Neutral Citation No: [2019] NICA 46

Ref:	**MOR11060**
	DEE11055

*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **20/09/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY FRANCIS McGUIGAN FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY MARY McKENNA FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS AND ONGOING FAILURES OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND, THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND AND THE NORTHERN IRELAND OFFICE

Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

MORGAN LCJ and STEPHENS LJ

[1] This appeal concerns applications for judicial review of the decision made by the PSNI that there was no evidence to warrant an investigation, compliant with Articles 2 and 3 of the Convention, into the allegation that the UK Government authorised and used torture in Northern Ireland. The applications also challenge decisions of all three respondents as constituting a continuing failure to order and ensure a full, independent and effective investigation into torture at the hands of the United Kingdom Government and/or its agents in compliance with Articles 2 and 3 of the Convention, common law and customary international law.

[2] Maguire J dismissed those applications but declared that the decision made on behalf of the PSNI in October 2014, in effect not to take further steps to investigate

the question of identifying and, if appropriate, prosecuting those responsible for criminal acts, should be quashed. As a result of the notices of appeal, cross appeals and respondents' notices all the issues before the trial judge are open on this appeal. Mr Southey QC, Ms Ní Ghrálaigh and Mr Straw appeared for Mr McGuigan, Ms Quinlivan QC and Mr Anthony for Ms McKenna, Dr McGleenan QC and Mr McLaughlin for the PSNI and Secretary of State for Northern Ireland and Mr Coll QC and Mr McAteer for the Department of Justice.

Background

[3] In light of the deteriorating security situation in Northern Ireland in early 1971 the Northern Ireland Government entered into discussions with Her Majesty's Government about the introduction of detention without trial. If such a policy was implemented it was considered essential to interrogate those interned with a view to securing relevant intelligence. Guidelines on the approach to interrogation in previous internal security situations outside the United Kingdom were contained in Joint Intelligence Directive JIC (65)15 which governed military interrogation. It had been formulated in 1965 and amended in 1967 as a result of complaints arising from interrogations conducted in Aden. The Directive did not specifically set out the techniques of interrogation but required adherence to the Geneva Convention and expressly prohibited the use of violence including mutilation, cruel treatment and torture, outrages upon personal dignity and humiliating and degrading treatment.

[4] In March 1971 the British military was requested to provide advice and training to the Northern Ireland authorities about the establishment of an interrogation centre. The training provided by the military included the use of the so-called five techniques. These were described as follows in a subsequent judgement of the ECtHR:

> "96. … These methods, sometimes termed "disorientation" or "sensory deprivation" techniques, were not used in any cases other than the 14 so indicated above. The techniques consisted of the following:
>
> (a) *wall-standing:* forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being 'spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';
>
> (b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

167. The five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."

These techniques were taught orally by officers of the British military's English Intelligence Centre to members of the RUC at a seminar held in April 1971. Military Standing Orders were drawn up to govern the operation of an interrogation centre and the conduct of the interrogations.

[5] The internment operation commenced at 4 am on 9 August 1971 with the arrest of some 350 people. On the same day Brigadier Lewis copied to the Vice Chief of General Staff and the Secretary of State for Defence a memo describing the interrogation process. The memo indicated that successful interrogation relied heavily on the contrast between the very harsh and the kind and gentle interrogator in circumstances designed to heighten the subjects desire to communicate. Those circumstances included ignorance of the subject's whereabouts and complete loss of the sense of time, isolation and fatigue accompanied by interrogation for long and frequent periods with little sleep and white sound played to unsettle the subject and prevent them sleeping when not being interrogated. The Secretary of State for Defence and the Home Secretary discussed the proposed interrogation on 9 and 10 August 1971 and interrogation began on 11 August 1971 at 7 PM after the Director of Intelligence had had one hour of personally explaining the techniques to Mr Faulkner, the Prime Minister of Northern Ireland.

[6] Thereafter 12 men were taken to an interrogation centre, now known to have been located at a British Army base at Ballykelly, Northern Ireland. There they underwent interrogation in depth over the period from 11 to 17 August 1971 using the five techniques set out at [4] above. Owing to the second of these techniques, these men came to be known as "the hooded men".

[7] Francis McGuigan was arrested at his home at 4:30 AM on 9 August 1971. He was brought to a gymnasium with approximately 300 men. On 11 August 1971 he was brought to another building where plainclothes men were placing a hood over

each man's head. He said there were military police and paratroopers in the corridor but that the plainclothes men seemed to be in charge. He said that a hood was then put over him, that it was double material, a square-shaped bag, and was about 16 to 18 inches square.

[8] He was taken in a helicopter handcuffed to another hooded man and then to a building where there was a severe noise, giving him the impression that it was a saw in a joiner's shop. He said he was taken to another room where a doctor told him he would give him a medical examination. The handcuffs and clothing were removed but the hood remained. He was issued with boiler suit overalls and taken to a room with a deafening noise, similar to that of compressed air. He said he was put through various forms of what he called torture, which included him being lifted up on shoulders and thrown to the ground and being starved for long periods while against the wall. He said "they ran him over a table", back and forth and put him against a wall until he fell. During this time he continued to be beaten and his hood was tightened so much he had difficulty breathing. He said that he was dragged and placed against a wall in the stretch position (fingertips to the wall and feet well apart). He said he was kept like this for hours and any time he tried to move he was kicked and beaten. He said that when, at one point he heard screaming and removed his hood to see if one of the other men was alright, he was blinded by bright lights, grabbed and thrown to the floor, kicked in the genitals, and had his hair pulled. He said the hood was put back on and he was kept against the wall for three days without food, drink or rest. He said that at one point he collapsed and then found himself with his hands handcuffed behind his back in the back of a lorry. He said he began to hallucinate and believed he was dying. He prayed that he would die. He said that during this time he was brought to another room for interrogation about a dozen times. He said that the first occasion he got water was three days after he arrived. At the end of the period he was examined by the same doctor and he saw that his weight had fallen from 12 to 9 stone.

[9] Mary McKenna is the daughter of Sean McKenna, one of the 12 men interrogated at the centre in Ballykelly in August 1971. She was 14 years old when her father was interned and when she saw him 10 days later she said that he was a broken man, crying and very shaky. He told her that he had been hooded and handcuffed to a soldier who had an Alsatian dog. He was made to run barefoot up and down as the dog bit him and was required to drink from the same dish as the dog. He had been smacked into a concrete post and had blacked out at some time. He had not prior to this suffered from any psychiatric condition. She believes that the impact of the five techniques caused his psychiatric breakdown as a result of which he was transferred to a psychiatric hospital from detention.

[10] In respect of Mr McKenna two subsequent pieces of medical evidence have emerged. The first is that the appellant's father was examined by Dr Leigh in 1975. He was a medical expert witness on behalf of the British Army in the proceedings before the European Commission and European Court of Human Rights. When he examined Mr McKenna in 1975 he noted that the psychiatric problems he was experiencing at that time were probably the result of the deep interrogation

methods. The second piece of evidence concerned knowledge of a heart condition that afflicted Mr McKenna at the time that he was subjected to the deep interrogation techniques and which caused his premature death in 1975. Dr Leigh referred to Mr McKenna's angina when stating that it would be hard to show that it was wise to proceed with the interrogation. The doctor also accepted that it would be difficult to show that the interrogation did not have the effect of worsening his angina. Mr McKenna's subsequent civil action for damages was settled. Internal correspondence to the Crown Solicitor indicated that based on the medical evidence his symptoms were significantly more severe and incapacitating than those of the other men and that those symptoms would not remit during the short life he had left.

Public Response by Government

[11] As evidence of the nature and effects of the treatment of detainees emerged there was considerable public disquiet about the conduct of the interrogation operation. On 31 August 1971 the Home Secretary established a 'Committee of Inquiry' under the chairmanship of Sir Edmund Compton "to investigate allegations by those arrested on 9th August under the Civil Authorities (Special Powers) Act (Northern Ireland) 1922 of physical brutality while in the custody of the security forces prior to either their subsequent release, the preferring of a criminal charge or their being lodged in a place specified in a detention order".

[12] The Committee met with the Chief Constable of the RUC and other senior officers on 3 September 1971. The Chief Constable explained the nature of the operation. The minute of the meeting includes the following:

> "Because of the high assurances the RUC had obtained before the operation had been set about and the fact that only physical brutality was within the terms of reference, it had been hoped the enquiry would not require the presence of the officers involved. However, the Chief Constable accepted that if the allegations involved assault… that the relevant RUC officers would appear before the Committee if required."

[13] The issue of assurances again arose in a meeting between senior members of the RUC led by ACC Johnson with officials of the Enquiry on 22 September 1971. The minute of that meeting includes the following:

> "Mr Johnson expressed grave concern about the Enquiry's examining detailed allegations lest they proceeded in practice to look at the whole of the interrogation process. He rehearsed at length the history of the enterprise so far as the RUC were concerned; how the military had initiated the idea; how in the early part of the year they had run a presentation for his officers; how the whole thing had been forgotten until immediately before internment;

> and how at the last moment it had been decided to go ahead only after assurances had been obtained from the highest places. The assurances, as Mr Johnson interpreted them, give every support to the operation short of actions that involved physical brutality and it was because the Enquiry's terms of reference had been limited to looking at allegations of physical brutality that the RUC had found the idea of an investigation acceptable at all having regard to the protection they had sought and obtained before embarking on the interrogations."

[14] The Compton Committee reported on 3 November 1971. The Committee's investigation was hampered by the fact that the Northern Ireland Civil Rights Association let it be known that the enquiry was unacceptable to them because of the constitution of the Committee and the private procedure. As a result only two of the more than 1000 people affected by the internment operation made any complaints to the Committee. The Committee did, however, receive representations from those involved in the conduct of the operation and also reviewed open sources which included reports of alleged ill-treatment by detainees.

[15] At paragraph [19] of its report the Committee indicated that it had confined its investigation to that part of a complaint that referred to physical ill-treatment. At [92] - [96] the Committee concluded that wall standing, hooding, noise, deprivation of sleep and deprivation of food and water all individually constituted physical ill-treatment. At [105] the Committee considered that brutality was an inhuman or savage form of cruelty, and that cruelty implied a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain. The Committee concluded that none of the complainants suffered physical brutality as so defined.

[16] It is relevant to this appeal that the terms of reference of the Compton Committee were interpreted as not requiring any analysis or finding in relation to the persons responsible for the infliction of the treatment. The report of the Committee was discussed in Parliament on 16 and 17 November 1971. In the course of that discussion Mr Hattersley asked Lord Balniel to state who actually took the decision that this form of interrogation was appropriate in these cases. The reply was that exactly the same Ministerial concurrence as was given to the same methods of interrogation used in Aden, Malaysia and Borneo. This issue was raised by Mr George Cunningham MP in a written question to the Minister of State and the reply indicated that Ministers were aware of the principles underlying interrogation in-depth and of the safeguards against violent or humiliating treatment but were not acquainted with the detailed methods that were employed. Mr Cunningham also pursued the issue of proceedings being taken against those who planned the use of in-depth interrogation in Northern Ireland. In a written answer the Attorney General stated that in his opinion there was no evidence that any person within the jurisdiction of the English courts had committed a criminal offence of the nature alleged. Mr Cunningham pursued the matter on 9 December 1971 in Parliament and

was advised that the interrogation was authorised by the Northern Ireland Government with the knowledge and concurrence of Her Majesty's Government.

[17] On opening the debate on the Compton Committee report on 16 November 1971 the then Home Secretary indicated that the Prime Minister had decided to set up a Committee of three Privy Councillors to consider "whether, and if so in what respects, the procedures currently authorised for the interrogation of a person suspected of terrorism and for their custody while subject to interrogation require amendment". The committee was to be chaired by Lord Parker.

[18] The Parker Committee reported on 31 January 1972. The majority interpreted its terms of reference as calling upon it to enquire quite generally into the interrogation in custody of a person suspected of terrorism in such circumstances in the future and not specifically in connection with Northern Ireland. They considered that some if not all the techniques in question would constitute criminal assaults and might also give rise to civil proceedings under English law. They also concluded that one of the unsatisfactory features of the past has been the fact that no rules or guidelines had been laid down to restrict the degree to which the techniques could properly be applied. They considered that it could not be assumed that any UK Minister had ever had the full nature of these particular techniques brought to his attention and consequently that he had ever specifically authorised their use.

[19] The majority concluded that the answer to the moral question about the use of interrogation in-depth was dependent on the intensity with which the techniques were applied and on the provision of effective safeguards against excessive use. Subject to those safeguards the majority concluded that there was no reason to rule out the techniques on moral grounds and that it was possible to operate them in a manner consistent with the highest standards of society. One of those safeguards was that Her Majesty's Forces should neither apply nor be party to the application of these techniques except under the express authority of a UK Minister. It follows that if the Minister was to authorise their application he must have full knowledge of what they involved and of the persons to whom they were to be applied.

[20] The minority report was prepared by Lord Gardiner. He considered that it was clear from the statements in the House of Commons made by the Home Secretary on 16, 17 and 29 November 1971 and by the Minister of State for Defence on 9 December that the procedures to be examined were those described in the report of the Compton Committee. He considered it necessary, therefore, to establish of what the procedures consisted, whether they were authorised, what were their effects and did they require amendment.

[21] Lord Gardiner found that the issue of authorisation was one of some difficulty. The only evidence before the Committee was that it could not be said that UK Ministers had ever approved them specifically, as opposed to agreeing the general principles set out in the Directive on Military Interrogation. He concluded that if any document or Minister had purported to authorise them it would have been invalid because the procedures were and are illegal by the domestic law and may also have been illegal by international law. Lord Gardiner described the real

question as being whether the Committee should recommend that Parliament should enact legislation making lawful in emergency conditions the ill-treatment by the police, for the purpose of obtaining information, of suspects who are believed to have such information and, if so, providing for what degree of ill-treatment and subject to what limitations and safeguards. He set out his reasons for opposition to such a recommendation. On 2 March 1972 the Prime Minister announced that the government, having considered the Committee's report, had decided that the techniques which the Committee examined would not be used in future as an aid to interrogation.

Ireland v United Kingdom

[22] In light of the public controversy over the treatment of those who had been detained without trial on 16 December 1971 the Irish government submitted an application to the European Commission for Human Rights against the United Kingdom alleging in particular that the hooded men were subjected to treatment in breach of Article 3 carried out by the security forces of the United Kingdom and that their treatment constituted, in breach of Article 3, an administrative practice and a continued series of executive acts exposing a section or sections of the population to torture or inhuman and degrading treatment.

[23] The details of the issues arising in the course of the case have been helpfully set out by the learned trial judge at [50]-[92] and we will do no more than summarise the position. As was the practice at the time the Commission examined the case and decided that it should take oral evidence from 119 witnesses over a period lasting more than a year. The Irish Government submitted that the allegations were not made personally against any member of the United Kingdom Government but were based on the legal concept of an administrative practice. The alleged acts were not isolated in time and place and had not been duly punished.

[24] The position of the UK Government was that it had taken all reasonable steps to prevent any recurrence including a commitment not to use the techniques in the future. Those affected by the use of the techniques had civil remedies in domestic law. The UK Government later admitted that the use of the five techniques had been authorised at a senior level and was, therefore, an administrative practice. It advised its witnesses not to answer questions on the use of the five techniques because of concern for the safety of the witnesses involved. The Irish Government drew attention to the failure of the UK Government to inform the Commission of the authority which ordered the application of the techniques.

[25] The Commission concluded that the required posture for wall standing caused physical pain and exhaustion. It could not conclude in respect of the two hooded men whose cases it examined how long they had been without sleep or to what extent they were deprived of nourishment. The Commission was satisfied that the witnesses suffered loss of weight and that a certain degree of force was used to make them stand in the required posture which caused physical pain and exhaustion. There was a difference of view about the duration of any psychiatric after-effects between the consultant psychiatrists called by each of the governments

but the Commission was satisfied that some psychiatric after-effects in certain of the persons subjected to the techniques could not be excluded. The Commission found it probable that physical violence was sometimes used in the forcible application of the five techniques.

[26] The Commission accepted that the treatment of those in custody and the methods of interrogation constituted an administrative practice in breach of Article 3 of the Convention. In its final report it concluded unanimously that the combined use of the five techniques in the case before it constituted a practice of inhuman treatment and of torture contrary to Article 3 and that violations of Article 3 occurred by inhuman and, in two cases, degrading treatment of several persons including one of the hooded men.

[27] In light of the findings of the Commission the two governments discussed the possibility of a friendly settlement. Agreement could not be reached, however, on the initiation of prosecutions or disciplinary proceedings against the officers who were involved in conducting the interrogations. The Irish Government then requested an order from the ECtHR that the UK Government should proceed under the criminal law of the UK and the relevant disciplinary code, against those members of the security forces who committed acts in breach of Article 3 referred to in the Commission's findings and conclusions, and against those who condoned or tolerated them.

[28] The ECtHR published its judgment on 18 January 1978. Although the United Kingdom Government had not contested the finding of the European Commission that the five techniques had amounted to torture the Court decided that it should review that finding of its own motion. While it accepted that the use of the techniques amounted to inhuman or degrading treatment it considered that although the object of the techniques was the extraction of confessions and the naming of others and although they were used systematically they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood. The Court also concluded that the sanctions available to it did not include the power to direct one of the States before it to institute criminal or disciplinary proceedings in accordance with its domestic law.

The RTÉ programme

[29] After the delivery of the judgment there was then a substantial gap before the occurrence of further material events. In April 2003 the Secretary Of State commenced the release of the archive relating to the Irish State case to the National Archive. This largely appears to have gone unnoticed. In about August 2013, however, it appears that researchers came across some of the documentation which was then the subject of an RTÉ documentary entitled "The Torture Files" broadcast on 4 June 2014.

[30] The correspondence disclosed in the programme indicated that in December 1976 the then Secretary of State for Northern Ireland corresponded with his opposite number in the Conservative party, Mr Neave, indicating that it was preferable that the claims for damages in respect of deep interrogation procedures should be settled

out of court given that the procedures themselves were unlawful and because of the embarrassment or worse which could arise for those concerned at the time – including Lord Carrington.

[31] The terms of the letter raised concerns in the Ministry of Defence. It was suggested that various difficulties might occur if the letter was disclosed. In the circumstances it was recommended that the Secretary of State attempt to recover the letter from Mr Neave and above all advise Mr Neave not to reveal its contents to anyone else. It appears that Mr Mason, the Secretary of State for Northern Ireland, was successful in recovering the letter and an amended letter excluding the reference to embarrassment and Lord Carrington was provided.

[32] The programme also referred to a memo written by the then Home Secretary, Merlyn Rees, on 31 March 1977 to the Prime Minister after a meeting with representatives of the Irish Government seeking to achieve a friendly settlement of the dispute which by that time had been reported upon by the European Commission.

> "… Costello [the Irish Attorney General] raised the proceedings brought by the Irish Government to the European Court of Human Rights, and in particular the possibility of either prosecuting or taking disciplinary action against those responsible in 1971/72 for acts found by the Commission to have been in breach of Article 3.
>
> It is my view (confirmed by Brian Faulkner before his death) that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by Ministers – in particular Lord Carrington, then Secretary of State for Defence.
>
> If at any time methods of torture are used in Northern Ireland contrary to the view of the Government of the day I would agree that individual policemen or soldiers should be prosecuted or disciplined, but in the particular circumstances of 1971/72 a political decision was taken."

In a note in the margin of the Rees memo, the Head of the Army Department of the Ministry Of Defence, John M Parker, wrote: "This could grow into something awkward if pursued". At [107]-[109] the learned trial judge set out correspondence from the then United Kingdom Defence Secretary suggesting that this was a hard way of putting the decision to use deep interrogation and an acknowledgement by Mr Rees in a memo dated 18 April 1977 that he had "compressed the record too starkly".

[33] Some of the material contained in the National Archive was also uncovered by the Pat Finucane Centre ("PFC") in August 2013. On 24 October 2013 KRW law

forwarded some of those documents to the Office of the Attorney General in the Republic of Ireland and on 6 March 2014 the PFC sent documents relating to the examination of Mr McKenna by Dr Leigh on 3 June 1975 suggesting that the effects of the deep interrogation were rather more prolonged and serious than Dr Leigh had first thought. After the RTÉ documentary the PFC submitted several thousands of pages of documents to the Department of Foreign Affairs in the Republic of Ireland on 13 June 2014 touching on the UK Government's defence of the litigation.

[34] The learned trial judge placed particular emphasis on a document dated 9 November 1971 from a MOD official, Mr Hockaday. The document is marked "secret" and is entitled "Northern Ireland – Authority for Interrogation". Although set out at [148] of the first instance judgment it bears repeating here:

> "2. Following a visit to Northern Ireland by the Intelligence Co-ordinator, whose report emphasised the importance of interrogation and the desirability of assisting the RUC Special Branch in every way possible, a request for assistance in the setting up of an RUC Interrogation Centre was discussed on 24 March 1971 at a meeting in the Ministry of Defence with representation of the Security Service. As the Security Service was not prepared to undertake the commitment, it was agreed that assistance should be provided by the Joint Services Intelligence Wing (JSIW) which is recognised as the only official school for interrogation training. The Home Office was informed at official level of the agreement, and DGI mentioned the matter in general terms to the Minister of State at the end of March.
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> 3. In discussion on the pros and cons of internment in early August, S of S was advised that one of the advantages would be the intelligence dividends expected to be obtained through interrogation. Following the decision to proceed to internment, VCGS forwarded to S of S on 9 August a note from BGS (INT) which:-
>
> (a) summarised the safeguards provided in JIC(65)15;
>
> (b) explained that the supporting methods designed to heighten the subject's desire to communicate with his fellow human beings included isolation, fatigue, white sound, and deprivation of sense of place and time;
>
> (c) made clear that the interrogation would be conducted by the RUC and that JSIW had

provided, and would continue to provide, advice and support from the technical intelligence aspect.

4. On 10 August S of S [Lord Carrington] discussed the matter with the Home Secretary [Reginald Maudling]. Neither Secretary of State indicated any dissatisfaction with the situation explained in BGS (INT)'s minute. S of S consider I believe, that he and the Home Secretary (in the Prime Minister's absence) thereby acquiesced in the provision by the Army of advisory services for the interrogations that were expected to be authorised by the Northern Ireland Minister of Home Affairs and to produce a valuable intelligence dividend. The selection of individuals to be interrogated was, however, entirely a matter for the RUC and the Northern Ireland Government.

5. On 11 August Mr. Faulkner, acting as Minister for Home Affairs, and on the advice of the RUC, signed orders … authorising the removal of each of the 12 persons … Mr Faulkner had received recommendations that these individuals should be interrogated, and he had been extensively briefed by the Director of Intelligence in Northern Ireland on the techniques of interrogation. By authorising the removal of these persons in the circumstances, Mr Faulkner must be deemed to have agreed that they should be interrogated.

6. I believe therefore that not only would it be fair that any public answer should be in terms that interrogation had been authorised by the Northern Ireland Government with the knowledge and acquiescence of HMG; but that the legal fact of the signing of the removal order by Mr Faulkner virtually precludes any other answer. Likewise, if asked who authorised interrogation of these particular individuals, the facts permit no other answer than "the Northern Ireland Government".

7. This minute is being copied to the Home Office and the Secretary of the JIC. If they agree the facts and deductions in the foregoing paragraphs, it will be for consideration when and how the Home Office should obtain Mr Faulkner's agreement that this will be the public line taken."

[35] As a result of the discovery of the new materials representations were made to the Attorney General in Ireland requesting an application to the European Court of Human Rights under Rule 80 of the Rules of the Court to reopen the case. Initially the Attorney General's office indicated that it did not consider that new evidence had become available. Judicial review proceedings were issued in November 2014 and on 4 December 2014 the application to the ECtHR was made. That application had not been determined by the time Maguire J gave judgment.

The Northern Ireland Policing Board

[36] The issue of authorisation was raised at a meeting of the Northern Ireland Policing Board on 3 July 2014 when Gerry Kelly MLA tabled the following question for the Chief Constable:

> "Following the assertion in official documents that Lord Carrington authorised the use of methods of torture in this jurisdiction, what action has the Chief Constable taken?
>
> Response:
>
> The PSNI will assess any allegation or emerging evidence of criminal behaviour, from whatever quarter, with a view to substantiating such an allegation and identifying sufficient evidence to justify a prosecution and bring people to court."

[37] Responsibility for the investigation was given to Detective Chief Superintendent Hanna who was head of the Historical Enquiries Team ("HET") which by then was no longer practically independent of the PSNI for the reasons set out in McQuillan's Application [2019] NICA 13. The learned trial judge set out the nature of the investigation at [123]-[135] of his judgment and noted the conclusion of the investigating officer that there was no useful purpose in taking the investigation further; that there was no reference to the word "torture" as stated in the Rees memo and no documentation linking Lord Carrington to matters of "torture". He stated that it was abundantly clear that the use of torture was never authorised at any level.

The learned trial judge's conclusions

[38] The conclusions of the learned trial judge on the background matters were helpfully set out at [178]:

> "(i) Deep interrogation techniques were taught by the MOD to members of the RUC beginning around March 1971.
>
> (ii) Interrogations were as a result supposed to be conducted in accordance with JIC (65) 15.
>
> (iii) Ministers at Westminster and in Northern Ireland were aware of the techniques as they were

told what the methods to be employed were to be. The techniques were to be those which had been used on numerous occasions in the past. The above position was not disguised when controversy surrounding the use of the techniques broke out within days of deep interrogation being used but, for the most part, the use of general formulations to describe the official position was adopted. Authorisation, it was said, occurred at a "high level" or it was said that steps were taken by the Northern Ireland Government with the concurrence of the United Kingdom Government. The role of individuals was not highlighted. The court considers there is evidence which supports the view that informed authorisation in advance was given by one, if not two, Cabinet Ministers, as well as by the Northern Ireland Minister for Home Affairs.

(iv) The Compton inquiry did consider issues of alleged ill-treatment /brutality in the context of the use of deep interrogation but it did not explore the process of authorisation in any depth. Nor did it explore issues related to the identification or punishment of those responsible for what occurred.

(v) The Parker inquiry likewise did not concentrate on the issue of identifying those responsible for setting up and authorising the operation of deep interrogation. Rather it was chiefly concerned with policy development. However, both majority and minority reports acknowledged that some, if not all, of the techniques in use involved unlawfulness and the possible commission of criminal offences.

(vi) It appears likely that at some point in the process of authorising the use of interrogation in depth or in the immediate aftermath of controversy involving its use, the RUC received assurance that its members, provided they acted in line with the JIC Guidelines, would not face legal sanction. The detail of this is unclear.

(v) Unsurprisingly, the Government of the day announced when Parker was debated in Parliament that the techniques would not be used in future as an aid to interrogation.

(vi) The Ireland-United Kingdom inter-State case was brought in the aftermath of these events. Insofar as the case involved the issue of deep interrogation it centred on the question of the substantive breach of the requirements of Article 3 ECHR, including the issue of whether the respondent State was engaging in an administrative practice. The overall issues were subjected to careful consideration and evidence taking, albeit on a limited scale. Ultimately, the UK Government conceded the administrative practice point but the issue of the impact of deep interrogation on the mental health of the individual who was the subject of it was contested.

(vii) While both the Commission and the Court found that the UK had substantively breached Article 3 in the context of deep interrogation, the emphasis was different as between the two with the Commission viewing what had occurred as amounting to inhuman and degrading treatment and torture whereas the court declined to make any finding of torture. Notably, the court's conclusion was reached in circumstances in which the UK had not, before the court, contested the Commission's finding in respect of torture.

(ix) Neither the Commission nor the court focussed to a substantial degree on the question of the effectiveness of any official investigation on the part of the UK authorities in the context of bringing those responsible for what occurred to justice. This aspect of Article 3 jurisprudence had not at that time been developed.

(x) Only a very limited finding was made by the Commission about the psychiatric effects arising from deep interrogation, though it acknowledged that on this issue there was disagreement between the psychiatrists on either side. The Commission said it was unable to establish the exact degree of psychiatric after-effects which the use of the techniques had. However it accepted that some after-effects resulting from the application of the techniques could not be excluded. This position was adopted later by the court.

(xi) Explicitly the ECtHR held that it could not direct the UK to institute criminal or disciplinary

proceedings against those members of the security forces who had committed acts in breach of Article 3 or against those who condoned or tolerated such breaches.

(xii) There is little sign that any serious investigation in fact took place in the immediate aftermath of the use of the measures directed at the issue of identifying persons responsible for possible prosecution. Nor is there evidence which suggests that such an investigation in a meaningful way was conducted subsequently.

(xiii) Following the end of the inter-State proceedings in 1978 the issue of what had happened to the hooded men lay dormant. While issues arose within the UK Government as to the disclosure of official public records in the early 2000s the discussion of this issue was conducted privately. Ultimately from in or around 2003 some documents were deposited in the UK National Archives, though their presence for long went unnoticed.

(xiv) It was not until 2014, as a result of documents found in the National Archives, that controversy in respect of the hooded men was re-awakened. The immediate trigger for this was a RTÉ broadcast in 2014 which suggested that torture had been authorised at the time by a UK Government Minister and that at the time of the inter-State case the UK Government had withheld from the Strasbourg institutions evidence which tended to undermine the UK case that the after-effects of the use of the five techniques were not long lasting or severe.

(xv) The RTÉ broadcast led to questions being asked about the posture of the PSNI in relation to the above allegations. In July 2014 the forum of the Northern Ireland Policing Board was used to question senior police officers, including the Chief Constable, about what steps the police proposed to take, in particular in relation to the allegation that torture had been authorised by a UK Government Minister.

(xvi) These questions elicited the response that the police would assess any such allegation and, if there was sufficient evidence, the question of prosecution could be considered.

> (xvii) Thereafter a preliminary investigation was carried out at the National Archives on behalf of the police but while it considered a range of documents it was concluded by the investigator that there would be no useful purpose served by taking the investigation further. This resulted in two Assistant Chief Constables stating that the evidence to support an allegation that the UK Government had authorised torture had not been found.
>
> (xviii) This led to the present proceedings.
>
> (xix) The issue of whether or not the ECtHR was misled is a matter which is currently being considered at Strasbourg.""

[39] The learned trial judge identified the critical date as being 2 October 2000 when determining for the purposes of domestic law whether the appellants had an enforceable right to a new investigation compliant with Articles 2 and 3 of the Convention into the circumstances surrounding the authorisation of the use of the five techniques with a view, if appropriate, to the prosecution of those responsible.

[40] He carried out a careful review of the appropriate European jurisprudence and in particular the application of the tests set out by the Grand Chamber in Janowiec v Russia (2014) 58 EHRR 30. He noted that the genuine connection test comprised two ingredients both of which had to be satisfied. The first was the temporal connection between the events at issue and the critical date. The Grand Chamber had suggested that this should not exceed 10 years. In this case the events in issue occurred approximately 29 years prior to the critical date and approximately 40 years prior to this application. The judge concluded that this gap exceeded by a wide margin the period suggested by the Grand Chamber.

[41] The second ingredient was concerned with the balance of the process of investigation. In this case the judge concluded that the great bulk of the activity in respect of the evidence at issue occurred in the period between 1971 and 1978. The judge accepted that the investigations and inquiries which did take place did not concentrate on the issue of identifying those responsible for the acts with a view to bringing them to justice but concluded in light of the two enquiries and the litigation before the European Court of Human Rights that neither of the genuine connection tests set out in Janowiec were satisfied.

[42] The judge then turned to the Convention values test set out at [149]-[150] of Janowiec. The Grand Chamber accepted that there may be extraordinary situations which did not satisfy the genuine connection standard but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection. It considered the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the

negation of the very foundations of the Convention. That would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

[43] The judge recalled that this case involved the state and state authorities establishing a secret interrogation centre and a system for the deep interrogation of detainees using the five techniques already described. When what was occurring reached the public domain it produced such a reaction as to require the immediate establishment of the Compton Enquiry and the events shortly became the subject of interstate proceedings within the Convention system leading to a finding of a breach of Article 3.

[44] Maguire J stated that the Convention is a living instrument and falls to be interpreted in the light of present day conditions. If the events here at issue were replicated the ECtHR would probably accept their description as torture. The proscription of torture is viewed as a peremptory norm from which the state cannot deviate. This supports the view that this case has a larger dimension than an ordinary criminal offence and would amount to the negation of the very foundations of the Convention. Accordingly the judge concluded that the Convention values test was satisfied.

[45] The judge noted the approach established in Brecknell v UK (2008) 46 EHRR 42 in the context of Article 2 that a new obligation to investigate a death may arise where there is new information which comes into the public domain purportedly casting a new light on the circumstances. That applied similarly to the procedural obligation under Article 3. In this case the materials which had been exposed in the RTÉ broadcast in 2014 tended to suggest that torture had been authorised at the time by a senior United Kingdom Minister and that the UK Government had withheld from the Strasbourg institutions evidence which undermined their case that the after effects of the use of the five techniques were not long lasting or severe. The Grand Chamber in Janowiec noted that the genuine connection and Convention values tests applied in a Brecknell case. The judge was satisfied that the Brecknell test was satisfied in this case and that on the European authorities the Convention values test was also satisfied.

[46] He then turned to the decision of the House of Lords in McKerr [2004] 1 WLR 807. He noted that this decision had not been overturned and that it purportedly fixed the commencement date of the Human Rights Act 1998 as the date after which the triggering event had to occur. He did not accept that the decision of the Supreme Court in McCaughey [2012] 1 AC 725 led to any different conclusion. For that reason he concluded that in domestic law the applications based on Articles 2 and 3 must fail.

[47] If wrong on that point he then addressed the issue of the independence of the PSNI. This court has already dealt with that issue in McQuillan [2019] NICA 13. The investigation that was carried out was under the control of the HET which subsequently became the Legacy Investigation Branch ("LIB"). In McQuillan this

court found that those arrangements lacked the practical independence necessary to satisfy the ancillary obligation under Articles 2 and 3.

[48] Maguire J rejected the submission that there was a common law obligation to investigate broadly parallel to the Convention obligation on the basis that it had been rejected in McKerr. He also rejected the submission that there was a common law form of investigative requirement based on customary international law. He considered that this conclusion followed from the decision of the Supreme Court in Keyu [2016] AC 1355.

[49] The judge then investigated the rationality of the investigation which had been carried out. He considered that the investigation lacked focus and that may have been because the question was directed in respect of Lord Carrington only. The investigation should have been aimed at identifying evidence of criminal behaviour. The judge found it difficult to see why the investigation would not have examined the more general issue of official authorisation of unlawful methods of the deep interrogation which were capable of being regarded as criminal assaults. That would have been the obvious step for the PSNI to have initiated.

[50] The judge found it difficult to see why senior officers should have chosen to accept such a narrow scope to the investigation given that it was plain that the methods used were unlawful and were capable of being viewed as criminal and given that no one had been identified for potential prosecution in respect of the matter. The judge noted that the PSNI indicated that it was intending to review the matter in light of still further information but there was no sign of any meaningful review and in those circumstances the judge quashed the decision made in October 2014 so as to clear the field and enable a completely fresh decision process to begin. He made a declaration accordingly. He did not find it necessary to deal with the legitimate expectation argument but noted that what was said by the Chief Constable may have amounted to little more than a statement of what was his duty come what may.

The application to revise Ireland v UK

[51] It was submitted on behalf of Ireland that there were two grounds for revising the judgment:

(i) The UK Government had information within its possession, including medical reports from Dr Leigh demonstrating that the effects of the five techniques could be substantial, severe and long-lasting while that government, through the evidence of the same Dr Leigh, before the Commission had alleged in the Convention proceedings that the said effects were minor and short term; and

(ii) The archive material revealed the extent to which, at the relevant time, the UK Government had adopted and implemented a policy of withholding information from the Commission and the Court about key facts concerning the five

techniques, including that their use had been authorised at ministerial level and their purpose in doing so.

[52] In respect of the first ground the majority of the court noted that the only direct proof relied upon for Dr Leigh's medical views was his report on Mr McKenna in June 1975. It noted that Mr McKenna had a serious medical precondition and that in Dr Leigh's view the five techniques should not have been applied at all. The fact that the five techniques produced serious long-term effects on a person with a specific health condition did not, in the Court's view, suffice as *prima facie* evidence that the statements he made in respect of the general effects of those techniques were misleading or were made in bad faith.

[53] The majority also noted that in April 1974 Dr Leigh had identified three persons suffering from serious mental effects. None of those individuals were among the illustrative cases examined by the Commission and the Court had doubts whether the document contained sufficient *prima facie* evidence that the doctor gave misleading evidence on the question of whether the five techniques generally produced serious and long-term effects. It noted another document in which it was suggested that there was no consolidated scientific knowledge on this question at the relevant time. It did not consider that documents dealing with the level of damages awarded were material since those were before the Court at the time. The majority concluded that it had doubts as to whether the documents submitted by the Irish Government contained sufficient *prima facie* evidence to suggest that Dr Leigh misled the Commission as to the serious and long-term effects of the five techniques.

[54] In respect of the second ground the Court accepted that a number of documents submitted in support of that ground demonstrated that the then Government of the United Kingdom was prepared to admit that the use of the five techniques had been authorised at "high level" to avoid any detailed enquiry into the issue and that they were opposed to the hearing of witnesses in respect of the five techniques in order to avoid exposing the ministers involved. The Court concluded, however, that the relevant facts were not "unknown" to the Court at the time of the original proceedings. Both the Commission and the Court were well aware of the United Kingdom's general attitude to the establishment of facts in respect of the five techniques and that they had instructed all of their witnesses not to reply to any questions regarding the techniques. The Government had conceded from the start that the use of the five techniques had been authorised at a "high level", that they had been taught to members of the RUC at a seminar held in April 1971 and that there had been an administrative practice. The Court concluded that the documents submitted in support of the second ground did not demonstrate facts that were "unknown" to the Court when the original judgment was delivered.

[55] The majority then set out why it concluded that even if Dr Leigh had misled the Commission the Court considered that the revision request could not succeed. The Court noted the divergence in views among the psychiatrists who gave evidence to the Commission and that Dr Leigh and one other psychiatrist considered that the acute psychiatric symptoms developed by the witnesses during the interrogation had been minor and that their persistence was the result of everyday life in Northern

Ireland. The Commission had been unable to establish the exact degree of the psychiatric after-effects which the use of the five techniques might have had on the witnesses. The Commission did not, therefore, exclude the possibility of substantial after-effects.

[56] The Court noted, however, that in concluding that the techniques did not occasion suffering of the particular intensity and cruelty implied by the word torture the original judgment did not mention the issue of possible long-term effects of the use of those techniques in its legal assessment. It considered, therefore, that it was difficult to argue that the original judgment attached any particular importance to the uncertainty as to their long-term effects let alone considered this to be a decisive element for coming to a different conclusion from the Commission. Without an indication in the original judgment that if it had been shown that the five techniques could have had severe, long-term psychiatric effects this would have led the Court to the conclusion that the use of the five techniques constituted very serious and cruel suffering constituting torture the Court could not conclude that the alleged new facts might have had a decisive influence on the original judgment.

[57] In her detailed and carefully constructed dissenting judgment Judge O'Leary took issue with the conclusions of the majority. In respect of the medical evidence she noted that there had been extensive written and oral submissions made before the Court in 1976 – 1977. References to the conflict of expert opinion on the seriousness of the psychiatric after-effects of the five techniques peppered the parties' submissions to the Commission and the Court. At no stage was there any amendment or supplementary reference to the different medical evidence compiled by Dr Leigh and others and relied on in the domestic proceedings which were progressing in parallel to the Convention proceedings.

[58] Secondly, although it was true that none of the three men in respect of whom there was new medical evidence were either of the illustrative cases heard by the Commission all were among the 14 detainees subjected to the five techniques. The Commission's decision was not confined to the illustrative cases put before it. It was a decision in respect of an administrative practice concerning the 14 detainees in breach of Article 3 of the Convention. The Court had clearly stated in a revision context the parties are obliged to bring to the attention of the Court all relevant facts which have been produced in the domestic legal order. That did not happen in this case.

[59] Thirdly, the majority appeared to conclude that the medical evidence in relation to Mr McKenna should be treated as irrelevant because of his underlying medical condition. That ignored, however, that the assessment of treatment with reference to Article 3 is, according to the Court's case law, relative and depends on circumstances such as duration, physical and mental effects and, in some cases, sex, age and state of health.

[60] In respect of the second ground Judge O'Leary pointed out that the several documents revealed that knowledge and authorisation of the five techniques was at ministerial level. This was not known to the applicant Government at the hearing

before the Court and could not have been proved by it. The level of authorisation would have been central to the assessment of the seriousness of any breach flowing from the existence or exercise of the administrative practice. She noted with approval the conclusions on this issue reached by Maguire J in the first instance judgment which was available to the Court.

[61] Judge O'Leary concluded that the new facts revealed first, that medical expertise was available to the respondent Government pointing to the long-term serious mental effects of the five techniques, such that in reality there was no conflict of evidence on this crucial point which related to the intensity of the suffering endured and secondly, the existence, nature, extent and purpose of a policy of nondisclosure and obstruction by the respondent State. She considered that those new facts might or would have had a decisive influence when the Court considered whether it should confirm or overturn the unanimous Commission finding of torture.

Submissions of the parties

[62] On behalf of Mr McGuigan it was submitted that the court should be careful to reject any invitation to review the factual findings by the learned trial judge unless satisfied that those findings were clearly erroneous. The PSNI placed considerable weight on the decision of the majority to dismiss Ireland's request for revision of the interstate judgement. That approach was erroneous as the questions before this court are different.

[63] The appellant's case was based upon the Brecknell test. That merely required that there was a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of unlawful killing. The test for revision was different and the majority emphasised that a request for revision would only be permitted in exceptional circumstances. The key material in this case is the material demonstrating ministerial responsibility for the conduct of state agents. The fact that the material identified individuals responsible for the conduct pointed towards criminal liability.

[64] This appellant submitted that the genuine connection and Convention values test did not arise in this case since the critical date was 1966 when the United Kingdom accepted the right of individual petition. The PSNI submission that the court must only have regard to case law in 1971 was plainly wrong since the court had applied the ancillary obligations test developed in McCann v United Kingdom (1996) 21 EHRR 97 to events which occurred prior to the date of that case. That was another difference between the revision judgment and the Brecknell test.

[65] For Ms McKenna it was argued that the decision in McKerr had been significantly qualified by the decision of the Supreme Court in McCaughey. This was a case in which the PSNI had committed to carrying out a criminal investigation with a view to prosecution. Even if the genuine connection and Convention values test were not met the principle in Brecknell was sufficient to ensure that any such investigation had to be compliant with Articles 2 and 3 of the Convention.

[66] This appellant further submitted that as a matter of common law the PSNI lacked the requisite investigative independence to investigate the circumstances. The appellant further submitted that the common law now imposed an obligation indistinguishable from Articles 2 and 3 of the Convention despite the statements of the House of Lords to the contrary in McKerr.

[67] Finally, this appellant submitted that the prohibition of torture is a peremptory/*ius cogens* norm of international law which has now been fully absorbed by the common law. There is a corresponding rule whereby the common law will give effect to rules of customary international law unless they are in conflict with an Act of Parliament. The decision in Keyu did not address the issue of torture.

[68] The PSNI and Secretary of State submitted that the Rees memo was the central focus of the proceedings. It was submitted that the memo added nothing to the public position of the UK government both in Parliament and before the European Court that the use of the five techniques had been authorised by ministers. In respect of the medical evidence the views of Dr Leigh were carefully expressed. His opinion was that the five techniques should not produce lasting damage if properly administered. If they were not used carefully they would produce a condition of madness. He criticised the absence of any oversight by a psychiatrist and accepted that the techniques might have been administered by inexperienced personnel in a brutal and sadistic manner. In cross-examination he also accepted that those he examined had psychiatric symptoms when he saw them.

[69] This respondent supported the conclusion of Maguire J that the critical date was 2 October 2000 and that the genuine connection test was not met. The Convention values test was exceptional. In this case the mistreatment of detainees was assessed as amounting to inhuman and degrading treatment but fell short of torture. The revision decision by the ECtHR is of considerable significance on this issue. The assessment by the learned trial judge that the Convention values test was met should not stand.

[70] There was no new information or new analysis which met the Brecknell threshold here. That was clear from the revision decision of the ECtHR. Where the Convention values and genuine connection tests are not met a decision by the PSNI to carry out a further investigation does not give rise to an Article 2 or 3 ancillary obligation. If any such claim was to be pursued it should have been pursued long ago because it has been clear since the decision in Ireland v UK that criminal or disciplinary sanctions were not being pursued.

[71] In light of our decision in McQuillan it is unnecessary to comment on the submissions in relation to the independence of the PSNI. This respondent also criticised the decision of the learned trial judge to quash the decision to end the police enquiry which had been conducted in light of the indication by the PSNI that further work was required.

[72] The Department of Justice made submissions supporting the approach of the PSNI and the Secretary of State in respect of the engagement of the Convention and also supported their submissions on police independence and on the engagement of

the common law and international law. The written submission of Amnesty International emphasised the importance of the investigative obligation in respect of torture and commented on the right to truth which had been expressly acknowledged by and was well developed in the decisions of the Inter-American Court on Human Rights.

Consideration

[73] The learned trial judge identified the efflux of time as the most substantial issue in this appeal. That arises in two ways. The first is that the Convention is a living instrument. In 1978 the ECtHR was satisfied that the five techniques were authorised at a high level and were used on 14 United Kingdom citizens, who had neither been charged with nor convicted of any offence, by members of the RUC who had been trained and were monitored by the British military at a secret location in order to obtain confessions and/or information. Having made admissions of this administrative practice the United Kingdom Government declined to allow any of its witnesses to give any evidence in relation to the preparation or administration of the five techniques or specific evidence about their authorisation. The Court concluded that this did not amount to torture and that was reaffirmed in the revision judgment where it was accepted that authorisation at a high level was comparable to ministerial authorisation.

[74] In the intervening 40 years it is clear, however, that the approach both nationally and internationally to the conduct which would constitute torture and the steps that should be taken in relation to it have changed. In 1984 the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted. The UN Convention provided a definition of torture but also provided in Article 4 that torture be criminalised and that alleged offenders should be subject to criminal, disciplinary or other appropriate proceedings. The United Kingdom Government gave effect to the criminalisation provisions of the UN Convention in section 134 of the Criminal Justice Act 1988 which provides:

> "134(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties. "

[75] The decision of the ECtHR in Ireland v UK was subject to a degree of criticism because of the nature and extent of the conduct required to constitute torture before such a finding could be made. The Court reviewed its position in Selmouni v France (1999) 29 EHRR 403 at [101]:

> "The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture. However, having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present day

> conditions", the court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."

[76] At the domestic level Lord Bingham in A v Secretary of State for the Home Department (No 2) [2006] 2 AC 221 accepted that the international prohibition of the use of torture enjoyed the enhanced status of a *jus cogens* or peremptory norm of general international law. That meant that in terms of criminal liability every state was entitled to investigate, prosecute and punish or extradite individuals accused of torture who were present in its jurisdiction. It was also accepted that torture may not be covered by a statute of limitations.

[77] The customary international law issue was also addressed by Lord Neuberger in Keyu. That was a case in which there were allegations of unlawful killing which may have amounted to war crimes. At [113] in his judgment, with which the majority agreed, he stated that it appeared to be common ground that it was only within the past 25 years that international law recognised a duty on states to carry out formal investigations into at least some of the deaths for which they were responsible and which may well have been unlawful. He noted that the first case in which the Strasbourg court suggested that there was such a duty was in 1995 in McCann v United Kingdom (1995) 21 EHRR 97 and in McKerr Lord Steyn at [52] suggested that it was probably unrealistic to suggest that the procedural obligation was part of customary international law in 1982.

[78] The second element affected by the efflux of time is the temporal relationship between the claim in this case made in 2014 and the events which occurred some 43 years earlier. In order to determine the impact of the passage of time on this appeal it is necessary to review some of the domestic and international case law.

[79] Section 6(1) of the Human Rights Act 1998 ("the 1998 Act") makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Article 2 of the Convention deals with the right to life and its scope was helpfully set out by Lord Nicholls in Re McKerr [2004] 1 WLR 807 at paragraph [18]:

> "This article expressly imposes a positive obligation on the state to protect everyone's life. The state must take appropriate steps to safeguard the lives of those within its bounds. But the state's obligation does not stop there. The European Court of Human Rights has held that by implication article 2 also requires there should be some form of effective official investigation when individuals have been killed as a result of the

> use of force: see *McCann v United Kingdom (1995) 21 EHRR 97* (the "death on the Rock" case), and McKerr v United Kingdom 34 EHRR 553, 598–599, para 111. The European Court of Human Rights has described this as a "procedural" obligation imposed by article 2. The purpose of the investigation is to secure that domestic laws protecting the right to life are effectively implemented and, in cases involving state agencies, to ensure those responsible for deaths are made properly accountable: see *Jordan v United Kingdom (2001) 37 EHRR 2* , para 105"

[80] That case concerned the shooting dead of the applicant and two others in November 1982 by members of the Royal Ulster Constabulary. Three officers concerned were prosecuted in respect of the death of one of the men but were acquitted on the direction of the judge. An inquest was opened in 1984 but following adjournments a reopened inquest was abandoned in 1994.

[81] The 1998 Act came into force on 2 October 2000. It was not retrospective. Accordingly section 6 (1) did not apply to any claim in respect of an unlawful killing carried out in 1982. The issue of principle in McKerr was whether a failure to carry out the necessary investigation required by Article 2 which in the ordinary course would be held after 2 October 2000 into a death which occurred before that date was also caught by the retrospectivity principle. The unanimous answer of the House was helpfully encapsulated by Lord Nicholls at paragraphs [21] and [22]:

> "21 In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the article 2 obligation to investigate must have occurred post-Act.
>
> 22 I think this is the preferable interpretation of section 6 in the context of article 2. This interpretation has the effect, for the transitional purpose now under consideration, of treating all the obligations arising under article 2 as parts of a single whole. Parliament cannot be taken to have intended that the Act should apply differently to the primary obligation (to protect

> life) and a consequential obligation (to investigate a death)"

[82] The issue of the relationship between the substantive obligation and the procedural obligation in Convention law had been considered by the ECtHR in Moldova v Romania (App 41138/98 13 March 2001). Romania acceded to the Convention on 20 June 1994. In 1993 a pogrom had taken place in a Roma village in which it was alleged local police had participated. The applicants claimed a breach of the procedural obligation. The court held that because the procedural obligation was derived from the killings which could not be examined by the court it followed that the complaint of breach of the procedural obligation similarly had to be rejected. The reasoning was, therefore, essentially that adopted by the House of Lords in McKerr.

[83] This issue subsequently came before the Grand Chamber in Silih v Slovenia (2009) 49 EHRR 996. The applicants' son was admitted to hospital and given intravenous injections. He suffered anaphylactic shock as a result of which he died in May 1993. Civil and criminal proceedings were issued thereafter. The civil proceedings were still outstanding after more than 13 years and the last hearing of the criminal proceedings had been in 2003 when the proceedings were struck out as time-barred. The applicants claimed that the criminal and civil proceedings did not allow for the prompt and effective establishment of responsibility for their son's death.

[84] Slovenia ratified the Convention on 28 June 1994. At [140] the Grand Chamber explained that the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the Convention with respect to that Party. There was, therefore, no substantive breach of Article 2.

[85] At [157] the court noted that while it was normally death in suspicious circumstances that triggered the procedural obligation under Article 2, that obligation "binds the state throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it".

[86] The Court then examined its case law in respect of the "detachability" of the procedural obligation under Article 2 and set out its position at [159]:

> "159 Against this background, the Court concludes that the procedural obligation to carry out an effective investigation under art.2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of art.2 it can give rise to a finding of a separate and independent "interference" within the meaning of the Blečić judgment. In this sense it can be considered to be a detachable obligation arising out of art.2 capable of

> binding the state even when the death took place before the critical date."

In considering the Court's temporal jurisdiction in such cases it was determined that only procedural acts and/or omissions occurring after the critical date could fall within the Court's temporal jurisdiction. Secondly, there had to exist a genuine connection between the death and the entry into force of the Convention for that State and thirdly, a significant proportion of the procedural steps required will have been or ought to have been carried out after the critical date. The Grand Chamber also said that it did not exclude the possibility that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

[87] The rather unsatisfactory nature of the test for temporal jurisdiction in Silih was addressed by the ECtHR in Janowiec. The application was concerned with the mass murder in Poland of 20,000 prisoners of war by Soviet forces in 1940. The Russian Federation ratified the convention in May 1998. The Court noted that the duty only arose in relation to procedural acts undertaken within the domestic legal system which are capable of discharging the investigative duty and did not extend to other types of enquiries that may be carried out for other purposes such as establishing a historical truth. It reiterated that the procedural obligation could only apply to acts and omissions after the critical date. It clarified the "genuine connection" test, holding that the lapse of time between the triggering event and the critical date must remain reasonably short and in any event should not exceed 10 years and that much of the investigation into the death ought to take place in the period following the entry into force of the Convention. The court also recognised that the "Convention values" test comprised extraordinary situations where the connection would be established by reason of the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention. The Grand Chamber concluded that the genuine connection test was not met and that the Convention values test could not apply in relation to events which occurred prior to the adoption of the Convention in November 1950.

[88] In this case the appellants rely upon the decision of the European Court of Human Rights in Brecknell v United Kingdom (2008) 46 EHRR 42. On 19 December 1975 a loyalist gunman attacked a bar in Northern Ireland killing the applicant's husband. A few days later police contacted the applicant and informed her that they knew who was responsible for the attack but that they all had alibis. The investigation became active again in 1978 when a police officer arrested in connection with another matter identified persons that he believed were involved in the murder. In April 1981 the DPP made a decision not to pursue the charges against those persons.

[89] In January 1999 another police officer who had been released from prison in 1993 on licence after his conviction for the murder of a shopkeeper made a statement to a journalist alleging RUC collusion with loyalist paramilitaries and identified a farm house owned by an RUC officer which was used as a base from which to carry out loyalist attacks including that in which the applicant's husband was killed. On

10 June 1999 RTÉ broadcast a television programme containing the allegations. The applicant was advised by police in January 2000 that investigations indicated that there had been collusion between loyalist paramilitaries and officers of the RUC in her husband's murder. In February 2000 a substantial report was compiled by the RUC which concluded that an investigation should continue into the credibility of the source. That report was eventually made available to the Serious Crime Review Team in November 2003.

[90] On 11 December 2002 the applicant's solicitors requested the Secretary of State for Northern Ireland to conduct an investigation into the allegations that was compliant with Article 2 of the Convention. The applicant commenced judicial review proceedings but these were dismissed on the basis of the McKerr judgment. On 10 September 2004 she lodged an application with the European Court of Human Rights alleging among other things a breach of Article 2 by reason of the failure of the United Kingdom to carry out an effective investigation into her husband's murder.

[91] The Court noted that the fact that an investigation ends without concrete or with only limited results is not indicative of any failings as such. It may be, however, that sometime later information purportedly casting new light on the circumstances of the death comes into the public domain. The Court rejected the submission that a strict six-month time-limit should be applied to such cases and relied upon a passage in McKerr v UK (2002) 34 EHRR 20 where there had been a criminal trial of three officers charged with the murder of unarmed IRA suspects and subsequently serious concerns arose about the incident:

> "… there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require wider examination … the aims of reassuring the public and the members of the family as to the lawfulness of the killings had not been met adequately by the criminal trial. In this case therefore, the Court finds that Article 2 required a procedure whereby these elements could be examined and doubts confirmed, or laid to rest."

[92] That position was also supported by Hackett v UK (10 May 2005 app 34698/04) which concerned the publication of a book in which the author alleged that he had been wrongly convicted of the murder of the applicant's husband years earlier and purported to name the actual perpetrator. The court noted that circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued. The nature and extent of those investigations would inevitably depend on the circumstances of each particular case.

[93] The Court noted that it could not be the case that any assertion or allegation could trigger a fresh investigative obligation under Article 2 of the Convention but stated that [70]:

> "Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further."

[94] The court in Brecknell held that if Article 2 does not impose an obligation to pursue an investigation into an incident the fact that the state chooses to pursue some form of enquiry does not thereby have the effect of imposing Article 2 standards on the proceedings. It described the nature of the obligation in a case such as that at issue at [71] as follows:

> "…the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution……."

The court noted, however, that this obligation must be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. In Janowiec the Grand Chamber made clear that the genuine connection and Convention values tests also applied in respect of new material allegedly giving rise to a Brecknell obligation.

[95] The impact of this jurisprudence on domestic law was considered by the Supreme Court in McCaughey. The claimants' relatives were shot and killed by members of the British Army in Northern Ireland in October 1990. In 1993 the Director of Public Prosecutions announced that no prosecutions would take place in relation to the killings. In 1994 documents relating to the killings were passed to the coroner by the police but the statements of the soldiers who had shot the deceased

were not provided until 2002. In 2009 the claimants applied to the coroner for a ruling that the inquest would comply with the procedural requirements of Article 2 of the Convention but the coroner refused the application considering himself bound by McKerr. The seven Justices hearing the case each provided an opinion and six Justices reached the conclusion that the inquest should be conducted in accordance with Article 2 of the Convention.

[96] There were some differences of emphasis between the Justices in the majority but as a result of the unanimous decision of the Supreme Court in Geraldine Finucane's Application [2019] UKSC 7 the following propositions can be drawn:

(i) The decision in McKerr has not been overruled but its application must now be revised in light of the detachability of the procedural obligation.

(ii) The critical date for the establishment of Convention rights in domestic law is 2 October 2000 when the HRA was commenced.

(iii) Where it is sought to establish procedural or ancillary Article 2 or 3 Convention rights after that date in respect of a death prior to 2 October 2000 the genuine connection and Convention values tests set out in Silih and Janowiec apply.

(iv) The 10 year time-limit set out in Janowiec is not inflexible. Although it is a factor of importance its significance may diminish particularly where the vast bulk of the enquiry into the death or breach of Article 3 has taken place since the HRA came into force.

(v) The Brecknell test can provide a basis for the revival of the procedural obligation but Janowiec makes clear that the genuine connection or Convention values test must also be satisfied.

[97] As can be seen, therefore, we have differed from the learned trial judge on the effect of the decision in McKerr. Unlike him we now have the benefit of the decision of the Supreme Court in Finucane which in our view has clarified the position.

[98] Maguire J examined whether the ECtHR would conclude that the Brecknell test was satisfied at [259]-[263] of his judgment. He noted that in essence materials were exposed in the RTÉ broadcast in 2014 which tended to suggest that torture had been authorised at the time by a senior United Kingdom Minister and that the UK Government had withheld from the Strasbourg institutions evidence which undermined their case that the after-effects of the use of the five techniques were not long-lasting or severe. He was satisfied that the material, which encompassed more than the Rees memorandum, fell within the broad description referred to in Brecknell. It is important to recognise that although Lord Carrington, Reginald Maudling and Lord Faulkner are now all deceased the learned trial judge noted that

the investigation sought by the appellants was broader than the part that those individuals played. The passage of time indicates, however, that many of those involved in the events of the time may no longer be available.

[99] We consider that it is necessary to review the judge's finding on Brecknell in light of the revision judgment in Ireland v UK which was not, of course, available to the learned trial judge. We conduct that exercise mindful of the guidance given by the Supreme Court in DB v Chief Constable [2017] UKSC 7 that it is only in the rarest occasions when the appeal court is convinced by the plainest of circumstances that it should interfere with the finding of the first instance judge on a matter of this kind. It is of significance, however, that the question which the learned trial judge was addressing was how the ECtHR might interpret the circumstances and the decision of the revising court, which was not available to him, gives substantial guidance on that issue.

[100] The question which the revising Court was required to ask itself in respect of the issue of ministerial authorisation was whether that was "known" to the original Court at the time of the hearing. Although, therefore, the overall issue before the Court was whether there was material which satisfied the very high test as to whether there were exceptional circumstances justifying a revision of the judgment, the basis upon which it was contended that the judgment should be revised required determination of what the new material was and how it was relevant to a revision of the original findings.

[101] We have set out at [54] the broad reasoning of the majority leading to the conclusion that the material was known to the Court. The answer by Judge O'Leary set out at [60] above was that the new documents indicated that knowledge and authorisation was at ministerial level. As we understand it, however, the purpose of the proposed investigation includes the obtaining of evidence as to the level of knowledge and understanding the persons authorising the application of the five techniques actually had. It is clear from Lord Gardiner's dissenting Parker Committee report to which we refer at [21] that this very issue was troubling him as far back as 1972.

[102] It is common case that there must be a trigger before the obligation to conduct a procedural investigation arises. Any other approach would offend the principle of legal certainty upon which the Convention places great weight as is demonstrated by the revision judgment. In Janowiec at [144] the Grand Chamber described the Brecknell test as depending upon new material emerging which should be sufficiently weighty and compelling to warrant a new round of proceedings.

[103] In order to answer that question it is necessary to examine what material was available by the time of the delivery of the judgment in Ireland v UK in 1978 and what difference to the obligation to investigate has been established by the material newly released into the National Archive. By 1978, as a result of the Compton Enquiry, the Parker Committee Report, the debates in Parliament, the investigations by the European Commission and the hearings before the ECtHR the following matters were established:

(i) the precise nature of the techniques used and the purposes for which they were used;

(ii) the persons in respect of whom they were used;

(iii) the extent of the training and preparation for their use;

(iv) the fact that a secret base was identified for their application;

(v) the use of the techniques had been authorised at a high/senior level;

(vi) the authorisation included ministerial authorisation (referred to by Lord Gardiner)

(vii) the use of the techniques was unlawful;

(viii) the use of the techniques was in breach of Article 3 of the Convention;

(ix) the use of the techniques was an administrative practice of the United Kingdom;

(x) the UK government had chosen not to co-operate fully with the investigation carried out by the European Commission;

(xi) that attitude persisted during the hearing before the Court;

(xii) the UK government made clear that it did not intend to carry out any investigation into the criminal or disciplinary liability of those who authorised and applied the techniques.

[104] It is clear, therefore, that by 1978 there was a compelling case for the investigation of those who authorised and implemented the unlawful use of the five techniques with a view to prosecution for any criminal offences disclosed. That investigation did not take place because of a policy decision made within the United Kingdom Government. All of that was known. It was also recorded in a minute prepared by Mr Varney on 13 February 1978 discussing what if any steps should be taken in light of the judgment of the ECtHR in Ireland v UK. The minute records:

> "In relation to the five techniques, there is no point in talking about evidence or investigations. It would not be a week's work to discover who was responsible if we set our minds to it. As I understand it, the decision not to prosecute was, and is, a policy decision (and no doubt an admirable one)."

[105] The new material which has been recovered principally from the National Archive provides further detail in relation to the circumstances leading to the authorisation of the use of the five techniques and the lack of cooperation of the United Kingdom Government in the disclosure of material, particularly in relation to the consequences of the use of the techniques. It does not, however, in our view alter

the substance of what has been known for the last 40 years. The omission of any adequate investigation seeking to establish criminal responsibility in respect of the unlawful treatment of those subjected to the five techniques has been publicly recognised since at least 1978 and although the recent focus on the additional material in the National Archive emphasises the proper sense of injustice felt by those who were subjected to the techniques that material does not constitute new material raising reasons for the conduct of an adequate investigation beyond those that have been known for a long time.

[106] The jurisprudence of the Convention does not permit the simple application of new law to past facts. Taking into account the analysis of the revision judgment which was not, of course, available to the learned trial judge and applying it to the circumstances of the appeal we consider that the Brecknell test has not been satisfied.

[107] If we are wrong in our approach to the Brecknell test we agree with the learned trial judge that the critical date is 2 October 2000 and the genuine connection test has not been met. We have little to add to the reasons given by the learned trial judge for those conclusions. We wish to make it clear, however, that in this case extensive, detailed investigations had taken place during the 1970s. The position in McQuillan was quite different where the investigation was perfunctory. It is for that reason that the lapse of time in McQuillan is deserving of little weight. That accords with the approach in Finucane.

[108] We have found the application of the Convention values test more difficult. We accept that the application of the five techniques amounted to the torture of those who endured them. That conclusion reflects the development of the Convention as a living instrument. We also accept that this is a feature which should be taken into account in determining whether any proposed investigation is required by Convention values.

[109] We question, however, whether it is the only feature. As pointed out in Keyu the Convention values test cannot apply to the period before the Convention was adopted. That would suggest that there is at the very least a role to be played in the application of this test by considering the nature of Convention values at the time when the omission took place. That would necessarily mean taking into account the conclusions of the ECtHR in 1978. It would also require one to recognise the investigations which did take place through the Compton Enquiry, the Parker Committee, the debates in Parliament, the investigation by the Commission and the consideration by the Court. The resolution of this issue is not necessary to our decision in this case since we have concluded that the Brecknell test is not satisfied but may have to be addressed in other circumstances.

[110] We can deal briefly with the issues of any duty at common law and customary international law. If the obligation at common law is the same as that under the Convention it will similarly fail because the Brecknell test has not been satisfied. We agree, however, with the learned trial judge that this argument was rejected by the House of Lords in McKerr and that decision was subsequently approved by the majority in the Supreme Court in Keyu. We consider that the

majority in Keyu agreed with Lord Neuberger that it could not be argued that there was an obligation to carry out a procedural investigation of a death as an aspect of customary international law before the 1990s. That was long after the relevant period in this case.

[111] The final issue concerns the legal consequences of the answer given by the Chief Constable to Mr Kelly at the meeting of the Northern Ireland Policing Board on 3 July 2014 set out at [35] above. Although the learned trial judge chose to deal with this issue by way of a rationality challenge the argument advanced on behalf of the appellant was constructed on the basis of legitimate expectation.

[112] The law on legitimate expectation was helpfully reviewed by Lord Kerr in Finucane at [55]-[81]. At [62] he stated that where a clear and unambiguous undertaking has been 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. The court is the arbiter of fairness in this context. The learned trial judge in our view properly characterised the narrowness of the enquiry which the researcher carried out as inconsistent with what the Chief Constable himself has said. The investigation should have been aimed at identifying evidence of criminal behaviour.

[113] We consider that the statement made by the Chief Constable to the Northern Ireland Policing Board was a clear and unambiguous undertaking as to the nature of the investigation that should be carried out. It created a legitimate expectation of a procedural kind to the public at large. This is not a case in which the Chief Constable has sought to resile from that undertaking.

[114] We agree with the learned trial judge that the investigation carried out by the researcher tasked with this issue was unduly narrow and appears to have been focused solely in establishing whether there was express information given to a particular Minister of the application of torture. It is disappointing to note that this inadequate investigation was signed off by two more senior officers. That may raise an issue about whether there is likely to be any public confidence in an investigation without practical independence from the PSNI.

[115] We agree with the learned trial judge that the approach to the investigation was irrational and in our view the expectation remains unfulfilled. We consider that the learned trial judge in the circumstances was perfectly correct to quash the decisions made in relation to the inadequate investigation so that a proper investigation in which the public could have confidence could proceed.

Summary

[116] (i) We are satisfied that the treatment to which Mr McGuigan and Mr McKenna were subject would if it occurred today properly be characterised as torture bearing in mind that the Convention is a living instrument.

(ii) We are satisfied that the Brecknell test can apply in domestic law so as to enable an Article 2 or 3 procedural investigation to take place in respect of a death occurring before 2 October 2000 but consider that the

test is not satisfied in this case taking into account the conclusion of the revision judgment in Ireland v UK.

(iii) We agree with the learned trial judge that the genuine connection test in Janowiec is not satisfied and we question whether the Convention values test is satisfied bearing in mind the conclusion of the Court in Ireland v UK and the extent of the investigation that has taken place already.

(iv) We agree with the learned trial judge that there is no common law obligation identical or similar to the procedural Article 2 or 3 obligations.

(v) We agree with the learned trial judge that there is no procedural obligation imposed by customary international law in this case.

(vi) We are satisfied that the Chief Constable's answer to the question posed by Mr Kelly at the meeting of the Northern Ireland Policing Board on 3 July 2014 gave rise to a legitimate expectation of the type described in the judgment.

(vii) The Chief Constable has not resiled from that undertaking.

(viii) We agree that the investigation carried out by the researcher on behalf of the HET was irrational and did not honour the undertaking given by the Chief Constable.

(ix) We are satisfied that the decision made by the learned trial judge to quash the outcome of that investigation was well within his area of discretionary judgment. In light of the manner in which the investigation was pursued it seems unlikely that an investigation by the Legacy Investigation Branch of the PSNI or its successor is likely to engender public confidence.

(x) We recognise, however, that the passage of time may considerably hamper the progress of any such investigation.

[117] It is, of course, entirely appropriate in a modern democracy that civil servants should protect the political reputation of their Ministers but there is a real danger that the rule of law is undermined if that extends to protecting Ministers from investigation in respect of criminal offences possibly committed by them.

Neutral Citation No: [2019] NICA 46	*Ref:* **DEE11055**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 20/09/2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY FRANCIS McGUIGAN FOR JUDICIAL REIVEW

AND IN THE MATTER OF AN APPLICATION BY MARY McKENNA FOR JUDICIAL REIVEW

AND IN THE MATTER OF DECISIONS OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND, THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND AND THE NORTHERN IRELAND OFFICE

_____

Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

_____

SIR DONNELL DEENY

[1] This judgment deals with appeals from the decisions of Maguire J set out in his judgment of 27 October 2017. That judgment was followed by two orders of the 27 October 2017 quashing "the decision made by the Police Service of Northern Ireland on 17 October 2017" [*sic, propter* 2014]. That decision, as the judge set out at [317] of his judgment, was not to take further steps to investigate the question of identifying and if appropriate prosecuting those responsible for criminal acts arising from the authorisation of the application of five techniques on internees, "the hooded men", prohibited by Article 3 of the European Convention on Human Rights and domestic law.

[2] I am unable to fully agree with the judgment of Morgan LCJ and Stephens LJ which I have recently received in draft and I set out my reservations in this judgment. I will not seek to replicate the extensive discussion of the facts and the issues set out in the judgment of the learned trial judge and in the judgment of

Morgan LCJ and Stephens LJ. As to the latter I agree with their view that the cross-appeals made by the appellants should be dismissed, as the original applications were by the trial judge, save in respect of the decision of 17 October 2014.

[3] For convenience I will address the findings summarised at paragraph [116] of the judgment of Morgan LCJ and Stephens LJ.

[4] I cannot agree with them that it is appropriate for this Court to make a finding that the treatment to which Mr McGuigan and the late Mr McKenna were subject is to be re-labelled at this time as torture forty eight years after the events.

[5] The first port of call regarding this issue is to see what the trial judge actually said. He sets this out clearly at paragraphs [252] to [254] of his judgment:

> "[252] With this last point in mind, it seems likely to the court that if the events here at issue were to be replicated today the outcome would probably be that the ECtHR would accept the description of torture in respect of these events as accurate. This view was expressed by Lord Bingham in his speech in the House of Lords decision in *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 at paragraph [53] and the court is willing to give considerable weight to this pronouncement, given its source. But the court also recalls the views of the Strasbourg Court in *Selmouni v France* (2000) 29 EHRR 403 when it said that 'certain acts which were classified in the past as inhuman and degrading treatment as opposed to torture could be classified differently in future…the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies' (paragraph 101).
>
> [253] In reaching its conclusion, the court also bears in mind that in recent times there is universal condemnation of torture and the principle of proscribing it is viewed as a peremptory norm which cannot be deviated from. Authority for this can be found in the A case (referred to above at paragraph [252]).
>
> [254] These points support a conclusion that the sort of activity with which this case is concerned has a

> larger dimension than an ordinary criminal offence and would amount to the negation of the very foundations of the Convention."

[6] It can be seen therefore there that he did not make a finding that it was torture but, in the light of the decisions he cites and the higher standards prevailing nowadays that such a finding would have been likely. For this appellate court to over-rule him on this would be contrary to *DB v Chief Constable* [2017] UKSC 7.

[7] The judge did not have the benefit of the decision of the European Court of Human Rights on this issue. Ireland, on 4 December 2014, renewed its application to the European Court of Human Rights in relation to the treatment of the hooded men. They argued that documents which had come to light might have had a decisive influence on the court's judgment in respect of Article 3 of the Convention at the time of its original decision of 18 January 1978. The judgment of the court, *Ireland v The United Kingdom* [Application No. 5310/71] was delivered on 20 March 2018 some months after the delivery of the judgment of Mr Justice Maguire.

[8] The court, by a majority of six to one, dismissed the request for revision of the judgment to substitute a finding of torture for one of "inhuman and degrading treatment" which the five techniques applied to these men undoubtedly and deplorably constituted. It is right to bear in mind that the European Court, as set out at paragraphs [120] and [121], had to be satisfied that there had been an error of fact put before the previous court which was unknown to that court. But it went on to say that even assuming that the earlier court had been misled by Dr L. the court "considers that it cannot be said that it might have had a decisive influence on the court's finding in the original judgment that the use of the five techniques constituted a practice of inhuman and degrading treatment in breach of Article 3 of the Convention but did not constitute a practice of torture within the meaning of that provision." Para [137].

[9] The court reiterated at para [122] that "legal certainty constitutes one of the fundamental elements of the rule of law which requires, *inter alia*, that where a court has finally determined an issue, its ruling should not be called into question (see *Harkins v The United Kingdom* (Dec.) [GC], no. 71537/14, &54, ECHR 2017).

[10] The principle of legal certainty is an important aspect of our own system of law. It has been the subject of relatively recent consideration by the Supreme Court in the context of the related topics of res judicata and estoppel. These authorities were considered and commented on by this court in *Teresa Jordan's Applications* [2018] NICA 23. For convenience I set out paragraphs [30] to [32] of that judgment:

> "[30] The issue of res judicata and cause of action estoppel was considered by the Supreme Court in *Regina (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2011] 2 AC 146; [2011] UKSC 1.

Delivering the judgment of the court Lord Clarke of Stone-cum-Ebony cited with approval the judgment of Diplock LJ in *Thoday v Thoday* [1964] P181 basing the doctrine on the Latin maxim 'nemo debet bis vexari pro una et eadem causa.' That might be translated as meaning that no one ought to be vexed twice for one and the same cause of action. His Lordship made it clear that the principle applied to cause of action estoppel and issue estoppel. Given that delay was only one issue in the case for recusal made by Hugh Jordan on behalf of his son before Hart J in 2009 if res judicata applies here it applies as issue estoppel.

[31] We were referred to Halsbury's Laws of England, Volume 11, relating to res judicata, paragraphs 1603 to 1628; also to Wade on Administrative Law and to Anthony 2nd Edition para 3.27. Undoubtedly there will be some limitations on the use of res judicata in public law proceedings. However, it is clear that the doctrine is, on authority, applicable in public law proceedings. Lord Clarke in Coke-Wallis cites with approval an earlier decision of the House of Lords at paragraph [27] of his judgment:

> 'In *Thrasyvoulou v Secretary of State for the Environment* [1990] 2 AC 273, where an issue was held to arise out of it a determination of a planning application, the principle was held to apply to public law proceedings. Lord Bridge (with whom the other members of the Appellate Committee agreed) stated the general principle and emphasised its fundamental importance in this way, at p. 289:
>
> > "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et

> eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudication subject to a comprehensive self-contained statutory code the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions'.
>
> The House of Lords thus stressed the importance of the res judicata principle in terms which in my opinion apply equally to cause of action estoppel and to issue estoppel."
>
> (Emphasis added)

[32] As more than one issue was being canvassed in the earlier proceedings issue estoppel is applicable

> here, as we have pointed out. We respectfully adopt the view expressed by Lord Clarke and Lord Bridge that the doctrine is generally applicable to public law, albeit subject to the need to yield to issues of illegality or public interest on appropriate occasions. The importance, highlighted by Lord Bridge, of the principle that it is in the interests of the public that there should be an end to litigation is fully applicable here. We note that Halsbury's Laws echoes that at paragraph 1605 from the above section: "It is a fundamental doctrine of all courts that there must be an end of litigation." Where a judge properly charged with an issue or cause of action has given judgment upon it, it is contrary to the public interest to have the matter reheard again unnecessarily. The Supreme Court has recently emphasised the importance of appellate courts not interfering too readily with decisions on an issue of fact by a judge at first instance: *DB v Chief Constable PSNI* [2017] UKSC 7. Consistent with that one judge should not lightly repeat the work done by another judge on a previous occasion."

[11] I fear the important maxim *interest reipublicae ut sit finis litium*, endorsed above, is not always borne in mind and that we too readily allow persons to endlessly relitigate old grievances, real, as in this case, or imagined. There is indeed a public interest in seeing an end to litigation. See *Magill v Ulster independent Clinic and Others* [2019] NICA 40, [2-3], as an illustration of addressing the tendency to re-litigate.

[12] It seems to me that for this court to make an actual finding that the deplorable conduct actually constituted torture is inappropriate in four respects. It alters a finding of fact by the judge for no good reason and is therefore contrary to *DB v UK*. Secondly, it runs counter in substance to the finding of the court with the ultimate responsibility for the vindication of the European Convention on Human Rights which chose not to make that finding, applying the appropriate test. Thirdly, it contradicts the principle of legal certainty. Fourthly, it seems to me that it is an unnecessary and otiose finding. The approach of the trial judge is to be preferred *i.e.* to find that the conduct here of the State in 1971 "had a larger dimension than an ordinary criminal offence and would amount to the negation of the very foundations of the Convention". That is a quote from paragraph [165] of the decision of this court in *Geraldine Finucane's Application* [2017] NICA. One can then proceed to consider the Convention values test in the light of that finding.

[13] To return to the summary of the judgment of Morgan LCJ and Stephens LJ [116](ii) I agree with them that the *Brecknell* test is not met here. The principal basis

relied upon by the applicants is the memorandum from Mr Merlyn Rees in 1977 saying that torture had been authorised by Lord Carrington. This is scarcely worthy of the name of evidence at all. Mr Rees was in opposition in 1971 at the time of internment. He became Secretary of State for Northern Ireland in 1974 shortly before the *soi-disant* Loyalist strike brought down the power sharing executive set up after the Sunningdale Conference. In 1977 he is therefore expressing an opinion about something done by his political opponent, Lord Carrington, in another government department, as the NIO did not then exist, six years previously. He is also doing it in the context then existing including the claim by Ireland before the European Court. Neither it nor the other material relied on by the appellants seems to me to justify a reopening of the investigation.

[14] Part of the context here is the history of this matter fully set out elsewhere. There was immediate outrage at what had happened in 1971. A committee was set up under Sir Edmund Compton. Mr McGuigan avers in his affidavit that this was something of a "white wash", which may indeed seem a reasonable comment. Certainly a further committee, this time of Privy Counsellors led by Lord Parker of Waddington, was also set up and reported on 31 January 1972. It confirmed that what had happened constituted criminal assaults. There was a dissenting opinion from Lord Gardiner putting the matter more strongly. In any event Mr Edward Heath, the then Prime Minister, on 2 March 1972 publicly stated that the techniques would not be used again. Mr McGuigan and Mr McKenna and the other hooded men all had civil actions which were apparently settled, vindicating their rights to compensation. The European Court of Human Rights considered the matter and gave judgment on 18 January 1978, following an earlier judgment by the European Commission on Human Rights. The matter was therefore very fully litigated long before searches of released archives revived interest in the topic in this century.

[15] I agree with the learned trial judge and with the Lord Chief Justice and Stephens LJ [116](iii) that the genuine connection test is also not satisfied.

[16] They question whether the Convention values test is satisfied bearing in mind the conclusion of the court in *Ireland v UK* and the extent of the investigation that has already taken place. I agree with that and would add this. The basis for a third avenue for investigation is to be found at paragraphs [149] to [151] of *Janowiec and Others v Russia* [2013] ECHR 55508/07:

> "149. The Court further accepts that there may be extraordinary situations which do not satisfy the 'genuine connection' standard as outlined above, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection. The last sentence of paragraph 163 of the *Šilih* judgment does not exclude such an eventuality,

which would operate as an exception to the general rule of the "genuine connection" test. In all the cases outlined above the Court accepted the existence of a 'genuine connection' as the lapse of time between the death and the critical date was reasonably short and a considerable part of the proceedings had taken place after the critical date. Against this background, the present case is the first one which may arguably fall into this other, exceptional, category. Accordingly, the Court must clarify the criteria for the application of the 'Convention values' test.

150. Like the Chamber, the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

151. The heinous nature and gravity of such crimes prompted the Contracting Parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order. The Court nonetheless considers that the 'Convention values' clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. Hence, a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predate the Convention. Although the Court is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the possibility of prosecuting an individual for a serious crime under international law where circumstances

> allow it, and being obliged to do so by the Convention."

[17] The trial judge was persuaded by his finding, his legitimate finding, that the triggering event here "was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention" to conclude that that test was met. But as can be seen from the paragraphs above meeting the test requires more than that. However deplorable the treatment here it is not to be equated with "war crimes, genocide or crimes against humanity" as set out by the ECtHR at paragraph [150]. To state the obvious it did not amount to murder let alone mass murder. Furthermore, in that case the court declined to find that the test was met, despite the murder of some 20,000 Polish prisoners of war by Russia in 1941. It did so principally because the Convention had not come into effect at that time. I agree that this indicates that the passage of time is a relevant consideration in seeing whether this test is applied. Indeed that is clearly the case from other decisions of the ECtHR including *Silih v Slovenia* (2009) 49 EHHR 37.

[18] The ECtHR held that the Convention values test contemplates "extraordinary situations" where there is "the need to ensure the real effective protection of the guarantees and the underlying values of the Convention". This matter has been twice before the European Court of Human Rights itself, thus meeting any such need.

[19] The mere fact that the events happened 48 years ago would very strongly point against such a course or the application of this test. So is the fact that those who authorised the techniques, whether in some lesser form or as actually applied in the brutal way they were, are either dead or, as Lord Carrington was at the time of the hearing at first instance, very elderly. He has since died. Lord Balniel M.P., as the senior Defence Minister in the House of Commons, accepted that the government had authorised the use of the techniques, as the previous Labour administration had done elsewhere; Volume 4/105/1258,1259. What is to be gained by going over this ground again? It seems to me therefore that this would be an erroneous application of the Convention values test which is to be kept for something more exceptional.

[20] I agree with the learned trial judge that there is no common law obligation identical or similar to the procedural Article 2 or 3 obligations nor imposed by customary international law, as summarised at [116](iv) and (v) of the main judgment in this court.

[21] I part company with Morgan LCJ and Stephens LJ when they conclude that the Chief Constable's response to the question posed by Mr Kelly at the meeting of the Northern Ireland Policing Board on 3 July 2014 gave rise to a legitimate expectation of the type described in the judgment.

[22] The law on legitimate expectation was recently reviewed by Lord Kerr in *Geraldine Finucane's Application* [2019] UKSC 7 at paragraphs 50-81. I quote the most relevant paragraph while bearing in mind the rest of his consideration:

> "[62] From these authorities it can be deduced that where a clear and unambiguous undertaking has been 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. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment.[1]"

[23] The first question to be considered is whether the Chief Constable did give a "clear and unambiguous undertaking" which is enforceable in law. The Amended Order 53 statement of Francis McGuigan does not contend that there was an undertaking giving rise to a legitimate expectation which has not been fulfilled. Nor does the Order 53 Statement on behalf of Mary McKenna dated 19 May 2015. Nor was this the basis of the judge's decision to quash the Chief Constable's decision contained in a letter of 17 October 2014 not to proceed further with investigation.

[24] Presumably the undertaking referred to is that to be found at page 863 of the papers and was an answer given by the Chief Constable to a question from a member of the Policing Board, Gerry Kelly. I set out the exchange:

> "Q. Following the assertion in official documents that Lord Carrington authorised the use of methods of torture in this jurisdiction, what action has the Chief Constable taken?
>
> A: The PSNI will assess any allegation or emerging evidence of criminal behaviour, from whatever quarter, with a view to substantiating such an allegation and identifying sufficient evidence to justify a prosecution and bring people to court."

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[1] There is an error later in Lord Kerr's judgment at [148] where he says that Stephens J declared that an article 2 compliant inquiry had not taken place "at the time his judgment was delivered". But in fact the judge had declared that "as of 17 March 2009" such a duty had not been complied with; see [190] of the judgment of Gillen LJ and [10] of my judgment in Finucane v Secretary of State for Northern Ireland [2017] NICA 7. My comments at [11] of my judgment related to the historical wording of the declaration made.

[25] The first thing to say about this is that it might be taken to be merely a statement of the duty on the police service to assess allegations of or evidence of criminal behaviour. It is in the most general terms. In substance it is simply a paraphrase of the statutory duty imposed on the PSNI by section 32 of the Police (NI) Act 2000. It seems to me that this is not what the courts have had in mind where we have found public authorities to have created a legitimate expectation of which they are in breach. Mr Kelly represents a political party, Sinn Fein. In that capacity he is entitled to ask this question. But in answering it the Chief Constable is somewhat like a Minister in Parliament answering a question in the House of Commons. Is every bland response of a Minister to look into something to become an undertaking enforceable in the courts? I think not.

[26] Furthermore, the question is related only to Lord Carrington and does not go further in seeking action with regard to other police officers, politicians or soldiers. There were oral exchanges at the Policing Board in June 2014 but again it does not seem to me they are of the nature to be categorised as a "clear and precise undertaking".

[27] I am also troubled by the view of my colleagues expressed at [116](vii) that the Chief Constable has not resiled from that undertaking. In the decision letter received by the appellants' solicitors on 17 October 2014 Will Kerr, Assistant Chief Constable, Crime Operations, in response to a letter from the solicitors of 14 August 2014 wrote the following:

> "This matter has been researched and reviewed by members of the Historical Enquiries Team, who have not identified any evidence to support the allegation that the British Government authorised the use of torture in Northern Ireland."

[28] It might not be an unreasonable implication from that that the PSNI considered the matter had been disposed of; they had not "resiled" from any "undertaking" but they had researched the matter as they said they would; if he gave an undertaking, which I consider he did not, he had discharged it. It is true to say that in subsequent correspondence the PSNI said they were open to consider any further evidence that came to light. It would have been preferable for ACC Kerr to give more detail at this stage of the work that had been done.

[29] I appreciate the views previously expressed by this court about the issue of independence with regard to the discharge of some of the PSNI's duties. I question whether they apply here. The report, regarding "assertions of torture" seems to me on the face of it an entirely proper, professional and informative document. It exhibits a considerable volume of documents which have been discovered by the researcher. It is not written by a police officer but by Mr Ian Clarke, an historical researcher. It does not seem to me that the issue of independence should be fatal here to the Chief Constable, via ACC Kerr implicitly saying that he was not

investigating further on 17 October 2014. *McQuillan's Application* [2019] NICA 13 is distinguishable on the facts.

[30] What was the legal duty on the Chief Constable here? The Lord Chief Justice, Stephens LJ and I are agreed that a case has not been made out either under *Brecknell* or under *Janowiec* imposing a duty on him under the Convention. He was presumably therefore acting on foot of his duties at common law and relevant legislation. It seems to me that the submissions of Dr Tony McGleenan have force in that this is an analogous situation to that of the Director of the Serious Fraud Office considered in *R (On the Application of Corner House Research and others) v Director of the Serious Fraud Office* [2008] UKHL 60. I set out the relevant paragraphs in the judgment of Lord Bingham at [30]-[32]:

> "[30] It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 141; *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330, para 23; *R (Bermingham and others) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, paras 63-64; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735-736; *Sharma v Brown-Antoine and others* [2006] UKPC 57, [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.
>
> [31] The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may

> exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of *Matalulu*)
>
> > "the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits".
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms.
>
> [32] Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

I consider Lord Bingham's summary both applicable and valuable in this context also.

[31] I dealt above with the context of this case *i.e.* the possible responsibility of a Secretary of State, as Mr Gerry Kelly enquired about, for the use of "torture" on the hooded men in 1971. All other Ministers involved in this seem to have passed on and Lord Carrington has passed on since the hearing before Maguire J. It seems to me that the police have much more pressing duties of crime prevention and law enforcement than to conduct historical research into the matters of which the appellants complain. It does not seem to me appropriate to interfere with the decision of the Chief Constable contained in the ACC letter of 17 October 2014 on discretionary grounds. This court has agreed that we are now dealing with the common law. As Lord Diplock said in *DPP v Hester* [1972] 3 All ER 1056 at 1072 common sense is "the mother of the common law." I think it is a common sense decision to take the course adopted by the Chief Constable. Certainly it is within his area of discretion and should not be interfered with by the court. With respect I do not see how the learned trial judge found it was irrational. Given the passage of

time, the elaborate investigations that have taken place in the past and the paucity of evidence that had come to light from Mr Clarke's investigation it seems to me a decision that could not possibly be described as irrational. I am not persuaded by the alternative grounds that my colleagues favour. This is not a case to which the doctrine of legitimate expectation applies, as indeed the appellants themselves considered in their Order 53 Statements. I would therefore find in favour of the Chief Constable on his appeal and reverse the decision of the learned trial judge insofar as he found against him. The decision not to investigate further as of 17 October 2014 was one the Chief Constable was entitled in law to make.