**IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**ARTICLE 2 PROCEDURAL IN NORTHERN IRELAND**

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**SUPPLEMENTARY**

**OPINION**

**DR AUSTEN MORGAN**

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1. I refer to the original opinion of 25 May 2020, which I drafted on the above topic. I understand this was submitted to the Committee of Ministers of the Council of Europe, on behalf of the Malone House Group in Belfast ([DH-DD(2020)500](https://search.coe.int/cm/Pages/result_details.aspx?Reference=DH-DD(2020)500)). That NGO urges a consideration of the Northern Ireland Troubles (1968-98), in terms of Article 2 substantive, plus Article 6 and Article 8, and not just Article 2 procedural.

**Substantive opinion**

2. It was my view in brief in May 2020 that: (1) Article 2 procedural, from 2001, was unfair retrospective law; (2) Strasbourg appeared to have forgotten about Article 2 substantive, and the fate of the right to life in Northern Ireland (NI); (3) in the line of cases, starting with Jordan, Strasbourg recognized only one category of victims, thereby excluding all others; (4) the overall effect of Article 2 procedural in NI had been lawfare (a new concept), which had taken the form of legal dispute continuing the conflict by other means – and frustrating the process of reconciliation between the two main communities.

3. It was further my view that (5) Strasbourg seems never to have appreciated that Article 2 procedural, under United Kingdom (UK) law, remains inapplicable to violent deaths (including in NI) before 2 October 2000. That is a principle of the UK’s constitution.

4. I attach to this supplementary opinion the most recent version of an article that I update for Thomson Reuters, in its UK Insight series, on Article 2 procedural. This discusses Strasbourg cases but also UK cases.

**Execution**

5. I have now been asked to comment upon the continued supervision of the execution of the judgments in what is being called the McKerr group of cases, and in particular the document: 1398th meeting, 9-11 March 2021 (DH) - [CM/Notes/1398/H46-38](https://search.coe.int/cm/Pages/result_details.aspx?Reference=CM/Notes/1398/H46-38).

6. It is my view in brief that: while it is progress that the Committee of Ministers recognized the Malone House Group; Strasbourg continues on the very course which was criticized in the substantive opinion of 25 May 2020.

7. This includes the handling of the killing of Patrick Finucane, a Catholic solicitor, on 12 February 1989, by loyalist paramilitaries (William Stobie being prosecuted unsuccessfully in 2001 and Ken Barrett pleading guilty in 2004). The Finucane case is a cause célèbre for Republicans in Northern Ireland, obscuring the fact that the IRA killed many, especially Catholic, judges and lawyers.

**The Finucane case**

8. I refer to: Finucane v United Kingdom (29178/95) [2003] EHRR 29. This is a judgment of the ECtHR of 1 July 2003. The applicant was Mrs Finucane. She complained to Strasbourg about an inadequate investigation in 1989 and afterwards. Strasbourg, it is often overlooked, did not specify a public inquiry in 2003 for the UK to meet its Article 2 procedural obligations.

9. The government, nevertheless, moved to establish a public inquiry, under a new Inquiries Act 2005. The Finucane family objected (though they were to later change their position on this legislation).

10. On 17 March 2009, the Committee of Ministers closed supervision of the execution of the judgment. There is an issue as to whether this was on the condition that the UK would continue trying to agree an inquiry.

11. On 12 December 2012, the UK government published the de Silva report: Rt Hon Desmond de Silva QC, *The Report of the Patrick Finucane Review*, 2 vols (pp 1 to 504 & 505 to 841), HC 802-I & II. The first volume was an analysis. The second volume contained original documents, being disclosed for the first time in a report. De Silva stated that he had gone further than any of his predecessors, inquiring into collusion allegations.

12. Mrs Finucane had declined to cooperate with Desmond de Silva. Instead, she effectively judicially reviewed him in Northern Ireland, by going against the Secretary of State.

13. This is the case that came to the Supreme Court on 26-27 June 2018, judgment being given on 27 February 2019: In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7

14. The date of judgment was shortly before the Supreme Court placed the following clarification on its website: “The Human Rights Act [1998] … requires UK courts, including the Supreme Court, to “take account” of decisions of the European Court of Human Rights (which sits at Strasbourg). UK courts are not required, however, always to follow the decisions of that Court. Indeed, they can decline to do so, particularly if they consider that the Strasbourg Court has not sufficiently appreciated or accommodated particular aspects of our domestic constitutional position.”

15. The principal judgment was given by Lord Kerr (the former lord chief justice of Northern Ireland), on which all five members agreed (Lord Carnwarth took a separate point on legitimate expectation). Query whether the other four justices should not also have written separate judgments?

16. Extraordinarily, Lord Kerr seems not to have been told the full story about an Article 2 compliant investigation. This concerned Brian Nelson, a former soldier and army agent. His female army handler had the code name A/13. It is now known that A/13 had legally refused to assist (Sir) John (Lord) Stevens, an English deputy chief constable, in his three enquiry reports of 1990, 1995 and especially 2003. Yet, Lord Kerr went on to fault de Silva, for not taking evidence from A/13: paras 47-49. The 841 page report – it was argued – did not satisfy the test for an effective investigation.

17. Lord Kerr was permitted by his judicial colleagues to uncritically discuss the law on Article 2 procedural through the common law, without any reference to the Human Rights Act 1998. In fact, a point of domestic law, about the date of 2 October 2000 (when the Act came into force), was obscured by Strasbourg’s reasoning on the expansive applicability of the Convention in time and space. However, while three plus one fellow justices agreed formally with him on Strasbourg jurisprudence, they appear to have driven the decision to dismiss Mrs Finucane’s appeal.

18. The decision is recorded: “I would therefore make a declaration that there has not been an Article 2 compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva’s review and the inquiries which preceded it to meet the procedural requirement of Article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement.’ (para 153); ‘The appeal should otherwise be dismissed.” (para 154)

19. Few reports described Mrs Finucane as having failed in the Supreme Court. There was a great deal of news reporting of the violation of Article 2. Virtually no one heard the Supreme Court say that any question of a public inquiry was solely a matter for the executive branch of government.

**The Response of Strasbourg**

**20. The Committee of Ministers decision on 9-11 March 2021 reads: “…decided to reopen their consideration of the individual measures in the case of Finucane in order to supervise the ongoing measures to ensure that they are adequate, sufficient and proceed in a timely manner; invited the authorities to clarify how the ongoing police and OPONI processes will proceed promptly and in line with the Convention standards given the issues raised by both of those bodies in recent statements.”**

21. This statement is open to the following criticisms:

• one, there is no explanation as to why a case closed in 2009 can be re-opened suddenly in 2021. That goes against the grain of a growing mountain of judgments, seemingly being whittled down by the Committee of Ministers through supervision of execution of judgments;

• two, there is no admission that the ECtHR had not directed a public inquiry in 2003, contrary to the widespread perception that Mrs Finucane had the support of Strasbourg;

• three, there is no balanced account of the 2019 Supreme Court decision, as between a violation of Article 2 procedural, no recommendation of a public inquiry and an appeal being otherwise dismissed; and

• four, using police and police ombudsman responses uncritically to found a basis for further Strasbourg supervision.

I submit that: 20 years after the first Article 2 procedural case (in 2001); Northern Ireland shows the irreconcilable nature of some applications arising out of the Troubles (contrary to the judicial intention behind this line of case law); and that it is time for the Council of Europe to review this judicial failure to contribute constructively to creating liberal democracy, peace and reconciliation in this part of the UK.

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