC at p 805, para 163 and Lord Sumption JSC at pp 833-834, para 230.”

But even when the UKSC seeks to measure domestic measures with the Strasbourg standard problems can still occur. In *R (DA and others) v Secretary of State for Work and Pensions*⁹ [2019] UKSC 21 a majority of the Supreme Court held that the justification of the adverse effects of rules for entitlement to welfare benefits should be by reference to whether these rules were manifestly without reasonable foundation. Lady Hale dissented on the application of that test¹⁰, not on its correctness; Lord Kerr proposed a test

7. Lord Kerr *The UK Supreme Court the modest underworker of Strasbourg?* https://www.supremecourt.uk/docs/speech_120125.pdf

8. *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26 at paragraph [107]

9. *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21

10. *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 paragraph [132] “There is no difference of opinion between Lord Wilson and me as to the legal principles applicable: we disagree only on the application of the principle of justification to the facts of these cases.”

of his own.

It might be thought that Lord Wilson gave, perhaps, a hostage to fortune when, having said that to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question was whether the rule was manifestly without reasonable foundation, he added the firm admonition: “Let there be no future doubt about it.”¹¹

Never say never. Even though none of the Justices thought that the test that would be applied in such a case by the Strasbourg Court was anything other than the Manifestly Without Reasonable Foundation test, the Strasbourg Court itself has since indicated that the Manifestly Without Reasonable Test does not have the general applicability even in Strasbourg that all of the members of the UKSC thought that it had. And, for what it is worth, I thought, too, that theirs was the correct reading of the Strasbourg authorities. In *JD and A v United Kingdom* (a decision of the First Section of 24 October 2019 in which a referral to the Grand Chamber was refused on 24 February 2020) the Strasbourg Court made it clear that it “has limited its acceptance to respect the legislature’s policy choice as not “manifestly without reasonable foundation” to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme carried out in order to correct an inequality”¹² and outside that narrow context the Court has held that “because of the particular vulnerability of persons with disabilities such [discriminatory] treatment would require very weighty reasons to be justified.”¹³

And, of course, it will be for the Strasbourg Court to say whether or not the policy reasons put forward by the state are ‘very weighty’ or not. And in one of the two cases it found that they were not. When a court, any court, can put the pall of a human rights breach over a policy outcome for which it considers the reasons not ‘weighty’ enough, we know that the scope for politically accountable policy making has been diminished, and the judicial role in such policy, enhanced.

III

From 1966 to 2006 over three thousand and seven hundred people lost their lives as a result of the Northern Ireland Troubles. Of these 2152 were killed by Republican terrorists; 1112 by Loyalist terrorists; 310 by the Army, and 51 by the RUC.¹⁴ The true figure is likely to be higher and the numbers of those hurt, physically and mentally, by the Troubles must be enormous.

Figures are available for those prosecuted in respect of Troubles related offences but these offer no real guide to the numbers of persons who, in fact, bear criminal responsibility the murders of the Troubles. In a case in which one person has been made amenable for one murder there may be four or five (or more) who bear criminal responsibility for that murder. And that is true not only of murder but for all troubles related offences.

As matters stand under our law at present these cases must all be considered open and investigated when reasonable to do so and, where

11. *R (DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21 paragraph [65]
12. *JD and A v United Kingdom* ECt HR (First Section) Application numbers 32949/17 and 34614/17 (24 October 2019) paragraph [88]
13. *JD and A v United Kingdom* ECt HR (First Section) Application numbers 32949/17 and 34614/17 (24 October 2019) paragraph [89]
14. These figures are extracted from Table 2 in the second edition of *Lost Lives* (Edinburgh and London, 2007) p. 1553

the evidence following investigation so permits, files presented to the Public Prosecution Service to determine whether a prosecution should be undertaken, and, if so, for what offences. There is, at common law, no limitation period for indictable offences.

Let me pause there and observe that, setting aside the obvious point that the passage of time can normally be taken to diminish the prospects of a successful criminal investigation, it would not be open to the Police at common law to close a case, that is to say in respect of any serious offence, they would not look at that case even if someone were to come to them with vital evidence showing that X had been involved in the commission of that offence.

What difference has Article 2 (which protects the right to life) made to the investigation of Troubles related cases?

I must immediately begin any answer to that question by pointing out that the difference comes not from the text of Article 2 as agreed by the member states of the Council of Europe but from the text as, in effect, re-written by the European Court of Human Rights. There are no procedural obligations in the text of Article 2

It can never, I think, be sufficiently emphasised that the procedural aspect of Article 2 ECHR is a creation of the Court and not the product of agreement by the member states of the Council of Europe.

It is no coincidence, I think, that this creation has emerged from two cases connected with the Northern Ireland Troubles of which the first is, of course, *McCann and others v United Kingdom*¹⁵. In that case, by ten judicial votes to nine, the Strasbourg Court held that there had been a violation of the Article 2 rights of the applicants. In *McCann* for the first time the Court held that Article 2 “requires by implication [note that: ‘by implication’] that there should be some form of effective official investigation when individuals have been killed as the result of the use of force by, *inter alios*, agents of the State.”¹⁶

The judgment in *McCann* was described to me by a senior member of the Strasbourg Court’s registry a few years ago as the equivalent of an additional protocol to the Convention. That statement is as significant as it is accurate and when I jocosely taxed the author on its revealing candour, the reply was, “but I think it’s a good development.” My rejoinder was, “it may or may not be, but it was for the states to decide, not the court.”

For present purposes two things are worth noting about the decision in *McCann*, firstly that no breach of the new adjectival duty was found and secondly that the Court did not tell us “what form such an investigation should take and under what conditions it should be conducted”¹⁷.

In *Jordan v United Kingdom*¹⁸ the Court unanimously held that there had been a violation of Article 2 because of failings in the investigative process and, in so doing, the Court identified some of the features that the investigation first recognised as a requirement in *McCann* should possess. For this lecture I want to focus on only one of these features: effectiveness but I invite you to note that in *Jordan* the specification of the component parts of an investigation seems wholly legislative in character.

15. (1995) 21 EHRR 97

16. *Ibid.* at paragraph 161

17. *Ibid.* at paragraph 162

18. (2003) 37 EHRR 2

On efficiency, the Court said that the investigation “must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.”¹⁹

It is worth remembering that, while *McCann* concerned a challenge to the “adequacy of the Inquest proceedings as an investigative mechanism”²⁰, *Jordan* was a challenge across a wider front. In *Jordan* the applicant challenged (1) the police investigation for a lack of independence and a lack of publicity; (2) the Director of Public Prosecutions’ role being limited by the police investigation and the Director of Public Prosecutions’ failure to publish reasons for not prosecuting; and (3) the inquest’s delays, the limited scope of the inquiry, lack of legal aid, lack of access to documents, the non-compellability of certain witnesses and the use of public interest immunity certificates²¹. The inquest in *Jordan* was thus only one of three institutions under challenge.

In paragraph 130 the Court observed:

*“Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification and punishment of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Art.2.”*²²

If I read this passage correctly this is a finding that the Northern Ireland inquest had not (or at least had not in *Jordan*) any effective role in discharging the Article 2 procedural obligations of identifying and punishing any persons criminally responsible for taking life. Given this structural finding, it is then, I think, curious that the Court went on in paragraphs 132-140 to discuss, in respect of the inquest, the absence of legal aid, delay, disclosure of documents, and public interest immunity certificates. If the inquest cannot (as the Court suggested in paragraph 130 cited above) lead to the identification and punishment of perpetrators (and this is an objection to its current structure) then changes in the matters discussed in paragraphs 132-140 cannot alter what is a fundamental barrier to the inquest being an effective vehicle for delivery of the procedural rights protected by Article 2.

This reflection is strengthened, I think, by a reading of *Janowiec v Russia*²³. *Janowiec* concerned claims against Russia by descendants of Polish citizens detained and murdered in Katyn Forest near Smolensk in April and May 1940. The applicants claimed breaches of the duty under Article 2 to hold an adequate and efficient investigation and under Article 3 with respect to the denial of information about the fate of their relatives.

Since the Russian Federation only ratified the Convention in May 1998, the claim could only have been possible through the (rather odd) doctrinal porthole opened up by the Grand Chamber decision in *Silih v Slovenia*²⁴. *Janowiec* saw the claims under Article 2 rejected *ratione temporis* (on the ground that the ECHR hadn’t applied when the crimes occurred, and shouldn’t be made to apply retrospectively on this occasion) and a substantive rejection of the claims under Article 3. What is important for

19. *Ibid* at paragraph 107

20. *McCann v United Kingdom* (1996) 21 EHRR 97 cf.[157] – [164]

21. *Ibid.* at paragraph 97

22. *Jordan v United Kingdom* 37 EHRR 2 at page 94

23. *Janowiec v Russia* (2014) 58 EHRR 30

24. (2009) 49 EHRR 37

this lecture is what the Grand Chamber in *Janowiec* says about the nature of the investigative duty under Article 2.

In paragraph 143 of *Janowiec* there is a significant and helpful elucidation of the procedural obligation in Article 2. There, it is said that the procedural obligation in Article 2 covers “acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party”²⁵. Thus far this may be thought to be little more than one reads in *Jordan* but the Court then went on to observe “[t]his definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing historical truth”²⁶.

Now, while it is true that a coroner can refer a case to the Director of Public Prosecutions, an inquest is not designed to be, and is not, a substitute for a proper criminal justice investigation. While you can keep coal in the bath: the bath is not designed for that purpose.

This has caused me since *Janowiec* to refer requests for inquests to the Public Prosecution Service or the Police Service of Northern Ireland where what is at issue is an allegation of the deliberate taking of life. What the PPS and PSNI do are, as with the decisions that I take in relation to inquests, governed by the law in its present form.

Although the Strasbourg Court has been, as we have seen, remarkably creative²⁷ in creating procedural rights from the textually unpromising substance of Articles 2 ECHR²⁸ (as well as with Article 3) it has, with one exception, refrained from interpreting either Article 2 or Article 3 so as to create a free-standing right to truth. Indeed, the Court has consistently, as respects Article 2 ECHR emphasised both the practical, predominantly criminal justice colour of the procedural aspect of Article 2 and the exclusion from that procedural aspect inquiries that have as their purpose the recovery of historical truth.²⁹

The one exception I referred to occurred in the context of a ruling on the procedural obligations under Article 3 ECHR in *Abu Zubaydah v Lithuania*. In that case the Court said “Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.”³⁰

This is to advance well beyond the rights guaranteed by the Convention by creating or extending a right to the truth – hitherto subordinate to, and dependent on, to the predominantly criminal justice purpose of the procedural requirements of Article 3 – beyond those (the victim of the crime and his family) to ‘other victims of similar violations’ and, further still, to the general public. A general public which has, in the opinion of the First Section, a free-standing right to truth conferred upon it quite independently of Article 3 ECHR as well as Article 34.

It is instructive to compare *Abu Zubaydah v Lithuania* with *Husayn (Abu*

25. (2014) 58 EHRR 30 at paragraph 143

26. *Ibid.*

27. See, for example, the description (by a member of the Registry of the Strasbourg Court) of the *McCann* judgment “as the equivalent of an additional protocol to the Convention” in John F Larkin, *Dialogue at cross-purposes? The Northern Ireland Inquest and Article 2 of the European Convention on Human Rights*, in Lawrence Early, Anna Austin, Clare Ovey and Olga Chernishova (editors) *The Right to Life under Article 2 of the European Convention on Human Rights* (Oisterwijk, 2016)162

28. See the essays in Lawrence Early, Anna Austin, Clare Ovey and Olga Chernishova (editors) *The Right to Life under Article 2 of the European Convention on Human Rights* (Oisterwijk, 2016). The sub-title of the volume is significant: *Twenty Years of Legal Developments since McCann v. the United Kingdom*

29. *Janowiec and others v Russia* [GC] nos. 5508/07 and 29520/09, § 143 ECHR 2013

30. *Abu Zubaydah v Lithuania* (First Section) no. 46454/11, § 610 [2018] ECHR 446

Zubaydah) v Poland. In the latter case (both cases concerned detention of the same applicant by the CIA and various forms of physical and mental abuse by its agents with the permission of Lithuania and Poland) there is, as in the former, a breach of the procedural aspect of Article 3 but there is no explicit invocation of a right to truth, rather a focus on the effectiveness of the required investigation: “the authorities ... must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions. They must take all reasonable steps available to them to secure the evidence concerning the incident”.³¹ These are all steps that have as their goal the accurate ascertainment of what happened not, however, as an end in itself but primarily “capable of leading to the identification and punishment of those responsible.”³²

In dealing with the procedural aspect of Article 2 ECHR the Strasbourg Court has made an explicit distinction between the kind of inquiries included and excluded from the scope of Article 2 (and Article 3).

A recent confirmation of the continued correctness of the Janowiec distinction comes in the recent admissibility decision in Chong³³ where the Court observed that in that case “any investigation at this point in time would likely be limited to establishing the truth of what happened at Batang Kali, (a shooting during the Malayan emergency) and would therefore fall outside the definition of “procedural acts and omissions” set out in Janowiec”.³⁴

If Strasbourg has not (yet) identified a free-standing right to truth³⁵ independent of an obligation to identify and punish violators of Articles 2 and 3 ECHR we cannot be certain that it will not do so in future.

In the meantime I have (so far) seen off all judicial review challenges to my decisions declining to direct an inquest but am awaiting one decision from an appeal against a High Court victory and one leave hearing has yet to take place.

If Strasbourg were to find that Article 2 encompassed a right to truth (and who can say that it will not?) then I would find it hard, as a section 6 public authority under the Human Rights Act 1998, to do other than grant virtually every inquest application made to me. Such a shift would also lead to increased demands for public inquiries with those demands plausibly backed with threats of litigation.

IV

Suggestions for the Future

I want to outline three suggestions. There is little that is original in any of them, since, in one way or another, they have all been put forward by me or others before. Two relate to our domestic law, the Human Rights Act 1998, and our law on the use of force, and the third to the ECHR itself.

The first is that section 22 of the Human Rights Act should be amended by a section 22 (4A) to provide that no claim shall be founded on any of the Convention rights in respect of a death occurring before October 2

31. *Husayn (Abu Zubaydah) v Poland* (Fourth Section) no. 7511/13 § 480 [2014] ECHR

32. *Ibid.*, § 479

33. *Chong and Others against the United Kingdom* (First Section) no. 29753/16 [2018] ECHR

34. *Ibid.*, § 78

35. For how the Court might do so, or be already in the course of doing so, see Nina Le Bonniec *L'Emergence D'Un Droit A La Verité Dans La Jurisprudence De La Cour Européenne Des Droits De L'Homme in La Verité - Actes du Colloque de L'Ecole Doctorale Droit et Science Politique* (Montpellier, 2014) pp. 29 – 41 and Olga Chernishova, *Right to the Truth in the case-law of the European Court of Human Rights* in Lawrence Early, Anna Austin, Clare Ovey and Olga Chernishova (editors) *The Right to Life under Article 2 of the European Convention on Human Rights* (Oisterwijk, 2016) pp. 145 – 160.

2000³⁶. This would not, of course, prevent a claim being made directly to the Strasbourg Court but, as I have suggested, there may be, at least sometimes, less to fear from that Court than from the domestic application of the rights in schedule 1 of the 1998 Act.

It is worthwhile in this context to note Article 35 (3) (b) of the ECHR. This requires the Strasbourg Court to declare inadmissible any application if it considers that “the applicant has not suffered a significant disadvantage” unless “respect for human rights” requires a hearing on the merits and provided that the case has been “duly considered by a domestic tribunal.” The proviso relating to due consideration by a domestic tribunal will go once Protocol 15 is in force.

The second suggestion is a new statutory model establishing a certification process for the commencement or continuation of troubles-related cases in Northern Ireland.

At the core of the new model is the principle that no investigations or proceedings with respect to a ‘qualifying offence’³⁷ will commence or continue without a certificate.

The certification process applies the existing law under section 3 of the Criminal Law Act (Northern Ireland) 1967 and the common law of self-defence with the following additional elements:

- a. The subjective belief of the suspect [to use that shorthand] which already applies to the existence of circumstances is extended for procedural purposes only to the reasonableness of the force used. The law already under section 3 permits the accused to rely on the circumstances as they were honestly, even if unreasonably, believed by him to exist, for example, “I honestly thought his paintbrush was a machine-gun and the person holding it was going to shoot me” will, if possibly true, even if absurd, justify lethal action by the accused as our law currently stands. The present protection for honest belief in circumstances will extend to an honest belief in reasonableness and legality of response.
- b. A belief by the suspect at the time lethal force was used that the force was unreasonable or unlawful will result in certification.

When certification occurs the investigation or trial will proceed with the standard substantive application of section 3 of the 1967 Act so far as relevant. This new provision simply applies a heightened filter to all cases involving qualifying offences irrespective of the job description of the suspect. It will, in all likelihood, prevent investigations where what is at issue is a split second error of judgment, and it will place no barrier in the way of prosecuting those who set out deliberately to kill.

The certification process would be given the same protection as a High Court order in order to avoid the problems that can arise from collateral litigation. It is, of course, possible that the legacy commissioner could be a judge of the High Court or Court of Appeal. Limited provision may be made for an appeal only on the ground of bad faith, similarly

36. See the evidence of Professor Richard Ekins to the Defence Committee <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/defence-committee/statute-of-limitations-veterans-protection/written/97128.html>

37. ‘Qualifying offence’ would be defined to include all Troubles related offences. The approach taken in section 3 (7) of the Northern Ireland (Sentences) Act 1998 would be a useful template.

in a protection against collateral litigation as well as a safeguard against a decision, however improbably, taken in bad faith. If the certifying commissioner is a High Court or Court of Appeal judge there may be no need for this.

The suggestion described in this lecture has been referred to in summary form in the valuable Policy Exchange paper by Professor Richard Ekins and others, *Protecting Those Who Serve*.³⁸ But my object in advancing this suggestion is to protect all of us, those who served and those who did not, from the potentially lopsided criminal justice burden of the troubles³⁹, and to do so in a way that is reflective of a sound and almost universally held moral sense within Northern Ireland and beyond, that there is a profound gulf between, on the one hand, A's planned killing of B or C, and, on the other hand, A's killing of B in the context of unexpected and unwished for circumstances.

The third suggestion relates to the future shape of the ECHR itself. I suggest that a future protocol should re-establish the primacy of sovereign states as the creators of international obligations. This would be done by enabling states to enter interpretive declarations within one month of final judgments addressed to them in which they could reject the interpretations of the ECHR proposed by the Court. The interpretive declarations would be effective as respects the state entering them (and any other state that indicated agreement to them) but would not free the state from any monetary obligations (damages and costs) contained in the judgment.⁴⁰

Issues for debate include the extent to which a new judgment relying on an old (but objectionable) interpretation of the Convention could be subjected to the protocol process, and the extent to which other states should have a role in limiting the use of the interpretive declaration, for example, could unanimous opposition by all other states, or a heavily weighted majority of them, prevent an interpretive declaration taking effect?

Put shortly, this proposal would mean that where states A and B have agreed X, no international court can come along and tell them that X means Z. If states want to agree that there should, for example, be an enforceable right to truth in the Convention, fine, but one could not, with such a protocol, be foisted on them in future by the Strasbourg Court.

I am not, to borrow the title of the Susan Sontag essay, against interpretation but I am very much against substituting one text for another and describing that process of substitution as interpretation: bluntly, it isn't interpretation to play Haydn when the concert programme and the score call for Mozart.

Finally, consistently, I hope, with my expression of concern at domestic judicial advances on Strasbourg, let me express concern also at the scope for judicial law-making that might arise from a British Bill of Rights. We don't need one. Not only do we not need one, its creation and existence would not only lead to an expansion of judicial law-making but would, I think, be likely to dull or diffuse that keen concern for our rights that ought to flourish among Members of Parliament – and it is they, and not

38. Richard Ekins, Patrick Hennessey, Julie Marionneau *Protecting Those Who Serve* (Policy Exchange, London, 2019) p. 32

39. That there is potential lop-sidedness appears, I think, from a mismatch between responsibility for Troubles related deaths, and the numbers of persons from each responsible group currently (March 2020) facing trial for some of those deaths.

40. Here I am delighted to find myself in agreement with Professor Richard Ekins: see his Policy Exchange paper, *Protecting the Constitution how and why Parliament should limit judicial power* (Policy Exchange, 2019) p. 22 <https://policyexchange.org.uk/wp-content/uploads/2020/01/Protecting-the-Constitution.pdf>

the judges, who Blackstone regarded⁴¹, and, I think, rightly regarded, as the guardians of our constitution.

41. William Blackstone *Commentaries on the Laws of England* Volume 1 (Oxford, 1765) p. 9



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