18 May 2011

PRESS SUMMARY

In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)

[2011] UKSC 20

ON APPEAL FROM: The Court of Appeal (Northern Ireland), [2010] NICA 13

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lady Hale, Lord Brown, Lord Kerr, Lord Dyson

BACKGROUND TO THE APPEAL

The appellants are the next of kin of Martin McCaughey and Dessie Grew, who were shot and killed by members of the British Army on 9 October 1990. They believe that the men were the victims of a 'shoot to kill' policy. In 1994 the Director of Public Prosecutions decided that no prosecutions should be brought and the papers were passed to the Coroner. Some preparatory steps have been taken but for various reasons the inquest into these deaths have still to take place. The appellants seek a declaration that the scope of the inquest should comply with Article 2 of the European Convention on Human Rights ('the Convention') and thereby extend to an examination of the planning and control of the operation that led to the deaths.

Article 2 (1) provides that '*Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*'. Article 2 gives rise not only to a substantive obligation on the state not to kill people but also a procedural obligation to carry out an effective investigation into the circumstances of the deaths ('the procedural obligation'). It has been possible since 1966 for an individual to pursue a complaint that the United Kingdom has breached its obligations under Article 2 to the European Court of Human Rights ('the ECtHR') if domestic law does not provide a remedy. The issue arising in these appeals is whether the appellants are entitled to bring a domestic claim under the Human Rights Act 1998 ('the HRA'), which came into force on 2 October 2000.

In 2004 the House of Lords held in *In re McKerr* [2004] UKHL 12 that the procedural obligation to investigate a death was triggered by the death. Investigations into deaths occurring before 2 October 2000 were not therefore within the reach of the HRA, as it was not retrospective. In 2009 the Grand Chamber of the ECtHR extended the effect of Article 2 in *Šilih v Slovenia* (2009) 49 EHRR 996, ruling that it imposed a freestanding

procedural obligation, which in certain circumstances arose even where (as in that case) the death occurred before the member state had ratified the Convention.

In this case the Coroner assigned to conduct the inquest made a preliminary ruling as to its scope on 1 December 2009. He proposed to consider the purpose and planning of the operation in which the deceased met their deaths. The Chief Constable of the Police Service of Northern Ireland asserted that as there was no requirement to comply with Article 2 under the HRA (in the light of *McKerr*) the scope of the inquest was restricted to establishing by what means the deceased came to their deaths.

On the appellants' application for a declaration, the High Court and Court of Appeal in Northern Ireland held that they were bound by *McKerr* to hold that the HRA did not apply to the appellants' claims, even if that decision was now inconsistent with *Šilih*.

JUDGMENT

The Supreme Court by a majority (Lord Rodger dissenting) allows the appeal and holds that the Coroner holding the inquest must comply with the procedural obligation under Article 2.

REASONS FOR THE JUDGMENT

- The Convention is a living instrument and the ECtHR has over time extended the ambit of Convention rights in many areas. Article 2 is an example of this. The procedural obligation was first identified in 1995. In 2001 (in *Moldovan v Romania*) the ECtHR held that the procedural obligation was 'derived from' the deaths, and the Convention would only apply to the procedural obligation if it applied also to the substantive obligation. This reasoning was echoed by the House of Lords in 2004 in *McKerr* on the question of whether the HRA could apply to the procedural obligation when it did not apply at the time of the death **[5]**.

- The Grand Chamber of the ECtHR departed from its reasoning in *Moldovan* in *Šilih* in 2009. It held that in certain circumstances Article 2 imposed a freestanding or 'detachable' obligation in relation to the investigation of a death which applied even when the death itself had occurred before the member state ratified the Convention. Those circumstances included where a significant proportion of the procedural steps would take place after the Convention had come into force **[50]**. As a matter of international obligation, therefore, it is now apparent that the UK must ensure that the inquest which is the subject of this appeal complies with Article 2 as far as this is possible under domestic law **[51]**, **[82]**.

- The ambit of the HRA has to be interpreted by reference to Parliament's presumed intention on enactment concerning future developments by the ECtHR of Convention rights. As to this, two principles could be detected, which were potentially in conflict. The first was that the HRA should not operate retrospectively. The second was that its ambit should mirror that of the Convention, so that claims could now be brought in the UK which would otherwise be permitted before the ECtHR. The first principle prevailed in *McKerr*. That case was argued on the basis that Article 2 imposed a continuing procedural obligation linked to the death. *Šilih* made it clear, however, that if a State held an

inquest, it was under a freestanding obligation to ensure that it complied with the procedural obligations of Article 2. In the light of this, Parliament could be presumed to have intended that there should be a domestic requirement to mirror the international requirement which now applies **[60]** – **[62]**. In practice, comparatively few inquests will be affected by this ruling, given the ten years which have already passed since the HRA came into force **[102]**.

- Lord Rodger dissented, considering that *Šilih* was irrelevant to the interpretation of the HRA and that the decision of the majority involved adding a transitional provision to the HRA which for policy reasons Parliament had not included **[161]** Lord Hope agreed with him that there was no right in domestic law to an Article 2 compliant inquest in respect of deaths occurring prior to 2 October 2000. However, he agreed with the majority that where the state has decided to hold an inquest into such a death, that inquest must comply with Article 2 **[75]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://www.supremecourt.uk/decided-cases/index.html