The requirement of compliance with Article 2 of the European Convention on Human Rights in legacy investigations in Northern Ireland

Does Operation Kenova comply?

Note & Queries

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*Reason for preparation of the Note & Queries*

A meeting was held on 11 November 2020 in Belfast between Jon Boutcher, the Officer in Overall Charge of Operation Kenova and participants in the Malone House Group. Reference was made to the ‘Independent Review of Article 2 Compliance’ carried out by Alyson Kilpatrick BL dated 9 February 2020 (‘the Review’) as published on the Kenova website and that Mr Boutcher indicated he would be willing to consider any legal questions in regard to the Review.

Accordingly, we note as follows:

1. *Vires*

We understand that Mr Boutcher is leading Operation Kenova under the following statutory provisions:

* The Chief Constable of the Police Service of Northern Ireland (‘the PSNI Chief Constable’) commencing in June 2016 requested the assistance of the (now retired) Chief Constable Jon Boutcher of Bedfordshire Police under section 98 (1) of the Police Act 1996 (‘the 1996 Act’) to lead an external investigation into the matters which the Director of Public Prosecutions under section 35 (5) of the Justice Act (Northern Ireland) 2002 (‘the 2002 Act’) asked the PSNI Chief Constable to investigate.
* Under section 98 (5) of the 1996 Act Mr Boutcher has the like powers and privileges as a member of the PSNI has in Northern Ireland as a constable.

The Operation Kenova website states:

“Mr Boutcher will be responsible for the delivery of the final reports through the [PSNI Chief Constable] to the Director of Public Prosecutions. These can include a file with prosecutorial recommendations for the consideration of the Director.”[[1]](#footnote-1)

Thus it is clear that where, as in this case, the PSNI obtains this category of external assistance to perform or assist in the performance of its Article 2 investigatory duties (see section 2 below & following), the powers of the assisting body (in this case Mr Boutcher/Bedfordshire Police) cannot be greater than the powers of the PSNI Chief Constable/PSNI officers.

We shall return to this point later in this note.

1. Article 2

Clearly, the jurisprudential approach of the European Court of Human Rights (for the purposes of this note, ‘the Court’) is that Article 2 of the European Convention on Human Rights (‘the Convention’) requires a proper procedure for reviewing the lawfulness of lethal force by state authorities.

As is pointed out in para 8 of the Review, the Court in the McCann case observed that:-

“ . . . a general legal prohibition of arbitrary killing by 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.”

The Court in McCann accordingly concluded that in such circumstances there must be, as stated in para 7 of the Review, ‘some form of effective official investigation’.

However, the difficulty is to identify what form of ‘effective official investigation’ is required to satisfy the Article 2 requirements as identified by the Court.

Para 4 of Review asserts that:

“ . . . it will be Article 2 which regulates and provides for the continuance of Kenova and other investigations.”

But the difficulty is that, as para 14 of the Review notes, the Court has refused to determine a model for Article 2 investigations.

Later in this note we list several of the Article 2 requirements and we raise enquiry as to whether, in fact, Operation Kenova itself fulfils these requirements.

At the heart of this is the difficulty of identifying what are the inherent requirements of Article 2 investigations as required by the Court.

The requirements are summarised in para 14 of the Review:

“It is clear that to be effective the investigation must be adequate i.e. it must be capable of leading to a determination of what happened and of identifying and – if appropriate – punishing those responsible. This is not an obligation of result but of means: Armani Da Silva v UK (2016). The [Court] has refused, expressly, to determine a model for Article 2 investigations for that reason.”

We suggest there are several aspects to be tackled:

* When should an Article 2 process be carried out?
* *What is the nature of the formal process required when Article 2 applies?*
* The essential distinction between investigation and adjudication
* *Fair process*
* *Public scrutiny*
* *Compellability of witnesses*

Each of these is examined in turn:

1. **When should an Article 2 process be carried out?**

In Brecknell v UK (2007) para 70 the Court held:

“It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 . . . Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusion of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. . . . The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely-differing situations that might arise.”

However, we take it as a given, because of the very serious nature of the allegations under investigation in Operation Kenova, that its investigative obligations must comply with Article 2.

1. What is the nature of the formal process required when Article 2 applies?

The recent judicial review (in admittedly an Article 3 case): *MA BB* [2019] EWHC 1523 (Admin) appears to contemplate there must be a formal process (whether or not a hearing may be an essential requirement).

But is it the case that Operation Kenova will carry out purely internal processes before it issues its reports?

That could be insufficient for full Article 2 compliance. What is the Operation Kenova position on this issue?

Note, in this context, how the shooting dead of Ronan MacLochlainn in Ashford, County Wicklow by gardai led (eventually) to a Commission of Enquiry carried out by Senior Counsel (sitting for 60 days of evidence) and this was followed by a judicial review (as reported in the Irish Times 17 February 2018: Judge refuses to overturn verdict of lawful killing).

However, in Operation Kenova the procedures appear to be essentially those of a police investigation (with the addition of the *ad hoc* bodies to which we refer below).

It also appears that in the great majority of cases where prosecutions cannot be taken (apparently only very few prosecutions may be achieved)[[2]](#footnote-2) the ultimate result will be this issue of reports by Operation Kenova. In this regard we understand that Kenova has two roles[[3]](#footnote-3):

* To issue ‘public facing’ reports[[4]](#footnote-4) and
* An ‘updating families’ role[[5]](#footnote-5).

But it is not clear to us if these will be two categories of reports and, if so, how will they differ?

In any case would the ‘Updating families’ role duly constitute the formal process as apparently required by Article 2? (Some further questions in regard to such Operation Kenova reports are listed below.)

In particular, we make the point below (section 4) that Kenova cannot properly perform any adjudicatory function in any of its reports. But even if an independent adjudicatory element is introduced, there are still vital elements of procedural fairness by whoever performs such adjudicatory function.

No doubt, and nevertheless, the expectation of victims’ families will be (based on the many assurances to them of the delivery of ‘truth’) that any adjudication will reveal any criminality and attribute blame for any misfeasance.

However, on the one hand, it cannot be acceptable that truncated procedures are adopted denying those so ‘accused’ or ‘blamed’ full and fair participation before any such ‘adjudication’ against them is made. On the other hand, clearly the volume of Article 2 cases in Northern Ireland has to be taken into account. Thus, as a practical matter, there will be substantial difficulty in delivering the full and fair adjudicatory processes (such as in the *MA BB* and *Ronan MacLochlainn* cases) that must be required for each and every case.

This is a conundrum, but one should not avoid its consideration.

1. **The essential distinction between investigation and adjudication**

 It appears that Article 2 require some form of independent adjudication as well as and separate from the investigatory process

Analogy may be drawn with the role of the Police Ombudsman for Northern Ireland (‘PONI’) issuing reports. In *Re Hawthorne’s and White’s Application[[6]](#footnote-6)* the Court of Appeal held that PONI’s principal role is investigatory and not adjudicative[[7]](#footnote-7).

Clearly, the requirements of Article 2 as laid down by the Court entail some form of adjudicative element.But to follow the direction laid down by our Court of Appeal there must be rigorous separation of the investigatory and adjudicative elements.

But it does not appear that investigations of the nature of Operation Kenova, however well organised and carried out as a police investigatory process, can properly also contain any element of adjudication.

We revert to the matter of *vires* raised in section 1. Clearly, it is impermissible for the PSNI Chief Constable/PSNI officers to perform any adjudicatory role, as opposed to their proper investigatory role. Thus also it is impermissible for Mr Boutcher/Operation Kenova officers to perform any adjudicatory role as they do not have any statutory authority beyond that of acting in the role and with the powers of PSNI officers. In sum, where PSNI cannot perform any adjudicatory role Mr Boutcher/Kenova officers cannot perform such role.

We refer above in section 4 to the performance of the adjudicatory role. Where a prosecution is to be taken, then of course the court performs that role with due process and full defence rights. But, where there is to be no prosecution, there is a *lacuna* in regards to performance of the adjudicatory role. It seems to us that provision for this urgently needs to be made by way of legislation.

We note that Mr Boutcher himself has made the assessment in the House of Commons in his evidence to the Northern Ireland Affairs Committee (NIAC) that:

“Outcomes should not be judged by the criminal justice system alone. The criminal justice system never could nor should be a comprehensive solution for dealing with the past”[[8]](#footnote-8)

and “Because of my principles, I find that an amnesty is uncomfortable, but we have to accept that prosecutions are incredibly unlikely for cases from so long ago. The focus should be on information recovery, not prosecution, as I mentioned in my opening remarks.”[[9]](#footnote-9)

This underscores the dilemma of legacy: how can the legacy processes be dealt with expeditiously, but at all times with full due process? With respect, we submit that Operation Kenova itself cannot properly fulfil *all* the necessary requirements.

1. Fair process

The requirements for fair process were set out extensively by McCloskey J (as he then was) in his first instance judgment in *Hawthorne & White’s Application[[10]](#footnote-10).*

The Court of Appeal for Northern Ireland considered this in its judgment and ruled:

“ . . . Matters bearing on personal honour and reputation fall within the scope of Article 8 [of the Convention] and where they attain a certain level of gravity and are made in a manner causing prejudice to personal enjoyment of the right of respect for private life they are entitled to protection.”[[11]](#footnote-11)

So the questions arise as to what protections Operation Kenova has or will put in place firstly as to fair process for those under investigation and secondly for protection of personal honour and reputation for those who might be identified in its reports in a manner causing prejudice to their personal enjoyment of their right of respect for private life to which they are entitled.

1. Public Scrutiny

Para 15 of the Review notes that:

“Article 2 also requires (as part and parcel of an effective investigation) a sufficient element of public scrutiny to secure accountability in practice as well as in theory.”

The Review goes on to explain that this is not to be assessed according to any check list of simplified criteria:

“Article 2 has, at its core, the maintenance (or rebuilding) of public confidence in the State’s adherence to the rule of law and seeks to prevent any appearance of collusion in, or tolerance of, unlawful acts.”

Para 15 of the Review then cites the observation of the Court in *McKerr v UK* (2002) that

“. . . the degree of public scrutiny required may well vary from case to case but particularly stringent scrutiny must be applied by the relevant domestic authorities to the investigation of a death in which State agents have been implicated.”

Clearly the Kenova investigation is of such serious allegations and circumstances.

Para 15 of the Review then goes on to state:

“ . . . the Court in finding that the subsequent enquiry did not comply with Article 2, gave weight to the fact that the inquiry’s reports and their findings were not published in full or in extract meaning that the investigation lacked public scrutiny.”

But the question is then whether Kenova itself involves a sufficient degree of public scrutiny in relation to the gravity of the allegations against agents of the State.

Certainly, the establishment by Mr Boutcher of the Independent Steering Group (Review, para 18 ‘ISG’) the Victims Focus Group (Review, para 19 ‘VFG’) and the Governance Board (‘GB’) [[12]](#footnote-12) constitute an element of outside involvement in Kenova.

But we query the apparent *ad hoc* nature of the creation and operation of the ISG, VFG and GB. None of these bodies is set up under legislation or regulation. It is not clear what categories of information is disclosed to them, or any of them and how any such information is protected against disclosure.

In sum, the Court in *McKerr v UK* (cited above) referred to the obligations under Article 2 of ‘the relevant domestic authorities’. It simply appears to us that the ISG, the VFG and the GB, as collections of lay people, cannot be termed as ‘relevant domestic authorities’ for the purpose of performance of Article 2 requirements.

Furthermore, there is lack of transparency. All the appointments have apparently been made by Mr Boutcher without any public application process and the deliberations of the ISG, the VFG and the GB are not published on the Kenova website.

It seems to us that there is a fundamental distinction between enabling scrutiny on the one hand by the public at large and on the other hand by a group or groups, however created. This is implicit from para 15 of the Review. It follows that Kenova’s self-appointed structures fall short of what is required.

1. Compellability of witnesses

The Supreme Court has held that the de Silva enquiry into the murder of Pat Finucane was not fully compliant with Article 2 as there was no power to compel witnesses.[[13]](#footnote-13)

*Finucane* was the case of an independent enquiry carried out by Sir Desmond de Silva QC - a senior legal figure. Lord Kerr identified the lack of compellability as leading to Sir Desmond being unable to be conclusive as to the opportunity to identify individuals responsible for, or in any way complicit, in the murder.

However, an enquiry of the form carried out by Sir Desmond seems to us to be quite different from a criminal investigation carried out by a police officer (such as Mr Boutcher) appointed by the Chief Constable to investigate a series of serious acts of terrorism including allegations of criminality on the part of police officers.

1. [www.kenova.co.uk](http://www.kenova.co.uk) ‘Role of the Police Service of Northern Ireland’ section – accessed 22 February 2021 [↑](#footnote-ref-1)
2. See Mr Boutcher’s evidence to NIAC on 2 September 2020 – answers to Q243, Q 245 & Q269 [↑](#footnote-ref-2)
3. That is, in addition to the primary statutory duty to report to the Director of Public Prosecutions, as set out in section 1, above [↑](#footnote-ref-3)
4. See paras 3.7 & 3.12 (final bullet) of Mr Boutcher’s written evidence to NIAC (LEG0041) [↑](#footnote-ref-4)
5. ibid - see paras 4.6 & 6.1 [↑](#footnote-ref-5)
6. *Hawthorne & Whites’ Application* [2018] NICA 33 [↑](#footnote-ref-6)
7. See paras 43, 54 & 55 [↑](#footnote-ref-7)
8. NIAC *Addressing the Legacy of Northern Ireland’s Past: The UK Government’s New Proposals* HC 329 Oral Evidence Q243 – see also, in answer to Q245, his observations on the difficulties of legacy prosecutions in Northern Ireland [↑](#footnote-ref-8)
9. *ibid Q*269 [↑](#footnote-ref-9)
10. [2018] NIQB 35 – section 2 of the Judgment ‘The Second Ground: Procedural Unfairness’ paras 104 to 115 [↑](#footnote-ref-10)
11. para 53 [↑](#footnote-ref-11)
12. Not referred to in the Review but see Mr Boutcher’s written evidence to NIAC para 3.7 (ref LEG0041) [↑](#footnote-ref-12)
13. *Finucane, Re application for judicial review* [2019] UKSC 7 at para 140 [↑](#footnote-ref-13)