**News Letter**

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**Neil Faris**

**Lawyer queries legacy inquests plan**

A lawyer has queried the general assumption that legacy inquests are the only way to resolve outstanding state-related Troubles deaths. Over the coming month the News Letter is publishing weekly articles by Neil Faris, a Belfast-based lawyer, in which he examines whether there are other ways forward that comply with the European Convention on Human Rights. Mr Faris says it is clear that there is a requirement to hold “effective, independent investigations into all the deaths during the course of the Troubles”, but he questions the assumption that inquests are the only means of achieving such an outcome. The inquests, which mostly look at deaths at the hands of the security forces, have been said to be necessary for Britain to comply with Article Two of the convention, which protects the right to life. Legacy processes were agreed as a separate process to the Historical Investigations Unit in the Stormont House Agreement in 2014. Mr Faris suggests there has been what he describes as inadequate thought and a failure of political and legal imagination in how legacy cases might best be tackled in the interests of the whole community. There has been mounting concern at the way republicans could use the inquests to endorse their narrative of the past. There are currently 94 outstanding deaths in legacy inquests. A News Letter analysis of the inquests on Saturday found that at least 35 of the dead were terrorists. Among them are the eight IRA men shot dead by the SAS at Loughgall in 1987. Republicans say that incident revealed a shoot-to-kill policy. In recent months the British government and unionist politicians have withheld funding for the legacy inquests, until there is an agreed way forward on legacy. Amid the pending prosecution of ex soldiers, the News Letter will be scrutinising the Stormont House structures to assess whether they are likely to lead to balanced scrutiny of the past, including equivalent funding for legacy inquest cases and for unsolved Troubles deaths that do not qualify for inquests.

**Legacy inquests: Article 2 of the ECHR and the right to life**

*Over the next month we will publish a weekly series of four articles by Neil Faris, a lawyer. In these articles Mr Faris examines the legal background to the ‘right to life’ procedural requirements (as contained in Article 2 of the European Convention on Human Rights) which are currently driving the demands for inquests into contested deaths in the Troubles.*

*Mr Faris is in no doubt that there must be effective, independent investigations into all the deaths during the course of the Troubles. But he challenges the assumption that inquests are necessarily the only means of achieving such end. The political talks at Stormont are currently stalled because of the general election. But when they resume in June the question of ‘legacy investigations’ will be at the centre of the talks. Mr Faris suggests there has been inadequate thought and a failure of political and legal imagination of how this difficult matter might best be tackled in the best interests of everyone in the community.*

**Neil Faris is a Belfast lawyer who does advisory work in public and commercial law**

1 - In the Stormont negotiations, there was much talk of the ‘Article 2 right to life’ and the ‘right to independent investigation’ of Troubles deaths, in particular where there is any allegation of ‘state involvement’ in any death. Neil Faris, a Belfast-based lawyer who does advisory work in public and commercial law.

What does all this mean? To begin at the beginning, the European Convention on Human Rights (ECHR) was drafted (with much British input) in the years following the end of the Second World War in an attempt to ensure that the peoples of Europe should never again have to endure fascist dictatorship and that they might be protected against the then real threat of spreading communism in Europe. Initially, it was not envisaged that the convention should be the sole preserve of lawyers. The convention’s preamble makes it clear that it is a political as well as a legal document: the signatory states declared their profound belief that the fundamental freedoms which were ‘the foundation of justice and peace in the world’ were best maintained by ‘an effective political democracy’ and by ‘a common understanding and observance of the human rights upon which such fundamental freedoms depended’. Of course, Northern Ireland currently suffers from a lack of ‘effective political democracy’ at Stormont. But perhaps an equal, or greater, problem is that there is possibly little or no ‘common understanding’ among everyone in Northern Ireland of the relevant human rights standards, particularly those which should properly apply in resolving the most difficult problems of ‘dealing with our past’. So this is an introduction to a series of articles which will investigate the proper contribution of ‘convention rights’ in this context. First of all, Article 1 of the convention provides that the states party to the convention: - “...shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Section I is titled ‘Rights and Freedoms’: it includes the Article 2 ‘Right to life’ and also other very important rights such as the Article 10 ‘Freedom of expression’ and the Article 11 ‘Freedom of association and assembly’. The ‘Right to life’ in Article 2 (1) is that ‘Everyone’s right to life shall be protected by law.’ There are some tightly drafted exceptions to provide that there is no contravention in certain specific circumstances such as where death results ‘from the use of force which is no more than absolutely necessary to defend another person from unlawful violence’. Of course, in each case the key question will be whether the action taken was ‘no more than absolutely necessary’ in accordance with Article 2. It is not the purpose of this article to discuss the scope and application of these exceptions, save to point out that it is in the interest of every citizen that the power of the state to take life is circumscribed and equally that servants of the state, such as police officers, should be duly protected in all cases where their actions can be shown to be ‘no more than absolutely necessary’. The courts have interpreted the general statement of the ‘right to life’ to mean that it includes additional elements essential to the operation of Article 2, albeit not expressly set out in the text. Much of this is indeed parallel to the already well established principles of the common law that apply in Northern Ireland. These additional elements will be discussed in the next article in this series.

2 - This is the second in a weekly series of four articles by Neil Faris, who is examining the legal background to the ‘right to life’ requirements of Article 2 of the European Convention on Human Rights, which are driving the demands for inquests into contested Troubles deaths. Here he says it will be difficult to chart a way forward to tackle of our past if the Strasbourg court’s requirement for privileged treatment of the investigation of deaths caused by ‘agents’ of the state’ means other deaths merit a lesser degree of investigation:

Last week’s article explained the importance of the European Convention on Human Rights as a political as well as legal document and the basic elements of the ‘right to life’ under Article 2 of the Convention. This article examines in some more detail how the Article 2 right has been developed in the ‘case law’ of the convention. There are three components to the duty:

Firstly the state must not take life without justification. This does not require further discussion.

Secondly the state must establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. This does not require here much discussion: certainly, the state is under a duty to protect the right to life, but the exigencies of circumstances apply in considering whether in any particular case the state may be in breach.

Thirdly the state has what may be called a ‘procedural obligation’ to supplement the above ‘substantive’ obligations. This ‘procedural obligation’ arises in cases where it appears that ‘agents of the state’ may be implicated in a death. In such cases the duty of the state is to instigate a prompt and effective public investigation by an independent official body into any such death occurring in circumstances where it appears that one or other of the substantive obligations has or may have been violated. This ‘procedural obligation’ does not expressly appear in the text of Article 2: it was established by the court in a series of cases over several decades. But certainly as the law now stands, established in these cases and confirmed also by the House of Lords and now the Supreme Court in London, proposals for dealing with the past in Northern Ireland must conform to this ‘procedural obligation’. Many politicians and activist groups have been energetically focused on this ‘procedural obligation’ of Article 2. Indeed, if one thinks about it, clearly the Strasbourg court is right to insist that in circumstances of deaths involving ‘agents of the state’, in principle there should be a prompt, effective and independent procedure of investigation. Otherwise the state may cover up its ‘actions’ and the substantive protections of Article 2 to protect the citizen may be rendered of only theoretic benefit, if in practice the state cannot be held to account. On that basis, one would not seek to have the Strasbourg Court water down this ‘procedural obligation’ which should stand as essentials protection for all the citizens of Europe against abuse of power by their governments. But it is the outworking of this, in the particular circumstances of Northern Ireland in the last three decades of the last century that is problematic. As will be discussed, the rulings of the Strasbourg court appear to require a privileged level of investigation in the circumstances of deaths involving ‘agents of the state’ as compared with what must or feasibly can be done in regard to investigations of deaths in which ‘agents of the state’ are not implicated. Obviously, it will be difficult to chart a way forward for any comprehensive tackling of the problems of our past if the Strasbourg court’s requirement for privileged treatment of the investigation of deaths caused by ‘agents’ of the state’ means that all the other deaths, injuries, damage and destruction of the troubles merit only a lesser degree of investigation. I will suggest that this need not necessarily be so and the next article will investigate in more detail the problems that arise.

3 - This is the third in a weekly series of four articles by Neil Faris, who is examining the legal background to the ‘right to life’ requirements of Article 2 of the European Convention on Human Rights, which are driving the demands for inquests into contested Troubles deaths. Here he says the priority of investigation into deaths involving the security forces will leave everyone else who has suffered bereft of equivalent remedy and susceptible to a deep sense of injustice:

This article examines how Article 2 of the European Convention on Human Rights applies in the contentious context of ‘dealing with the past’. As already explained, the ‘right to life’ duty includes an obligation on the state to ensure prompt and effective public investigation by an independent official body where there is allegation of state involvement in any death – the ‘procedural obligation’. Examining key phrases from the ‘procedural obligation’:

• Prompt examination – in practical terms how can there at this length of time be ‘prompt examination’ of what happened in every death involving ‘agents of the state’ across Northern Ireland in every year of the Troubles?

• Effective examination – to the extent that resources of investigation, forensics and legal input are focussed to the task in (perhaps futile) effort to prove ‘effectiveness’, the less in practical terms there can be for anything approaching an equivalent level of investigation into the circumstances of all the other deaths, injury, destruction and damage of the whole Troubles period.

• Independent official body – certainly, the Coroners Courts qualify as the independent official body under current Northern Ireland legislation for the independent investigation of such deaths. But to the extent that the Coroners Courts are to be required to carry out historic inquests, the more prejudice there must be to the current work of the Coroners Courts. Is it fair that inevitable delays in inquests should be extended yet further to accommodate every demand for each historic inquest?

• Death – If the aim and intent is to ‘find the truth’ of what happened in the whole Troubles period, one should not focus only on all the deaths of that period, tragic and wasteful as each and every death was. Any full process of examination and investigation into that period should surely focus also on all those who were injured or who had their homes or businesses destroyed by terrorist explosion, who lost their employment or means of earning a living, who were intimidated or who otherwise suffered trauma. The terms of Article 2 do not address any of that. The apparent priority of investigation into deaths involving ‘agents of the state’ will leave everyone else who has suffered bereft of equivalent remedy and susceptible to a deep sense of injustice.

Agents of the state implicated – in circumstances of deaths involving agents of the state, deaths in custody, for instance, convention case law now requires such independent investigation. In such cases there is generally no ‘third party’ involvement. But in the circumstances of our Troubles the state had to contend with a persistent campaign waged by several large, well-resourced and determined republican and loyalist terrorist organisations. That was ‘third party’ action on an entirely different order of gravity for the state. From the perspective of the victims of those organisations it is incongruous that the actions of ‘agents of the state’ must be subject to such forensic scrutiny involving privilege of treatment when the convention appears silent in regard to investigations of the actions of the terrorist organisations themselves. Apparently, the outcome of the political negotiations may be that some alternative mechanisms for investigations of deaths not attributable to state actors may be put in place. But will this be ‘second class’ compared with the priority given to ‘Article 2 deaths’? And no provision for any investigation of the rest of the Troubles? So the final article will attempt to draw some conclusions.

4 - This is the final part in a series of four articles by Mr Faris, a lawyer, which challenges the notion that Article 2 of the European Convention on Human Rights (ECHR) means we must hold separate legacy inquests into Troubles deaths caused by state forces. Here he draws some conclusions:

As matters stand, any proposals for dealing with the past must duly be made in compliance with the ECHR case law, as currently understood, on the basis that there must be privilege of treatment to be accorded to the investigation of all the deaths involving ‘agents of the state’. But to the majority of victims who have suffered so terribly at the hands of perpetrators over the entire Troubles period such privilege of treatment may leave them with a deep sense of injustice. This may be a major impediment to achievement of agreement on a way forward. How can any proposals coming out of the Stormont negotiations achieve any reasonable degree of consensus if they afford such privilege of investigatory treatment for deaths involving agents of the state, over and above the investigation of all the other deaths, injury destruction and trauma caused by terrorists? Perhaps, (but we do not really know!) a ‘police force of the past’ is on the ‘negotiation list’ at Stormont when talks resume there in the near future. But there would be many problems with any such proposal

• Apparently it might be staffed from personnel from outside Northern Ireland. It is claimed that any such body would have a statutory duty of ‘balance’ (whatever that might mean) but it seems to me that its greatest problem would be its lack of understanding. • And who would offer the training to such personnel and what perspectives on the past would such trainers have?

• How can one ensure that the investigators take due account of the critical pressures of life in Northern Ireland during the years of the Troubles, often entailing that the priority was the protection of life over and above the enforcement of the law?

• How can one ensure the investigators duly appreciate that while investigatory procedures and techniques (in all jurisdictions) have advanced in recent years, investigation into the past must not rush to condemn actions, or failure of action, against more modern standards? These and many more important questions arise to such extent that there must be full public consultation before any proposals are formed. There is a great danger, that if a ‘deal’ is cobbled together at Stormont before the end of this month, then all the questions that should be raised will receive at best cursory treatment and that any promised consultation will be formulaic as the key decisions will already have been taken in secret by the negotiators. Everyone should be involved in frank and open discussion before policy is formed. In particular, the following merit consideration: • the Belfast Agreement’s principles of ‘parity of esteem’ and ‘mutual respect’;

• Respect for rule of law – but accepting that there are circumstances where apparent failure of members of the security forces to investigate crime had to take second place to the preservation of the peace;

• Ensuring that the process is protected from manipulation by those who would seek to legitimise, on any side, their acts of terrorism;

• Thoughts on an alternative or accompanying process of ‘truth recovery’ or ‘fact finding’: a history collection process or ‘History Commission’ (with legislative privilege) under the supervision of independent, respected historians might be an option.

There is a matrix of legitimate interests and perspectives to be taken into account. It is in everyone’s interest to find the ‘right’ solution or at least one that causes the minimal amount of harm to any section of the community. This is one of the outstanding issues of the Stormont talks process, stalled because of the general election. But the solution must be in the delicate balance of law, policy and all legitimate interests. There are several problems. Firstly, perhaps no solution can emerge because, despite the ‘peace process’, there is no general cross-community agreement as to the true cause of the Troubles and as to the legitimacy of the security measures adopted during the course of the Troubles. The slogan ‘truth and justice’ may be proclaimed but it may mean very different things amongst those who proclaim it. Secondly, those involved in the talks process appear unwilling or unable to contemplate any alternative to inquests. Working within Article 2, surely there must be other ways forward, without leaving any section of the community under a sense of grievance? For instance, the Council of Ministers of the Council of Europe was considering this ten years ago and apparently was prepared to consider a more proportionate response in terms of expenditure and other resources. We should re-visit those proposals. Perhaps that failure of imaginative policy arises from the format of the talks process: it is not is it really the best vehicle for framing policy and devising solutions? Generally reform and new structures and processes in any area of public life emerge from a more transparent process and consultation involving people and organisations across society.

So the troubling question, with which I end, is whether this talks process, carried out in secret by a small group of politicians and senior civil servants is the right machinery to achieve any good result?

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