**The Times Law Report**

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**'Northern Irish police are not required to re-investigate incidents from the Troubles'.**

Supreme Court Judgment

December 15, 2021

McQuillan/Hooded Men

The Police Service of Northern Ireland could not be required to conduct new investigations into the killing of a woman in Belfast in 1972 or into the ill-treatment of people detained for questioning by the Royal Ulster Constabulary in 1971 despite the emergence of new evidence in recent years raising the possibility that the woman had been killed by a unit of the British Army and that the ill-treatment had been knowingly authorised by members of the cabinet of the United Kingdom government.

The Supreme Court so held in allowing appeals by the chief constable of the Police Service of Northern Ireland (PSNI), the Northern Ireland secretary and the Department of Justice against parts of orders made in two judgments of the Court of Appeal in Northern Ireland:

In the first judgment (Sir Declan Morgan, Lord Chief Justice of Northern Ireland, Lord Justice Stephens and Sir Paul Girvan) ([2020] NI 583) the court had allowed an appeal by Margaret McQuillan, sister of the late Jean Smyth, against the order of Mr Justice Maguire ([2018] NIQB 99) dismissing her judicial review claim for a new investigation into her sister’s death to be carried out by independent investigators.

In the second judgment (Sir Declan Morgan, Lord Chief Justice and Lord Justice Stephens; Sir Donnell Deeny dissenting in part) ([2021] NI 15) the court:

(1) Dismissed appeals by Francis McGuigan and Mary McKenna against the dismissal by Mr Justice Maguire ([2017] NIQB 96) of their judicial review claims for a new investigation into the authorisation of the ill-treatment of, inter alios, Francis McGuigan and Mary McKenna’s late father, Séan McKenna.

But (2) quashed a decision made by the PSNI in 2014, on the basis of a report it had commissioned, not to carry out a new investigation, on the ground of irrationality.

And (3) questioned whether any future investigation by the PSNI would: “engender public confidence.”

Both claims pleaded the duty placed on public authorities to investigate breaches of article 2 (right to life) and article 3 (prohibition of torture or inhuman or degrading treatment) of the European Convention on Human Rights.

Tony McGleenan QC, Paul McLaughlin QC and Laura Curran for the chief constable; Sir James Eadie QC, Jason Pobjoy and Ben Thompson for the secretary of state; Peter Coll QC and Philip McAteer for the Department of Justice; Hugh Southey QC and Blinne Ní Ghrálaigh for McQuillan. Hugh Southey QC, Adam Straw QC and Blinne Ní Ghrálaigh for McGuigan. Karen Quinlivan QC and Gordon Anthony for McKenna. Amnesty International UK, intervened by way of written submissions.

Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Leggatt, with whom the other members of the court agreed, said that the appeals were concerned with distressing events which occurred in Northern Ireland at a particularly horrible and murderous period of “the Troubles”.

One appeal related to the tragic death by shooting of Jean Smyth in 1972 when sat in the passenger seat of a car. No one had been prosecuted for her killing. However, in 2014 military logs were disclosed which gave rise to the possibility that the shot that killed her might have been fired by a member of a British army unit that was operating in that part of Belfast at the relevant time.

In response to that new information, the chief constable of the PSNI proposed that a further inquiry into Jean Smyth’s death be carried out by its Legacy Investigation Branch. Before the inquiry commenced her sister initiated judicial review proceedings seeking a declaration that the Legacy Investigation Branch was not sufficiently independent.

The other appeal related to the very serious ill-treatment by the RUC in 1971 of 14 men, who became known as “the hooded men” and who included Francis McGuigan and Séan McKenna, when detained by the security forces for interrogation. In the 1970s the hooded men brought civil claims against UK ministers which were settled by the payment of compensation. In 1978 the European Court of Human Rights held that the techniques constituting the ill treatment had been authorised at a high level, constituted inhuman and degrading treatment in breach of article 3 of the Convention but did not amount to torture: see Ireland v United Kingdom ((1978) 2 EHRR 25).

In 2014 the Irish national broadcaster RTÉ broadcast a documentary about the hooded men. It referred to documents which had been deposited in the UK national archives in 2003 and which had not been before the European court.

After the RTÉ documentary the PSNI considered whether there was sufficient evidence to warrant a further investigation into the allegation that the UK government had authorised the use of torture in Northern Ireland but on October 17, 2014, concluded that there was not sufficient evidence.

The first issue in the appeals related to the investigative obligations under articles 2 and 3 of the convention as applied to domestic law by the Human Rights Act 1998.

The coming to light of new evidence could cause an obligation to investigate an event of the past to be revived after an investigation had closed: see Brecknell v United Kingdom ((2008) 46 EHRR 42). The new material had to be sufficiently weighty and compelling to warrant a new round of proceedings. It was common ground that the military logs in the first case met that test.

In the hooded men case, however, the Brecknell test was not satisfied. Although the new material undoubtedly provided a considerable amount of detail as to the authorisation of the techniques, it did not add significantly to, nor alter the substance of, the state of knowledge that existed in 1978.

Even where the Brecknell test was satisfied, one of two additional requirements had also to be met where, as in the present cases, the death or ill-treatment (the triggering event) occurred before the right to bring an article 2 or 3 claim had arisen (the critical date).

The first — the genuine connection test — was that there had to be, inter alia, a reasonably short lapse of time between the triggering event and the critical date, not exceeding ten years. The critical date for a claim brought under the 1998 Act was its coming into force on October 2, 2000. Given that the triggering events in both cases were some 28 years before that critical date, neither case satisfied the genuine connection test.

The second — the convention values test — required there to be an “extraordinary situation” based on the need to ensure effective protection of the guarantees and underlying values of the convention: see Janowiec v Russia ((2014) 58 EHRR 30). It was not suggested that the convention values test was relevant in the first case, but it was said to be satisfied in the case of the hooded men.

It was likely that the deplorable treatment to which the hooded men were subjected at the hands of the security forces would be characterised today, applying the standards of 2021, as torture. However, the convention values test had to be applied on the basis of the law as it stood in 1971 and in the years immediately following during which the original inquiries and investigations took place. And in 1978 the European court had held that the treatment to which the hooded men were subjected in 1971 was not to be characterised as torture.

It was argued that, even if the relevant conduct was not to be characterised as torture, the fact that it undoubtedly constituted inhuman and degrading treatment was sufficient to satisfy the requirements of the convention values test. However, it was not necessary to resolve that issue given the court’s conclusion that, in the hooded men case, the Brecknell test had not been satisfied.

As to the challenges to the PSNI’s independence, there was nothing to suggest that it would not be possible to assign appropriate officers of the PSNI to carry out any further investigations to a proper standard.