



15 December 2021

PRESS SUMMARY

In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3)

In the matter of an application by Francis McGuigan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3)

In the matter of an application by Mary McKenna for Judicial Review (Northern Ireland) (Nos 1 and 2)

[2021] UKSC 55

On appeals from [2019] NICA 13; [2019] NICA 46

JUSTICES: Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Kitchin, Lord Sales, Lord Hamblen, Lord Leggatt, Lord Burrows

BACKGROUND TO THE APPEALS

These appeals from the Court of Appeal in Northern Ireland are concerned with distressing events which occurred in the province in 1971 and 1972 during “the Troubles” [1]. They concern the circumstances in which there is an obligation on the UK Government to investigate a death or allegation of torture or inhuman or degrading treatment under Articles 2 and 3 of the European Convention on Human Rights (the “**Convention**”) and the Human Rights Act 1999 (the “**HRA**”), and how to assess the independence of such investigations [4].

One appeal relates to the tragic death by shooting of Ms Jean Smyth, who was fatally wounded by a bullet striking her head while she was a passenger in a car on the Glen Road, Belfast on 8 June 1972 (the “**McQuillan case**”) [2]. Following the discovery, in June 2014, of military logs suggesting the possibility that the fatal shot was fired by a member of the British Army’s Military Reaction Force [26-28], the Chief Constable of the Police Service of Northern Ireland (“**PSNI**”) proposed to conduct a further investigation into Ms Smyth’s death. The investigation was to be conducted by the PSNI’s Legacy Investigations Branch (“**LIB**”) [29-31]. Before the proposed further investigation took place, Margaret McQuillan, Ms Smyth’s sister, issued judicial review proceedings seeking a declaration that the LIB was insufficiently independent to conduct the proposed further investigation of Ms Smyth’s death, in contravention of Article 2 of the Convention [6-32].

The other appeal (the “**Hooded Men case**”) relates to the very serious ill-treatment of people who were detained by the security forces for interrogation in August 1971 by the Royal Ulster Constabulary [3]. Fourteen men, who have become known as the Hooded Men and who included Francis McGuigan and Séan McKenna, were subjected to this unacceptable treatment. There is no evidence that anyone involved in the authorisation or operation of the Hooded Men’s ill-treatment has ever been the subject of criminal charges. In the 1970s, the Hooded Men brought civil claims against UK ministers (which were settled) [82]. Ireland also brought an inter-state application to the European Commission of Human Rights (the “**Commission**”), and subsequently

to the European Court of Human Rights (“**ECtHR**”) against the UK regarding the treatment of the Hooded Men. In *Ireland v United Kingdom* (1979-80) 2 EHRR 25, the ECtHR determined that the Hooded Men’s treatment constituted inhuman and degrading treatment (but not torture) in breach of Article 3 of the Convention [83-90].

In 2014, the Irish national broadcaster, RTÉ, broadcast a documentary about the Hooded Men. This referred to documents from the UK National Archives which, RTÉ said, were newly discovered and had not been before the Commission or ECtHR [91-92]. The documentary also referred to a memorandum by the Home Secretary to the Prime Minister, written in March 1977, which referred to the use of “torture” and to its approval by UK ministers (the “**Rees Memo**”) [99]. Following the RTÉ documentary, the PSNI considered if there was sufficient evidence to warrant a further investigation into the allegation that the UK Government authorised and used torture in Northern Ireland in the case of the Hooded Men. On 17 October 2014, it concluded that there was not [99-100]. Separately, the Government of Ireland also made an application to the ECtHR for revision of its 1978 judgment, requesting that the finding of inhuman or degrading treatment be substituted by one of torture. The ECtHR dismissed the request [94-98]. On 20 January 2015 and 19 May 2015, Mr McGuigan and Mary McKenna, the daughter of the late Séan McKenna, applied for judicial review of the PSNI’s decision of 17 October 2014 [101].

JUDGMENT

The Supreme Court allows the appeals by the Chief Constable for Northern Ireland, the Secretary of State for Northern Ireland and the Northern Ireland Department of Justice, upholds the decision of Maguire J and the majority of the Court of Appeal to quash the decision taken by the PSNI in relation to the Hooded Men case on 17 October 2014, but otherwise dismisses the applications for judicial review. Lord Hodge, Lord Lloyd-Jones, Lord Sales and Lord Leggatt give a joint judgment, with which Lord Kitchin, Lord Hamblen and Lord Burrows agree.

REASONS FOR THE JUDGMENT

The first issue in both appeals concerns the temporal effect of the Article 2 and 3 rights in the Convention and under the HRA [112].

The Supreme Court considers and applies the test laid down in the ECtHR case of *Brecknell v United Kingdom* (2008) 46 EHRR 42, which determines whether the coming to light of new evidence might revive the investigative obligation under Article 2 [116-118]. In the McQuillan case it was common ground that the information in the military logs was sufficient to trigger a fresh investigative obligation [119]. In the Hooded Men case, the Court holds that the *Brecknell* test is not satisfied because the new material did not add significantly to the state of knowledge in 1978 or alter its substance [128]. That conclusion is supported by the ECtHR decision of 2018 not to revise its earlier judgment in *Ireland v United Kingdom* [129]. As such, the PSNI was not under an obligation to investigate the authorisation of the ill-treatment of the Hooded Men [132].

The Court analyses the “genuine connection” test laid down by the ECtHR in *Janowiec*, which addresses the situation where new evidence comes to light regarding a death which occurred before the relevant contracting state entered into the Convention or in relation to a claim by an individual, when that state recognised a right of individual petition to the ECtHR, if later. The Court concludes that, in the context of the HRA, the critical date for the application of the test is the date of the entry into force of the HRA on 2 October 2000 [133-168]. Applying the genuine connection test, the Court concludes that it was not satisfied in either the McQuillan case or the Hooded Men case [169-192]. The Court explains that the *Brecknell* test is subject to the “genuine

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connection” test, so there is no scope for it to apply to the McQuillan case (nor in the Hooded Men case, had the *Brecknell* test been satisfied) [177-180].

The Court holds that, if Articles 2 and 3 had applied, the Court of Appeal in Northern Ireland would have been entitled to conclude that the proposed investigation into Ms Smyth’s death would not have been effective in the particular circumstances of that case because the Chief Constable of the PSNI had failed to explain to her family and the public, and when faced with the judicial review challenge, the court, how he proposed to secure the practical independence of that investigation [201-212]. However, the Court of Appeal in Northern Ireland erred in concluding that an enquiry by the PSNI into the ill-treatment of Mr McGuigan and Mr McKenna would lack practical independence [213-214].

The Court also concludes that the PSNI was not under an obligation at common law or under section 32 of the Police (Northern Ireland) Act 2000 equivalent to the obligations in Articles 2 and 3 of the Convention [215-217]. Furthermore, the Chief Constable did not create a legitimate expectation that the PSNI would undertake an investigation of the persons responsible for authorising the ill-treatment of Mr McGuigan and Mr McKenna [218-222].

Finally, the Court finds that the PSNI’s decision taken on 17 October 2014 not to investigate further the allegation in the Rees Memo was based on a seriously flawed report, was therefore irrational, and falls to be quashed [223-252].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Committee’s decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at:

<https://www.supremecourt.uk/decided-cases/>