**27 February 2019**

**PRESS SUMMARY**

**In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7**
***On appeal from: [2017] NICA 7***

**JUSTICES**: Lady Hale (President), Lord Kerr, Lord Carnwath, Lord Hodge, Lady Black

## BACKGROUND TO THE APPEAL

Patrick Finucane was a solicitor in Belfast. On 12 February 1989, gunmen burst into his home and brutally murdered him in the presence of his wife and three children. Those responsible were so-called loyalists. It has emerged that there was collusion between the murderers and members of the security forces. Despite various investigations into Mr Finucane's death, none of these has uncovered either the identity of the members of the security forces who engaged in the collusion or the precise nature of the assistance which they gave to the murderers.

Following an inquiry into allegations of collusion between the security forces and loyalist paramilitaries, Brian Nelson was identified. Nelson was an informer for the security services and in particular for an organisation within the British army known as the Force Research Unit (**"FRU"**). His role had included the gathering of information about potential targets for assassination.

In 2001, political talks were held between the UK and Irish governments. It was decided that a judge would be appointed to investigate allegations of collusion in a number of cases, including that of Mr Finucane. It was said that if the judge recommended a public inquiry in any case, the relevant government would implement that recommendation. Judge Cory was appointed in June 2002.

Meanwhile, on 1 July 2003, following a case brought by Mrs Finucane, the European Court of Human Rights (**"ECtHR"**) decided that there had not been an inquiry into the death of Mr Finucane which complied with Article 2 of the European Convention on Human Rights (**"ECHR")**.

Judge Cory published his report on 1 April 2004. He concluded that a public inquiry into Mr Finucane's murder was required. In September 2004, the Secretary of State for Northern Ireland (**"SSNI"**) wrote to Mrs Finucane and made a statement in the House of Commons to the effect that the inquiry would be held on the basis of new legislation which was to be introduced shortly. This new legislation was the Inquiries Act 2005. Mrs Finucane objected strenuously to the proposal that the inquiry would take place under the new legislation and various discussions as to the terms of the inquiry took place over the years that followed.

In May 2010, there was a general election and a new government was formed. Following a consultation on the form which an inquiry into the murder of Mr Finucane should take, the decision was made on 11 July 2011 that a public inquiry would not be conducted. Instead, Sir Desmond de Silva was appointed to conduct an independent review into any state involvement in Mr Finucane's murder.

Sir Desmond was given unrestricted access to documents and was free to meet anyone whom he felt could help with his inquiry. He was not given the power to hold oral hearings, however. Although, initially Sir Desmond wished to meet with one of Nelson's former handlers, this meeting did not take

place and Sir Desmond explained in his report that the reason that the meeting did not take place was that he had been informed that the handler felt unable to attend for medical reasons. It has become apparent that this information was given to Sir Desmond by the Ministry of Defence. No medical evidence to support the claim of ill-health was provided. In the event, Sir Desmond subsequently decided that he did not need to meet the handler, but did not explain why he had changed his view.

Sir Desmond stated as part of the conclusion to his report: *"… I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the state…".*

Mrs Finucane's case is brought in judicial review. She claims that she had a legitimate expectation that a public inquiry would be held because of the unequivocal assurance given to her in September 2004. She says the government have failed to show valid grounds for failing to fulfil this promise and that the evidence suggests that the decision not to hold the inquiry was a sham with a predetermined outcome. Mrs Finucane supports her case by arguing that the failure to establish a public inquiry constitutes a violation of her rights under Article 2 of the ECHR and section 6 of the Human Rights Act 1998 (**"HRA"**) which requires any public authority (including a Court) not to act in a way which is in contravention of an ECHR right.

Mr Justice Stephens dismissed Mrs Finucane's application for judicial review but made a limited declaration that an Article 2 compliant inquiry into Mr Finucane's murder had not yet taken place. The Court of Appeal upheld this decision, save that it set aside the declaration.

## JUDGMENT

The Supreme Court holds that Mrs Finucane did have a legitimate expectation that there would be a public inquiry into Mr Finucane's death, but that Mrs Finucane has not shown that the government's decision not to fulfil this promise was made in bad faith or that it was not based on genuine policy grounds. The Supreme Court makes a declaration that there has not been an Article 2 compliant inquiry into the death of Mr Finucane. Lord Kerr gives a judgment with which all members of the Court agree. Lord Carnwath delivers a concurring judgment.

## REASONS FOR THE JUDGMENT

**Legitimate Expectation:** Where a clear and unambiguous undertaking is made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so **[62]**.

The undertakings given by the various ministers amount, individually and cumulatively, to an unequivocal undertaking to hold a public inquiry into Mr Finucane's death **[68]**. This promise was not of a substantive benefit to a limited class of individuals. Instead, it was a policy statement about procedure. That policy procedure applied not only to Mrs Finucane but also to the world at large **[63]**.

If political issues overtake a promise given by the government and a decision is taken in good faith and on genuine policy grounds not to adhere to the original promise, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it **[76]**. Mrs Finucane's argument that the process was a sham and the outcome was fixed is a serious charge which would require clear evidence before this could be accepted **[77 – 78]**. There is no sustainable evidence to this effect, so this part of Mrs Finucane's appeal fails **[81]**.

Whilst this issue did not arise on the facts of the present case, Lord Carnwath delivers a concurring judgment addressing the issue of detriment in substantive legitimate expectation cases **[156 – 160]**.

**Article 2 of the ECHR**: Article 2 gives rise not merely to a duty not to kill people but, where there is an issue as to whether the state had broken this obligation, an obligation on the part of the state to carry out an effective official investigation into the deaths **[83]**.

Mr Finucane died prior to 2 October 2000, which is the date when the HRA (which gives effect to the ECHR in domestic law) came into force **[84]**. The procedural obligation to investigate can be considered a detachable obligation, however. In that role, it is capable of binding the state even where the death took place before the critical date when these laws came into force **[96]**. The SSNI argued that there must be a genuine connection between the death and the critical date, and that this had not been established in this case **[106 – 107]**. It was suggested that the period between the death and the critical date should not exceed ten years. It was held that there was not an absolute rule that the period between the death and the critical date should be ten years or less. The period between the dates is important but the significance of this diminishes where, as in this case, most of the significant inquiries into the death took place after the HRA came into force **[108]**.

It has been established by the ECtHR that any information or material which has the potential to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further would prompt a revival of the procedural obligation **[117]**.

The need for an effective investigation goes well beyond facilitating a prosecution **[127]**. In order to be compliant, an investigation must be capable of leading to the identification and punishment of those responsible **[128]**. This must involve having the means to identify those implicated in the death **[131]**.

Various features show that Sir Desmond's review fell short of being an effective Article 2 compliant inquiry: Sir Desmond did not have the power to compel the attendance of witnesses, those who met him were not subject to testing as to the accuracy of their evidence, and a potentially critical witness was excused attendance for questioning. The review by Sir Desmond, even when taken with earlier inquiries, was not sufficient to fulfil the requirements of Article 2 **[134]**.

Mrs Finucane's representative had declined an invitation made by the Court of Appeal to amend her application and plead, as a freestanding issue, that the state was in breach of its Article 2 obligations. Notwithstanding this, the issue of whether there was a breach of the procedural obligation under Article 2 was before this Court and called for determination **[151]**. In any event, the confines of the deliberations of the Supreme Court are not necessarily determined by the manner in which the parties choose to make their presentations. Whilst it is unnecessary to decide this point in the present appeal, to allow a violation of an ECHR right to go unremarked upon may well be in breach of the spirit, if not the literal requirement, of section 6 of the HRA **[152]**.

*References in square brackets are to paragraphs in the judgment*