Hilary Term
[2019] UKSC 7
On appeal from: [2017] NICA 7

JUDGMENT

In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)

before

Lady Hale, President
Lord Kerr
Lord Carnwath
Lord Hodge
Lady Black

JUDGMENT GIVEN ON

27 February 2019

Heard on 26 and 27 June 2018

Appellant
Barry Macdonald QC
Fiona Doherty QC
(Instructed by Madden & Finucane)

Respondent
Sir James Eadie QC
Paul McLaughlin BL
(Instructed by Crown Solicitor's Office)

LORD KERR: (with whom Lady Hale, Lord Hodge and Lady Black agree)

Introduction

1. On the evening of 12 February 1989, gunmen burst into the North Belfast home of Patrick Finucane, a solicitor. He was having supper with his wife and three children. In their presence he was brutally murdered. He was shot 14 times. Mrs Finucane was injured by a ricocheting bullet which struck her on the ankle. This shocking and dreadful event still ranks, almost 30 years later, as one of the most notorious of what are euphemistically called "the Northern Ireland troubles".

2. Mrs Finucane and her children have waged a relentless campaign since Patrick's killing to have a proper investigation conducted into the circumstances in which he was murdered. It became clear at an early stage that those responsible were *soi-disant* loyalists. Before long, it also emerged that there was collusion between Mr Finucane's murderers and members of the security forces. Various investigations about the murder and the nature of the collusion have been conducted. None of these has uncovered the identity of those members of the security services who engaged in the collusion nor the precise nature of the assistance which they gave to the murderers.

(i) The police investigation

3. An investigation into Mr Finucane's death was launched by the Royal Ulster Constabulary (RUC), then the police force in Northern Ireland. A number of suspects were arrested and interviewed in the days following the murder. None was charged with a criminal offence. The initial RUC investigation did not consider the possibility of collusion between the security services and the loyalists who killed Mr Finucane.

4. On 4 July 1989 a gun was found during a police search in the Shankill Road area of Belfast. It proved to be one of the weapons used to murder Mr Finucane. It had been stolen by a Colour Sergeant of the Ulster Defence Regiment (UDR) in 1987. In April 1990 three people were convicted of possession of the gun and of membership of the banned paramilitary organisation, the Ulster Freedom Fighters, but they could not be linked to Mr Finucane's murder. The Colour Sergeant who had stolen the weapon sold it to a man called Ken Barrett. In 2004 Barrett pleaded guilty to the murder of Mr Finucane.

(ii) The inquest

5. When an inquest into Mr Finucane's death was held on 6 September 1990, his widow, Geraldine, was stopped from giving evidence about threats to her husband's life which, it is claimed, had been made to some of his clients by police officers who were interviewing them at Castlereagh Holding Centre, a police detention centre where suspects were interviewed. The coroner conducting the inquest ruled that, as the law then stood, his inquiry was confined to the cause and immediate circumstances of the death. (The inquest was held, obviously, before the decision of the House of Lords in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.)

(iii) The Stevens and Langdon Inquiries

6. In September 1989, John Stevens (then the deputy chief constable of the Cambridgeshire constabulary, later Sir John, and yet later Lord Stevens) was appointed by the chief constable of the RUC to investigate allegations of collusion between the security forces and loyalist paramilitaries. This investigation did not specifically examine the murder of Patrick Finucane. Sir John Stevens reported to the chief constable in April 1990.

7. On 17 May 1990, the Right Honourable Peter Brooke MP, the then Secretary of State for Northern Ireland, made a statement to the House of Commons relating to Sir John Stevens' investigation. He said that as a result of that inquiry, 94 people had been arrested and that 59 had been reported for or charged with offences. As a consequence of the investigation 45 individuals were later convicted of terrorist related offences - mostly for possession of materials likely to be of use to terrorists. Those convicted included 32 members of the Ulster Defence Association (UDA), a loyalist paramilitary group, and 11 members of the UDR. The report of Sir John Stevens which led to these events has never been published.

8. It has later been established that Sir John Stevens was seriously obstructed in his investigations. Instructions were given to deny him access to intelligence information. Material about advance warnings to UDA members in relation to pending arrests was deliberately withheld.

9. The first Stevens Inquiry did lead to the identification of Brian Nelson, however. He was an informer for the security services, in particular, an organisation within the British army known as the Force Research Unit (FRU). Although the army had denied running any agents in Northern Ireland, the

discovery of Nelson's fingerprints on intelligence documents put paid to that particular denial. Nelson had been recruited by FRU. On their instigation, he infiltrated the UDA and became its chief intelligence officer. His role involved the gathering of information about possible targets for assassination.

10. Nelson was arrested by the Stevens team on 12 January 1990. He made statements to the investigators about his activities. In due course, he was charged with a number of terrorist crimes and in January 1992 he pleaded guilty to five charges of conspiracy to murder, two of collecting information likely to be useful to terrorists, 12 charges of aiding and abetting others to possess or collect information likely to be useful to terrorists and one charge of possession of a firearm with intent. He was sentenced to ten years' imprisonment. None of his convictions related to the murder of Patrick Finucane.

11. At Nelson's sentencing hearing, the commanding officer of FRU, identified as Colonel J, gave evidence on his behalf. He claimed that Nelson had given information to FRU which had been instrumental in saving many lives. This evidence is highly controversial. It has been the subject of examination in a number of reports concerning Mr Finucane's murder. These shall be discussed later in this judgment.

12. On 11 February 1992, Mrs Finucane began a civil action against the Ministry of Defence and Brian Nelson. She later commenced proceedings against the police. These proceedings remain outstanding.

13. On 8 June 1992 a second Stevens Inquiry was instituted. This followed the broadcast on the BBC of a programme entitled, "Dirty War", in which it was claimed that Nelson had been involved in a number of murders and that he had been responsible for targeting Patrick Finucane. It was also reported that he had passed Mr Finucane's photograph to the UDA.

14. Interim reports from the second Stevens Inquiry were submitted to the Director of Public Prosecutions in April and October 1994 and a final report was delivered on 24 January 1995. No prosecutions were instituted on foot of those reports. Again, this inquiry did not address directly the killing of Mr Finucane.

15. In 1999, a non-governmental organisation, British Irish Rights Watch, provided the Secretary of State for Northern Ireland with a paper entitled, "Deadly Intelligence: State Collusion with Loyalist Violence in Northern Ireland". This made a number of claims including that there had been state collusion in the murder of Patrick Finucane. This, the paper asserted, had taken place as a result of

contact and exchanges between Brian Nelson, his FRU handlers and the RUC Special Branch.

16. Shortly after this, the Secretary of State asked a Home Office civil servant, Anthony Langdon, to conduct an inquiry into whether a fresh investigation of these claims was warranted. Among the conclusions reached by Mr Langdon were these:

(1) There were grounds for believing that one of his army handlers had assisted Nelson in the targeting of a murder victim;

(2) The same handler knew nothing about the threat to Patrick Finucane before his murder;

(3) But the handler had refused to answer police questions about these matters;

(4) Colonel J's evidence at Nelson's trial had misled the trial judge;

(5) The FRU gave Nelson intelligence information in some instances;

(6) Nelson's handlers were well aware of his efforts to support the UDA in targeting republicans;

(7) It was probable that Nelson had mentioned something about Patrick Finucane to his handler before the murder.

17. A third Stevens Inquiry was set up in May 1999. This focused on the murder of Mr Finucane and another man and the question of collusion between members of the security services and loyalist paramilitaries.

18. The following month a man called William Stobie was charged with the murder of Mr Finucane. During a court hearing, Stobie's solicitor stated that he had twice given information about the intended attack on Mr Finucane and that on neither occasion had this information been acted on. The case against Stobie collapsed when a vital witness refused to give evidence and all charges against him were dismissed in November 2001. A short time later, on 12 December 2001, he was murdered by, it is believed, loyalist paramilitaries.

19. On 19 June 2002 the BBC broadcast a programme called, "A licence to murder." In the course of this, a reporter, John Ware, interviewed Sir John Stevens and asked, "Was what was done in the name of the state defensible?" He replied "... the activities of the so called double agent Nelson … of course [were] inexcusable." Detective Sergeant Nicholas Benwell, a member of the Stevens Inquiry team from 1989 to 1994, was also interviewed and asked "… did ... the Stevens Inquiry come to the conclusion that military intelligence was colluding with their agent ... to ensure that the loyalists shot the 'right' people?" He replied, "Yes, that was the conclusion we came to ... there was certainly an agreement between his handlers and Nelson that the targeting should concentrate on what they described as the 'right' people."

20. On 17 April 2003 Sir John Stevens published a report which contained what was described as an overview of his investigation into the murder of Patrick Finucane. In it he said, at para 4.6, that he had "... uncovered enough evidence to lead me to believe that the murder ... of Patrick Finucane could have been prevented." He also concluded that "... the RUC investigation of Patrick Finucane's murder should have resulted in the early arrest and detection of his killers." He found, at para 4.9, there had been collusion in the murder and said, "... the co-ordination, dissemination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected. Crucial information was withheld from senior investigating officers. Important evidence was neither exploited nor preserved."

21. As to William Stobie, Sir John said, at para 2.7:

> "It has now been established that before the murder of Patrick Finucane, Stobie supplied information of a murder being planned. He also provided significant information to his Special Branch handlers in the days after the murder. This principally concerned the collection of a firearm. However, this vital information did not reach the original murder inquiry team and remains a significant issue under investigation by my Inquiry team."

22. The third Stevens Inquiry also examined the role of Brian Nelson in the murder of Patrick Finucane. The overview report stated, at para 2.12:

> "... Nelson was aware [of] and contributed materially to the intended attack on Finucane. It is not clear whether his role in the murder extended beyond passing a photograph, which

> showed Finucane and another person, to one of the other suspects. Nelson was rearrested and interviewed. There was no new evidence and he was not charged with any further offences."

23. While the third Stevens Inquiry was taking place, in the summer of 2001, political talks between the United Kingdom and Irish governments were held at Weston Park, Staffordshire. It was decided that a judge of international standing would be appointed to undertake a thorough investigation of allegations of collusion in a number of cases including that of Patrick Finucane. The statement about the appointment of this judge contained the following:

> "If the appointed judge considers that in any case [the inquiry is not provided with a] sufficient basis on which to establish the facts, he or she can report to this effect with recommendations as to what further action should be taken. *In the event that a Public Inquiry is recommended in any case, the relevant Government will implement that recommendation*." (Emphasis supplied)

(iv) The Strasbourg case

24. Mrs Finucane applied to the European Court of Human Rights (ECtHR) for a declaration that the United Kingdom government had failed to carry out a proper investigation into her husband's death and for an order requiring the government to conduct a full public inquiry into its circumstances. On 1 July 2003, ECtHR held that there had not been an inquiry into the death of Patrick Finucane which complied with article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). The first two Stevens inquiries, it held, since they did not involve an investigation of the killing of Mr Finucane, could not meet the requirements of article 2. Quite apart from this, the reports had not been made public and Mrs Finucane had not been informed of their findings. The necessary elements of public scrutiny and accessibility by the family of Mr Finucane to information about the circumstances in which he came to be killed were therefore absent.

25. As to the third inquiry, which was concerned with the Finucane murder, ECtHR held that, since it had begun ten years after the event, it could not meet the requirement that effective investigations be commenced promptly and conducted with due expedition. The court also held that the absence of reasons for decisions not to prosecute in controversial cases was not conducive to public confidence and

could deny the victim's family access to information about a matter of crucial importance to them and prevent any legal challenge of the decision.

26. The court observed that, despite the suspicions of collusion, no reasons had been given at the time for the various decisions not to prosecute. No information was made available to Mrs Finucane or to the public that might have provided reassurance that the rule of law had been respected. In these circumstances, the requirements of article 2 could not be met, unless the information was forthcoming in some other way. That had not happened. In sum, the court held that the proceedings for investigating the death of Patrick Finucane had failed to provide a prompt and effective investigation into the allegations of collusion by security personnel.

27. ECtHR did not find it necessary to address further allegations of a lack of accessibility by the family to the Stevens 3 investigations or of a lack of independence between that inquiry and the Police Service of Northern Ireland (PSNI) (which had replaced the RUC). The court found that there had been a failure to comply with the procedural obligation imposed by article 2.

28. ECtHR referred to the circumstance that it had not previously indicated that a government should hold a fresh investigation in response to a finding of a breach of the procedural obligation under article 2. On that account, it decided that it was not appropriate to do so in this case. It stated that it could not be assumed that a future investigation could usefully be carried out or that such an investigation would provide any redress, either to the victim's family or by way of providing transparency and accountability to the wider public. The lapse of time, the effect on evidence and the availability of witnesses might make such an investigation an unsatisfactory or inconclusive exercise. The court stated that it fell to the Committee of Ministers acting under article 46 to consider what might practicably be required by way of the government's obligation to comply with its article 2 obligations.

(v) The Committee of Ministers' consideration of the case

29. Article 46.2 of ECHR provides that the final judgment of ECtHR shall be transmitted to the Committee of Ministers, which shall supervise its execution. The Committee of Ministers is the Council of Europe's statutory decision-making body. It is made up of the ministers for foreign affairs of member states or their permanent diplomatic representatives in Strasbourg.

30. The Secretariat of the Commission published its assessment of the case on 19 November 2008. It suggested that the requirements of public scrutiny and accessibility by the family to information about Mr Finucane's death had been met. Crucially, this decision was based on a detailed statement by the Public Prosecution Service (PPS) of the reasons that it had decided not to institute further prosecutions and the absence of challenge to those reasons. (The Director of Public Prosecutions had issued a statement on 25 June 2007, having taken the advice of independent senior counsel. The statement recorded that, following his examination of the third Stevens Inquiry report, the Director had concluded that the test for prosecution was not met in relation to any other possible criminal proceedings relating to Mr Finucane's murder, apart from those which had already been taken against Stobie and Barrett. In particular, the Director's statement continued, the available evidence was insufficient to establish that any member of the FRU had agreed with Nelson or anyone else that the murder was to take place; that any RUC officer had agreed with Stobie or Barrett that Mr Finucane was to be murdered; or that there was misfeasance in public office by members of the FRU in the handling of Nelson as an agent).

31. In the assessment report of 19 November 2008, it was also stated that the Committee of Ministers might strongly consider encouraging the UK authorities to continue discussion with Mrs Finucane on the terms of a possible inquiry into her husband's murder. That recommendation was accepted by the Committee of Ministers on 17 March 2009 and it was decided that the examination of the specific measures taken by the UK on foot of the decision of ECtHR should be closed. Importantly, however, this decision was made on the basis that the UK was actively working on proposals for establishing a statutory public inquiry.

(vi) Judge Cory's inquiry

32. Several years before the Committee of Ministers' consideration of the case, on foot of the agreement made at Weston Park (see para 23 above), Judge Peter Cory, a retired justice of the Supreme Court of Canada, was appointed in June 2002 to conduct an inquiry into the murders of a number of people, including that of Mr Finucane. His letter of appointment contained an assurance that, in the event that he recommended a public inquiry into any of the deaths, the government would abide by that recommendation.

33. Judge Cory's report was published on 1 April 2004. Among his conclusions, in relation to the killing of Patrick Finucane, were these:

(i) A public inquiry into his murder was required;

(ii) The weight to be attached to Brian Nelson's statement to the Stevens Inquiry could only be determined at a hearing where the evidence was tested by examination and cross-examination in a public forum;

(iii) The documentary evidence which Judge Cory had considered was contradictory regarding the extent to which FRU had advance knowledge of the targeting of Mr Finucane;

(iv) While the inference could be drawn that FRU did indeed have prior information that Mr Finucane had been targeted, a decision on whether that was so could only be properly dealt with at a public inquiry;

(v) In 1981 the security services had been prepared to disregard warnings that Mr Finucane was in imminent and serious danger. They had chosen this path in order to protect the identity of one of their agents;

(vi) The failure of the security services in June 1985 and December 1988 to warn Mr Finucane that he was in danger was significant and "might well be sufficient in [itself] to warrant a public inquiry. In any event [it] must be taken into account in considering the overall or cumulative effect of all the relevant documents. That cumulative effect leads to a conclusion that a public inquiry should be held to examine the issues raised in this case";

(vii) There was evidence of a persisting attitude within the RUC special branch and the FRU that they were not bound by the law and were above its reach. The relevance and significance of this should be considered at a public inquiry.

34. By any standard, these amounted to compelling reasons for the holding of a public inquiry. Since prosecutions in the Finucane case were pending at the time that Judge Cory reported, however, an inquiry into his death could not be instituted immediately. But the Secretary of State for Northern Ireland made a statement that the government would "set out the way ahead" for the inquiry when the prosecutions ended.

35. Following Barrett's conviction, the Secretary of State wrote to Mrs Finucane, outlining a statement which he intended to make to the House of Commons on 23 September 2004. That letter stated that, in the inquiry into Mr Finucane's killing, "the tribunal would be tasked with uncovering the full facts of what happened and will be given all of the powers and resources necessary to fulfil that task. In order that the inquiry can take place speedily and effectively and in a

way that takes into account the public interest, including the requirements of national security, it would be necessary to hold the inquiry on the basis of new legislation which will be introduced shortly."

36. The "new legislation" referred to here was to be the Inquiries Act 2005. Before its introduction (on 7 June 2005), public inquiries were held under the Tribunals of Inquiry (Evidence) Act 1921. It is the government's case that this would have provided a wholly unsuitable vehicle for an inquiry into the death of someone such as Mr Finucane. Since national security issues were bound to arise, applications for public interest immunity (whereby certain matters that had to remain confidential would be excluded from evidence) would be an inevitable feature. This, the government suggested, would restrict the ambit of an inquiry such as was proposed into Mr Finucane's murder. The new legislation was intended to remove the need for a public interest immunity procedure in public inquires. All relevant information could be considered, subject to restrictions on further publication.

37. It had been argued on behalf of Mrs Finucane that the 2005 Act had been enacted specifically to deal with the proposed public inquiry into her husband's death. This was refuted by the government. It was pointed out that the 2005 Act had been preceded by a public consultation exercise conducted by the Department of Constitutional Affairs and a parliamentary inquiry carried out by the administration committee of the House of Commons. Moreover, the Act had been subject to post legislative scrutiny on two occasions.

38. In a note submitted to this court after the hearing of the appeal, the appellant explained that she had understood from correspondence that she had received from the government and the terms of the Secretary of State's statement to the House of Commons that the 2005 Act had to be introduced to allow the inquiry into her husband's death to proceed. She now accepts that all that the government had intended to convey was that the inquiry could not take place until the legislation had been enacted.

39. Mrs Finucane objected strenuously to the proposal that the inquiry into her husband's death be conducted under the terms of the 2005 Act. Section 19 of that Act allows ministers to impose restrictions on (i) attendance at an inquiry or any particular part of an inquiry; and (ii) disclosure of any evidence or documents given, produced or provided to an inquiry. The case made by Mrs Finucane was that, at least potentially, this removed substantial control of the inquiry process from the person chairing the inquiry and transferred it to ministerial edict.

40. Various discussions and efforts to obtain agreement and compromise took place over the years that followed. These proved unavailing.

41. In May 2010, following the general election, a new coalition government was formed and discussions about the inquiry into Patrick Finucane's murder took a different turn - indeed, a series of different turns. These have been well and fully described in the judgment of Gillen LJ in the Court of Appeal in Northern Ireland (Gillen LJ, Deeny J and Horner J [2017] NICA 7) in paras 41-61 and need not be repeated extensively here.

42. In broad summary, these include:

(i) The openly stated views of the Secretary of State for Northern Ireland, the Rt Hon Owen Paterson MP, and the Prime Minister, the Rt Hon David Cameron MP, that, generally, there should not be long-running, open-ended and costly inquiries into the past in Northern Ireland. Indeed, a statement to that effect had appeared in the Conservative party's manifesto for the 2010 election;

(ii) On 3 November 2010, Mr Paterson wrote to the Prime Minister, outlining the process which he intended to follow in relation to deciding whether it was in the public interest to establish a public inquiry into the death of Patrick Finucane. He referred to the policy that, in general, there should not be expensive, lengthy inquiries. He also provided information about the cost of recent inquiries. He made it clear, however, that the policy would not necessarily dictate the outcome - each case would be considered on an individual basis;

(iii) Following a meeting between the Prime Minister, the Attorney General and Mr Paterson, the last-named made a statement to Parliament on 11 November 2010, in which he said that he intended to embark on a two-month consultation period on the question of whether it was in the public interest to establish a public inquiry into the death of Patrick Finucane. This would involve discussions with the family. The views of public authorities and the public in general would be sought. Six particular factors would be taken into account:

- The commitment given in 2004;

- Public concern arising from the reviews and investigations that had occurred;

- The experience of other inquiries established after the Weston Park Commitments;

- The delay which had occurred since the 2004 announcement and the potential length of the inquiry;

- Political developments that have taken place in Northern Ireland since 2004;

- The potential costs of any inquiry and the current pressure on government finances.

(iv) Meetings between Mrs Finucane's legal representatives and the government occurred in January and February 2011. These centred on whether a *Baha Mousa*-type inquiry would be acceptable to the family. (The *Baha Mousa* inquiry, conducted by the Rt Hon Sir William Gage under the 2005 Act (2011) (HC 1452) had devised a protocol which provided that questions of disclosure should be decided by Sir William, using the restriction order procedure but that this did not prevent the use of a restriction notice by a minister). Some time after the meetings had taken place, representatives of the family indicated that, of the various formats for an inquiry that had been discussed, the *Baha Mousa* format "would be the most appropriate". The government contends, however, that the Finucane family did not respond to the question of whether a restriction notice could, if necessary, continue to be issued by a minister, something which was possible under the *Baha Mousa* protocol;

(v) Various briefing papers were submitted to ministers and a succession of meetings between civil servants and ministers took place between April and July 2011. In one significant email of 9 July 2011, Sir Jeremy Heywood, later the cabinet secretary, stated:

> "Does the PM seriously think that it is right to renege on the previous Government's clear commitment to hold a full judicial inquiry? This was a dark moment in the country's history - far worse than anything that was alleged in Iraq/Afghan. I cannot really think of any argument to defend not having a proper inquiry."

As Gillen LJ observed in para 59 of his judgment, Sir Jeremy moderated that opinion somewhat in later correspondence, but it nevertheless remains a striking expression of view from a senior civil servant;

(vi) The decision not to hold a public inquiry was made at a meeting of relevant ministers and civil servants on 11 July 2011. The prime minister chaired the meeting. Minutes of the meeting recorded him as having made the following points:

- The primary objective was to find the truth.

- There were strong reasons to conclude that the public interest in securing this objective would be better served by a process other than a potentially lengthy, costly and procedurally difficult public inquiry which might be unworkable in light of national security issues.

- His preference was for a speedier, paper-based review of all existing material by an independent person.

- There would be discussion with Mrs Finucane in advance of any announcement.

43. On 12 October 2011, the Secretary of State for Northern Ireland made a statement to the House of Commons that the former United Nations war crimes prosecutor, Sir Desmond de Silva, had been asked to conduct an independent review of any state involvement in Mr Finucane's murder. He was to have unrestricted access to documents and was free to meet anyone whom he felt could help with his inquiry.

The de Silva Review (2012) (HC 802-I)

44. The terms of reference for Sir Desmond's review were these:

- To draw, as required, from the extensive investigations that had already taken place;

- To carry out a non-statutory, document-based review without oral hearings and produce a full account of any involvement by the army, the RUC, the security service or other UK government body in the murder of Patrick Finucane;

- To have full access to the archives of the various Stevens' inquiries and to all government papers;

- His work was to be carried out independently of government;

- He was not asked to, nor was he given the power to, hold oral hearings although, if he wished to meet people who could assist with the work, that was a matter for him.

45. The manner in which Sir Desmond carried out his review, the people he met, the documents which he considered and the conclusions which he reached are comprehensively summarised in paras 64-67 of Gillen LJ's judgment in the Court of Appeal and need not be repeated verbatim here. The salient points are these:

(i) Mrs Finucane did not participate in Sir Desmond's review and did not meet him despite having been invited to do so;

(ii) He sought and obtained a wide range of documents from government departments and other sources. All relevant government agencies had co-operated fully with him. In consequence, he saw and considered many more documents than those which had been made available to Sir John Stevens and Judge Cory. He had had access to sensitive intelligence files. The reason that Sir John Stevens and Judge Cory had not received many of the documents which had been made available to Sir Desmond was not explained;

(iii) He met a number of individuals who had served in the army, the RUC and other security services. He also received a number of written submissions;

(iv) He found that there was a "clear" and "wilful" failure on the part of successive governments in the 1980's to establish and enforce a proper framework for the "running" of agents;

(v) He found that Brian Nelson's desire to target republicans was well known to the FRU. His handlers had supplied him with information which had been used by him in the selection of targets and there was inadequate supervision by the security service of the contact between FRU and Nelson;

> What Sir Desmond described as his "most serious" finding was the failure of RUC special branch to react to the intelligence which Nelson had supplied. FRU claimed to have supplied this information to special branch but they insisted that they had not received it. Sir Desmond considered that FRU's version was more likely to be accurate.

(vi) The RUC, the security service and the secret intelligence service failed to warn Patrick Finucane of known and imminent threats to his life in 1981 and 1985;

(vii) One or more officers in the RUC probably did propose Mr Finucane as a target for loyalist terrorists in December 1988;

(viii) Barrett received intelligence about Patrick Finucane from a police source;

(ix) Security service "propaganda initiatives" may have caused Mr Finucane to be identified as a legitimate target for loyalist terrorists;

(x) RUC officers, RUC special branch and army officers obstructed the Stevens investigations and lied to his investigation team.

46. Sir Desmond's overall conclusion about Patrick Finucane's murder was expressed in this passage of his report:

> "115. … I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the state. The significance is not so much, as Sir John Stevens concluded in 2003, that the murder could have been prevented, though I entirely concur with this finding. The real importance, in my view, is that a series of positive actions by employees of the state actively furthered and facilitated his murder and that, in the aftermath of the

> murder, there was a relentless attempt to defeat the ends of justice."

…

> "116. My Review of the evidence relating to Patrick Finucane's case has left me in no doubt that agents of the state were involved in carrying out serious violations of human rights up to and including murder. However, despite the different strands of involvement by elements of the state, I am satisfied that they were not linked to an over-arching state conspiracy to murder Patrick Finucane. Nevertheless, each of the facets of the collusion that were manifest in his case - the passage of information from members of the security forces to the UDA, the failure to act on threat intelligence, the participation of state agents in the murder and the subsequent failure to investigate and arrest key members of the West Belfast UDA - can each be explained by the wider thematic issues which I have examined as part of this Review."

47. Another discrete aspect of Sir Desmond de Silva's review requires particular attention. In the course of his review, Sir Desmond expressed a wish to speak to one of Brian Nelson's former handlers. She has been referred to as "A/13". Sir Desmond dealt with this somewhat cryptically at the end of the passage in his report dealing with those persons from whom he had received oral evidence, para 1.48. He merely observed, "I also sought to meet with one of Brian Nelson's former handlers (A/13), though in the event this was not to be possible due to medical reasons pertaining to the handler."

48. In the course of the hearing of the appeal before this court, the question arose as to whether any medical evidence had been supplied to support the claim that this individual's medical condition made it impossible for her to meet Sir Desmond. This sparked an exchange of post-hearing submissions from the parties. The respondent made the following reply:

> "Following consultation with the solicitor to the Review and also the Review archive, it has been ascertained that the availability of the handler for interview was the subject of an exchange of correspondence between the Review and the MOD and also internal consideration by the Review team. In late 2011/early 2012, the Review made a request, via the MOD, to interview the handler in order both to provide

> information to the review and also to comment upon the evidence of others. An indication was also given by the Review that adverse inferences may be drawn if an interview was declined without good reason. In response, the Review was advised by the MOD (following communication with the witness) that the handler '… has been suffering from stress for some time and is very frail.' The MOD also advised that the handler recognised the Review's desire for an interview but had expressed a belief that an interview would be 'seriously detrimental' to their health.
>
> In April 2012 the Review advised the MOD that it looked increasingly unlikely that Sir Desmond would wish to interview the handler, but that if he decided that he would be assisted by such a meeting 'he would ordinarily need to be satisfied by medical evidence that such an interview would indeed be seriously detrimental' to their health."

49. In response to this information, the appellant has made the following written submissions:

> "The clear impression given by the report … is that Sir Desmond did wish to meet with the handler but that such a meeting was not possible for medical reasons. However, it now appears (from the note provided [by the respondent] to the court) that in fact Sir Desmond did not consider it necessary to meet with this individual (although the reason for his apparent change of mind and the wording of the report are not explained). In any event, the note clarifies that the 'medical reasons' which prevented the meeting were self-reported and indeed came to Sir Desmond, not from A/13 herself, but from the MOD. Those reasons were not, at any stage, checked or verified by reference to a medical professional.
>
> …
>
> The importance of this handler's evidence lies in the question that was central to Sir Desmond's review ie whether members of the Army's Force Research Unit (by whom Mr Nelson was engaged) had advance knowledge of the plan to murder Patrick Finucane and the extent of that knowledge.

…

FRU's advance knowledge is one of the most important unanswered questions about the murder.

…

Judge Cory addressed this issue at para 1.134 and following of his report … His interpretation of the material led him to say… 'it does seem reasonable to infer both that: Nelson would have been aware of the targeting of Patrick Finucane and that he would have given that information to his handlers'.

…

Mr Langdon … concluded …

> '… There are grounds for thinking that one of the Army handlers assisted Nelson in the targeting of one murder victim (McDaid) and also that the same handler knew something about the threat to Patrick Finucane before his murder (despite the absence of any reference to such knowledge in the contemporary Army records). The handler concerned has refused to answer police questions about these matters.'

…

[Sir Desmond] admitted that the issue of what Nelson had told his handlers in advance of the murder was a 'complex and challenging [question] to answer' … However he then went on to disagree with the inferences and (provisional) conclusions drawn by Judge Cory (and Mr Langdon) by reference to the same material the judge had seen and with additional material comprising of (*sic*) submissions by the MOD and A/05 and an interview with A/05, which material, unsurprisingly, denied that Nelson had provided advance information about the murder.

…

> In these circumstances, and on any analysis, the state of knowledge of Nelson's surviving handler … was crucial. She was clearly an important potential witness for Sir Desmond's review."

The grounds of challenge

50. The appellant claims that she had a legitimate expectation that a public inquiry into her husband's death would be held. This, she says, is based on the unequivocal assurance given to her by the then Secretary of State for Northern Ireland and his statement to the House of Commons on 23 September 2004.

51. It was for the government to show that there were valid grounds for reneging on the promise made to Mrs Finucane. It had failed to do that. On the contrary, all the relevant evidence pointed to the decision not to hold the inquiry being a sham. The basis on which it had been suggested that this was a decision taken in the public interest was spurious, the appellant claims. Moreover, the process of consultation and discussions (outlined in paras 41-43 above) was entirely cosmetic. The outcome had been predetermined.

52. The process which the government announced was not followed, the appellant contends. Although it had been stated that the decision whether to establish a public inquiry was "primarily a matter for the Secretary of State for Northern Ireland", in the event, the process was driven by the Prime Minister, the appellant claims. The Secretary of State, after the various consultations and discussions that he had undertaken, had identified two possible courses: to have a statutory inquiry with clear time and cost controls or not to hold an inquiry at all. Although these options had been described as the "only two viable potential ways forward ...", a third option emerged during a meeting between the Secretary of State and the Prime Minister on 5 May 2011. This was a reiteration of the suggestion made by the Prime Minister on 5 November 2010, namely, that "an independent person [should] carry out a rapid examination of the details of the case ... but stopping short of a full public inquiry." This, the appellant argues, demonstrates that there was no genuine adherence to the process which the government had announced would take place.

53. It is further argued that the failure to establish a public inquiry constitutes a violation of the appellant's rights under article 2 of the ECHR and section 6 of the Human Rights Act 1998 (HRA). This was not advanced as a freestanding

argument for a declaration that the investigations into Mr Finucane's death which have so far taken place are not sufficient to constitute an article 2 compliant inquiry. Rather, the argument was made in support of the appellant's claim that the government should be held to its promise of a public inquiry.

54. Finally, the appellant sought to introduce in the hearing before this court a further ground which had not been advanced in the courts below. It was suggested that the practice of accepting affidavit evidence from government officials in proceedings challenging ministerial decisions should be amended. The affidavit evidence of civil servants as to the circumstances in which the decision not to hold a public inquiry should not be accepted, the appellant claimed.

Legitimate expectation

55. In *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1568-1569, Bingham LJ described the concept of legitimate expectation in this way:

> "So if, in a case involving no breach of statutory duty, the [public authority] makes an agreement or representation from which it cannot withdraw without substantial unfairness to the [citizen] who has relied on it, that may found a successful application for judicial review … If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it."

56. In what has subsequently come to be regarded as the leading case on substantive legitimate expectations, the concept was considered by the Court of Appeal in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. Acknowledging a contemporary controversy surrounding the court's role in legitimate expectations cases, Lord Woolf MR described three categories of case, at para 57:

> "(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury

> grounds (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This has been held to be the effect of changes of policy in cases involving the early release of prisoners: see *In re Findlay* [1985] AC 318; *R v Secretary of State for the Home Department, Ex p Hargreaves* [1997] 1 WLR 906. (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it (see *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629) in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires. (c) *Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy*." (Emphasis added)

57. Shortly after the decision in *Coughlan*, the Court of Appeal had occasion to again consider the reach of substantive legitimate expectation in *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115. At p 1130 Laws LJ said:

> "As it seems to me the first and third categories explained in the *Coughlan* case [2000] 2 WLR 622 are not hermetically sealed. The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review."

58. The key factor in *Coughlan* was, Laws LJ said, the limited number of individuals affected by the promise in question. Significantly, so far as concerns the present appeal, he also said at p 1131:

> "The more the decision challenged lies in what may inelegantly be called the macro-political field, the less

> intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

59. Laws LJ considered the evolving case law in this field in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, albeit on an expressly obiter basis - see para 67. In explaining the basis for substantive legitimate expectations, he made these observations at para 68:

> "It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement - to describe what may count as good reason to depart from it - as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

Laws LJ also returned in para 69 to the theme of decisions not to fulfil an undertaking for policy reasons falling within the "macro-political" field. I will consider his remarks on this subject in the next section of this judgment.

60. The subject of substantive legitimate expectation arose again in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755. At para 35, Laws LJ said:

> "… the notion of a promise or practice of present and future substantive policy risks proving too much. The doctrine of substantive legitimate expectation plainly cannot apply to every case where a public authority operates a policy over an appreciable period. That would expand the doctrine far beyond its proper limits. The establishment of any policy, new or substitute, by a public body is in principle subject to *Wednesbury* review. But a claim that a substitute policy has been established in breach of a substantive legitimate expectation *engages a much more rigorous standard*. It will be adjudged, as I have foreshadowed, *by the court's own view of what fairness requires*. This is a principal outcome of this court's decision in *Ex p Coughlan* (see in particular paras 74, 78, 81 and 82). It demonstrates the importance of finding the reach of substantive legitimate expectation." (Emphasis added)

61. At para 68 of the same case, Sedley LJ made these observations:

> "A duty to consult before modifying policy may arise from an explicit promise to do so. … But there is no equivalent expectation that policy itself, and with it any substantive benefits it confers, will not change. It follows that the most that the beneficiary of a current policy can legitimately expect in substantive terms is, first, that the policy will be fairly applied or disapplied in his particular case, and secondly that if the policy is altered to his disadvantage, the alteration must not be effected in a way which unfairly frustrates any reliance he has legitimately placed on it."

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.

63. In this case, it was argued for the respondent that it was incumbent on Mrs Finucane to show that she had suffered a detriment. That argument simply does not avail in this instance, since the question of detriment can only arise, if it arises at all, in the context of a substantive legitimate expectation. Here the promise made did not partake of a substantive benefit to a limited class of individuals (as, for instance, in *Ex p Coughlan*); it was a policy statement about procedure, made not just to Mrs Finucane but to the world at large.

64. The onus of establishing that a sufficiently clear and unambiguous promise or undertaking, sufficient to give rise to a legitimate expectation, is cast on the party claiming it - see, for instance, *In re Loreto Grammar School's Application for Judicial Review* [2012] NICA 1; [2013] NI 41, para 42 *et seq*. In *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1, para 37, Lord Dyson said:

> "The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too."

65. The respondent in the present case sought faintly to argue that the statements made by the government were not sufficiently unconditional and devoid of qualification to give rise to a legitimate expectation. Stephens J and the Court of Appeal rejected that argument, and, in my judgment, they were right to do so.

66. At para 64, Stephens J said:

> "... there was a promise which was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry into the death of Patrick Finucane would be held ... The only relevant qualification to that promise was that the public inquiry had to be recommended by Judge Cory. As soon as that recommendation was made then there was a substantive legitimate expectation that a public inquiry would be held."

67. In the Court of Appeal Gillen LJ at para 76 said:

> "We are satisfied that the Government made to the appellant a promise to hold a public inquiry that was clear, unambiguous and devoid of relevant condition subject only to the qualification that it required to be recommended by Judge Cory."

68. In the printed case for the appellant, at para 74, the various undertakings given by government ministers and the Prime Minister between 3 March 2004 and 7 May 2008 are set out. They need not be repeated here. It is quite clear that, individually and cumulatively, they amount to an unequivocal undertaking to hold a public inquiry into Mr Finucane's death. As pointed out in para 35 above, the critical undertaking given by the government was that the public inquiry would have to be conducted under new legislation - in due course the 2005 Act. That there was a plain and explicit undertaking that a public inquiry would take place cannot be doubted, however.

69. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, at para 60, Lord Hoffmann summarised the relevant principles:

> "The relevant principles of administrative law were not in dispute between the parties and I do not think that this is an occasion on which to re-examine the jurisprudence. It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. *It is not essential that the applicant should have relied upon the promise to his detriment*, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131." (Emphasis added)

70. For reasons that will shortly appear and for those given at para 63 above, it is unnecessary for me in this case to decide whether it is a requirement that there be a reciprocal undertaking by the person or group to whom the promise is made or that they should suffer a detriment in order to sustain a claim for substantive

legitimate expectation. But, if it had been necessary to decide that point, I would have concluded that it was not.

71. Lord Carnwath has provided, in his judgment in this case, an explanation of his remarks in *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17; [2016] 1 WLR 3383. It is clear that those remarks were obiter - see the leading judgment of Lord Neuberger of Abbotsbury in the same case at para 40, where he said that, "for present purposes … it is unnecessary for the Board to consider the law on this difficult and important topic more fully".

72. I would disagree with any suggestion that it must be shown that the applicant suffered a detriment before maintaining a claim for frustration of legitimate expectation for a fundamental reason. A recurring theme of many of the judgments in this field is that the substantive legitimate expectation principle is underpinned by the requirements of good administration. It cannot conduce to good standards of administration to permit public authorities to resile at whim from undertakings which they give simply because the person or group to whom such promises were made are unable to demonstrate a tangible disadvantage. Since the matter does not arise, however, it is better that the point be addressed in a future case when it is truly in issue.

73. I turn now, therefore, to consider the circumstances in which it is open to a public authority to decide not to comply with a previously given undertaking.

Resiling from the undertaking

74. Stephens J found that the considerations outlined in the Secretary of State's statement to Parliament on 11 November 2010 (set out in para 42(iii) above) "were overriding interests which, as far as the decision maker was concerned, justified the frustration of the expectation." - para 166. He held that the decision to resile from the undertaking "was clearly concerned with macro-political issues of policy." - para 167.

75. The reference to "macro-political issues" derived from the judgment of Laws LJ in *Nadarajah*. At para 69 of the judgment in that case, Laws LJ said:

> "… where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. … On the

> other hand where the government decision-maker is concerned to raise wide-ranging or 'macro-political' issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact."

76. Where political issues overtake a promise or undertaking given by government, and where contemporary considerations impel a different course, provided a bona fide decision is taken on genuine policy grounds not to adhere to the original undertaking, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it.

77. The circumstances in which the change of heart on the part of the government as to holding a public inquiry occurred have been described in paras 41 to 43 above. The appellant has argued that the vaunted investigation as to the need for the public inquiry which had been promised was a sham; that the outcome was fixed; that the proposal that the Secretary of State for Northern Ireland be in overall charge of the inquiries was ignored; and that the Prime Minister effectively took over those discussions and drove them to a conclusion which he personally wanted to achieve.

78. These are serious charges and would require clear evidence before they could be accepted - see Richards LJ in *R (N) v Mental Health Review Tribunal (Northern Region)* [2005] EWCA Civ 1605; [2006] QB 468, para 62. There is no reason to doubt the genuineness of the conviction of the appellant as to the reasons which she believes prompted the government to renege on the promise that she had been given. But, however strongly held is her belief as to the circumstances in which the decision not to hold the inquiry was taken, this cannot be a substitute for the unambiguous evidence that is needed to vindicate it.

79. On the question of the implementation of a predetermined conclusion Gillen LJ set out the unanimous view of the members of the Court of Appeal at para 134(i) of his judgment:

> "We found no evidence of a pre-determined adherence to a view that there would be no more open and costly inquiries into the past which therefore dictated the outcome of this

> matter. On the contrary, it was clear from the statements made by the Prime Minister, the briefing papers provided to him and the statements made by the [Secretary of State for Northern Ireland] that … the policy was that whilst generally against open-ended, long running and costly public inquiries into the past in Northern Ireland these decisions should be made on a case by case basis. We find that there was not a fixed policy which excluded the possibility of variations on a case by case basis. …"

Stephens J had made similar findings in para 195 of his judgment.

80. As to the argument that the process had been taken over by the Prime Minister and driven by him to a conclusion which he particularly favoured, Gillen LJ said at para 134(ii):

> "We do not find evidence that the process was driven by the Prime Minister. The fact of the matter is that the Ministerial Code emanating from the Cabinet Office of May 2010 at para 1.10 makes it clear that the Prime Minister must be consulted in good time about any proposal to set up major public inquiries under the Inquiries Act 2005. Apart from all the accepted conventions of collective Cabinet decisions, it would have been extraordinary if the Prime Minister had not been consulted on this matter. Once he was consulted, it would be contrary to all the promptings of reason and good sense if he was deprived of the right to forthrightly state a view on the outcome of the process or to make a suggestion. He is required neither to adopt a traceless presence nor a state of remote unavailability as the final decision is taken. The officials clearly played an important role in advising both the Prime Minister and the [Secretary of State for Northern Ireland] as to the various options and indeed to provide advice as to eventual outcomes. …"

Again, Stephens J had reached a similar conclusion in paras 197-202 of his judgment.

81. For my part, I consider that these findings cannot be faulted. There is simply no sustainable evidence that the process by which the decision was taken was a sham or that the outcome was predetermined. As to the role played by the Prime Minister, there are indications that he was strongly convinced that a costly,

open-ended inquiry would ensue if the promise made to Mrs Finucane was kept. And it appears that he played an important, if not indeed a controlling, role in the discussions which led to the establishing of the de Silva review. He was prepared to disregard (or, at least, not accept) the strongly worded recommendation of Sir Jeremy Heywood. But there is nothing untoward about any of this. The decision as to whether a public inquiry into Mr Finucane's death should take place was a matter of considerable political importance. As Gillen LJ said, it would be extraordinary if the Prime Minister had not been consulted. Having been consulted, the part that he played and the influence which he exerted were matters for his political judgment. This part of the appellant's appeal fails, in my view.

Article 2 of ECHR

82. Article 2 of ECHR provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

83. It is well settled that article 2 gives rise to two species of obligation on the part of the state, one substantive, the other procedural. Lord Phillips of Worth Matravers PSC in *In re McCaughey's application for judicial review* [2012] 1 AC 725, in a pithy description of the nature of the obligations, referred, at para 2, to ECtHR's decision in *McCann v United Kingdom* (1995) 21 EHRR 97 and said, "article 2 by implication [gives] rise not merely to a substantive obligation on the state not to kill people but, where there was an issue as to whether the state had broken this obligation, a procedural obligation on the state to carry out an effective official investigation into the circumstances of the deaths ('the procedural obligation')." (Evolving human rights jurisprudence, both from Strasbourg and domestically, has, of course, established that the procedural obligation to investigate deaths can extend beyond those deaths in which state authorities are alleged to be implicated - see, for instance (Application No 32967/96) *Calvelii and Ciglio v Italy*, January 17, 2001 at para 53; (Application No 53749/00), *Lazzarini and Ghiacci v Italy*, November 7, 2002; *Angelova and Iliev v Bulgaria* (2007) 47 EHRR 236; and *Byrzykowski v Poland* (2006) 46 EHRR 32, para 117.)

84. Patrick Finucane's death occurred 11 years and eight months before the coming into force of the HRA in October 2000. Section 6 of HRA provides that it is unlawful for a public authority (such as a court) to act in a way which is incompatible with a Convention right. Could Mrs Finucane maintain an action in the domestic courts under the HRA when it was not in force at the time of her

husband's murder? To answer that question, one must turn to cases which have dealt with that subject from 2004 onwards.

85. The principal issue before the House of Lords in *In re McKerr* [2004] 1 WLR 807 was whether, on the proper interpretation of HRA, section 6 gave rise to a continuing procedural obligation, notwithstanding that the death had occurred before the coming into force of HRA. The House unanimously held that it did not.

86. Following this decision, ECtHR, in a series of cases, examined the question whether the procedural obligation under article 2 was indissociable from the substantive obligation, and whether it might in certain circumstances endure beyond the date on which the rights under article 2 became available to an applicant. That examination focused on two principal, but overlapping, areas: first, whether, although the death occurred before the relevant date (usually the date of accession of the member state to the ECHR), there were circumstances which continued to animate the right; and secondly, whether events occurring after the relevant date were sufficient to inspire its revival.

87. In a different context from article 2, the Grand Chamber addressed the question of its temporal jurisdiction in *Blečić v Croatia* (2006) 43 EHRR 48. The claimant complained of violation of article 8 as a result of being deprived of a protected tenancy. The Supreme Court of Croatia dismissed her claim on 15 February 1996. She then lodged a constitutional complaint with the Constitutional Court, which was dismissed on 8 November 1999. Croatia had acceded to the Convention on 5 November 1997. Before ECtHR, the state objected that the Strasbourg court had no jurisdiction to hear the applicant's complaint. The Grand Chamber held, at para 82, that it was "essential to identify, in each specific case, the exact time of the alleged interference". Since the complaint to the Constitutional Court did not constitute part of the alleged interference (because it was an attempt to obtain a remedy) the Strasbourg court had no jurisdiction. This was because all the matters complained of had occurred before the date of accession.

88. This decision provides an example of the impossibility of breathing new life into a right whose currency had passed, when all the circumstances *constitutive of the interference* with the right had occurred before the relevant date. But, as will be seen, this is but part of the story.

89. *Brecknell v United Kingdom* (2007) 46 EHRR 42 provides a contrast to *Blečić*. In that case the applicant was the widow of a man killed in Northern Ireland by loyalist gunmen in 1975. Investigations took place but were concluded in 1981. In 1999 and thereafter further evidence came to light. This indicated that

there might have been collusion between the police force, the Ulster Defence Regiment (then part of the security forces in Northern Ireland) and loyalist paramilitaries. The applicant contended that this new evidence should give rise to the procedural obligation to conduct an article 2 compliant inquiry into her husband's death.

90. In *McCaughey* Lord Phillips portrayed this as a claim that the article 2 obligation was "revived" - see para 39 of that case. In fact, the applicant is not recorded in the Grand Chamber's judgment as having sought a "revival" of the obligation - see paras 54-59 of the *Brecknell* judgment, outlining the applicant's arguments. The government resisted the claim, inter alia, on the ground that the obligation should not be revived - see paras 61 and 63.

91. The Grand Chamber in *Brecknell* identified the principal issue as to "whether, and in what form, the procedural issue to investigate is revived" - para 66. So, the fact that this was not how the applicant framed her case may not be of critical importance in this instance. I would merely observe that if the notion of revival suggests that the right had gone into abeyance and required some special circumstance to disinter it, whereas the question whether it remained in existence suggests a state of suspended animation merely requiring some newly discovered evidence to animate it, these concepts might, in certain circumstances, give rise to different approaches. But this may be of academic interest only in the present appeal.

92. The Grand Chamber's decision is explicable on either basis. It said at para 71:

> "… 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 …"

93. In due course it will be necessary to consider whether, following Sir Desmond de Silva's review and the various inquiries which succeeded it, there remained a need further to investigate the circumstances of Mr Finucane's murder. The Court of Appeal divided on this issue, Deeny and Horner JJ agreeing with Stephens J that the *Brecknell* test was satisfied, Gillen LJ believing that it was not. Discussion of that issue must naturally take place in the next section of this judgment, but it is worth observing here that in para 70 of the Grand Chamber's judgment, the court, while pointing out that the revival of the duty to investigate

would not be prompted by any allegation, however inconsequential, said that "given the fundamental importance of [article 2], 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. In an important decision in this field, *Šilih v Slovenia* (2009) 49 EHRR 37, the Grand Chamber ruled that article 2 imposed, in certain circumstances, a freestanding obligation in relation to the investigation of a death which applied even where the death had occurred before the member state ratified the Convention. In that case the applicants were the parents of a young man who died as a result of medical negligence on 19 May 1993. They made a number of attempts to bring criminal proceedings, all of which were unsuccessful, the final disposal coming in July 2003. Civil proceedings were also dismissed in July 2008. They then lodged a constitutional appeal with the Constitutional Court. The outcome of that appeal was still pending when the Grand Chamber gave its judgment.

95. Slovenia acceded to ECHR on 28 June 1994. The task that the Grand Chamber faced, therefore, was described in para 152 of its judgment as being to:

> "… determine whether the procedural obligations arising under article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date [the date of accession to the Convention] or alternatively whether they are so inextricably linked to the substantive obligation that an issue may only arise in respect of deaths which occur after that date."

96. That question was emphatically answered in para 159 where the Grand Chamber said that: "… the procedural obligation to carry out an effective investigation under article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of article 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 article 2 capable of binding the state even when the death took place before the critical date."

97. In para 163, the Grand Chamber was at pains to point out that there had to be, "a genuine connection between the death and the entry into force of the Convention" in the member state. On that account, "a significant proportion of the

procedural steps required … will have been or ought to have been carried out after the critical date". A caveat to that requirement was entered. The Grand Chamber said (again at para 163) 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".

98. The Grand Chamber's judgment in *Šilih* was of pivotal importance in *McCaughey*. At para 50 of his judgment in the latter case, Lord Phillips said:

> "… The obligation to comply with the procedural requirements of article 2 is to apply where 'a significant proportion of the procedural steps' that article 2 requires … in fact take place after the Convention has come into force. This appears to be a free-standing obligation. There is no temporal restriction on the obligation other than that the procedural steps take place after the Convention has come into force. Thus if a state decides to carry out those procedural steps long after the date of the death, they must have the attributes that article 2 requires."

99. In the *McCaughey* case it was decided to hold an inquest into the deaths of Mr McCaughey and another man 20 years after their deaths. Lord Phillips decided that that decision gave rise to an international obligation to ensure that the inquest complied with article 2 of ECHR (para 51). At para 61 he said:

> "... In so far as article 2 imposes any obligation, this is a new, free-standing obligation that arises by reason of current events. The relevant event in these appeals is the fact that the coroner is to hold an inquest into Martin McCaughey's and Dessie Grew's deaths. *Šilih v Slovenia* establishes that this event gives rise to a free-standing obligation to ensure that the inquest satisfies the procedural requirements of article 2. That obligation is not premised on the need to explore the possibility of unlawful state involvement in the death. The development of the law by the Strasbourg court has accorded to the procedural obligation a more general objective than this, albeit that in the circumstances of these appeals state involvement is likely to be a critical area of investigation."

100. At para 93, to like effect, Lady Hale said that, "if there is now to be an inquiry into a death for which the state may bear some responsibility under article 2, it should be conducted in an article 2 compliant way."

101. The inquiries into the circumstances of Mr Finucane's death have taken place, (for the most part, and certainly for the most important part of the inquiries) well after 2 October 2000. The respondent submitted, however, that the observations in *McCaughey* must be viewed in light of the later decision of the ECtHR in *Janowiec v Russia* (2013) 58 EHRR 30. In that case, the respondent claimed, the Grand Chamber identified three limitations on the jurisdiction to examine pre-ratification (and, by analogy, in the United Kingdom, pre-October 2000) claims.

102. The first of these was that the duty arose only in relation to procedural acts - in other words, the steps which may be undertaken within the domestic legal system which are capable of discharging the investigative duty. It did not extend to "other types of inquiries that may be carried out for other purposes, such as establishing a historical truth" - para 143 of *Janowiec*.

103. The second limitation in *Janowiec*, the respondent claimed, was that the need for a genuine connection between the death and the critical date was primarily a temporal one. At para 146 of *Janowiec* the Grand Chamber said:

> "... the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the 'genuine connection' standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years … Even if, in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be done on condition that the requirements of the 'Convention values' test have been met."

104. Accordingly, the respondent argued, even if the period of time was less than ten years, but the majority of investigative steps or the most important of these took place prior to ratification, (or in the case of the United Kingdom, the coming into force of HRA), the ECtHR would not be in a position to scrutinise them (and, by corollary, UK courts would not be able to give effect to rights under HRA) since neither could examine acts or omissions occurring prior to ratification or the coming into force of the 1998 Act. In this regard, the respondent relied on the following passages from *Janowiec*:

> "147. ... This is a corollary of the principle that the court's jurisdiction extends only to the procedural acts and omissions occurring after the entry into force. If, however, a major part of the proceedings or the most important procedural steps took place before the entry into force, this may irretrievably undermine the court's ability to make a global assessment of the effectiveness of the investigation from the standpoint of the procedural requirements of article 2 of the Convention.
>
> 148. Having regard to the above, the court finds that, for a 'genuine connection' to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force."

105. The third "limitation" identified by the respondent is the "Convention values" test, referred to by the Grand Chamber in *Janowiec* in paras 149 and 150:

> "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 para 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."

106. The respondent submitted that the Convention values test was not relevant in this case. The appellant had to succeed on the genuine connection test. This contained, the respondent argued, two elements: the lapse of time between the triggering event and the critical date had to be reasonably short and the majority of investigative steps or the most important of these had to have taken place after the coming into force of HRA.

107. I consider that a genuine connection has been established between the triggering event and the critical date in this case. As Stephens J pointed out in para 34 of his judgment, ECtHR in *Mocanu v Romania* (2015) 60 EHRR 19, para 206 referred to "a reasonably short lapse of time that should not *normally* exceed ten years" (emphasis added). And in *Mladenović v Serbia* (Application No 1099/08) judgment of 22 May 2012 the court considered it could examine the procedural aspect of article 2 (and found a violation) in relation to a death that had occurred in 1991 when Serbia's ratification of the Convention took place some 13 years later in 2004.

108. A period of ten years or less between the triggering event (the murder of Mr Finucane) and the critical date (the coming into force of the HRA) is not an immutable requirement. The time which elapsed between the two dates is a factor of importance but, when taken into account with the circumstance that the vast bulk of noteworthy inquiry into his death has taken place since the HRA came into force (Stevens III, the Cory inquiry and the de Silva review), the significance of the time lapse diminishes. Nothing in *Janowiec* detracts from the proposition in *Šilih* that the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case.

109. Moreover, in *McCaughey* it was made clear that an inflexible ten-year limit was not essential and the consideration that most of the investigation took place after the critical date could compensate for the length of the time lapse - see paras 118, 119 and, in particular, 139 where Lord Dyson said:

> "The deaths were ten years before the HRA came into force. That is a relevant factor to be taken into account when considering whether there is a sufficient connection between

> the deaths and the coming into force of the Act. But *Šilih v Slovenia* 49 EHRR 996 shows that it is not the only factor. In particular, of considerable importance is the fact that at that date the investigation had been initiated, but a significant proportion of the procedural steps required to be taken had not yet been taken. In that respect, the facts of the case are similar to the facts in *Šilih v Slovenia*. This is the feature of *Šilih v Slovenia* which is emphasised by the majority at para 165 and by Judge Lorenzen at para O-I4 of the EHRR report."

Significantly, we were not invited to depart from the decision in *McCaughey*.

110. It was argued for the Secretary of State that the principles in *Šilih* and *Janowiec* relate to the ECtHR's temporal jurisdiction for deaths that have occurred before a state's ratification of the Convention and that the question of their application to domestic law remains undecided. I do not accept that proposition. It is quite clear from the judgments of the majority in *McCaughey* that the reasoning in *Šilih* was adopted in order to inform the approach to the question of the availability of the procedural right to an article 2 inquiry under HRA, where the triggering event preceded its coming into force. References to this abound in the judgments of the majority - see, for instance, para 61, per Lord Phillips, para 77, per Lord Hope of Craighead, paras 89 and 93, per Lady Hale, para 119 of my judgment and paras 131 and 139, per Lord Dyson.

111. Sir James Eadie QC for the respondent, founded his argument that the applicability of the principles in *Šilih* and *Janowiec* to domestic law remains undecided, on the decision of this court in the case of *R (Keyu)v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355. In particular, he fastened on statements made by Lord Neuberger of Abbotsbury at paras 98 and 99 of his judgment. It is unnecessary to set out Lord Neuberger's observations in those paras. It is quite clear that he was there examining the question of whether it had been decided by the court in *McCaughey* that the decision in *McKerr* remained good law. The remarks of Lord Neuberger, attributing to Lord Phillips, Lord Dyson and me the view that *McKerr* was no longer good law were not without controversy - see my comment on them at paras 247-248. But that is nothing to the point. The plain and inescapable fact is that this court in *McCaughey* unequivocally adopted the decision in *Šilih* as indicating the principled approach in domestic law to the question of genuine connection.

112. Stephens J found that, in the event that a genuine connection was not established, the appellant could have recourse to the "Convention values" test - see para 35 of his judgment. The Court of Appeal, per Gillen LJ, at para 167, observed

that this test set "an extremely high hurdle" but that the court would not go so far as to say that Stephens J's finding was "necessarily unreasonable".

113. The issue of what constitutes, as said in *Janowiec* 58 EHRR 30, para 149, a "need to ensure the real and effective protection of the guarantees and the underlying values of the Convention" is not an uncomplicated one. It did not occupy much of the oral submissions that were made in this case. In light of that and of my conclusion in relation to the existence of a genuine connection, I propose to say nothing more about it.

Brecknell v United Kingdom

114. As I have said before, (para 93 above) the Grand Chamber in *Brecknell* was careful to point out that not every allegation, however trivial, would revive the duty to investigate. But it was equally emphatic that it behoved state authorities to be sensitive to any information or material which might cast doubt on conclusions reached on foot of earlier investigations. Significantly moreover, it said that an "earlier inconclusive investigation" should be pursued further in order to meet the procedural obligation under article 2.

115. It is to be recalled that the Grand Chamber stated (at para 71 of its judgment - see para 92 above) that where 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 an unlawful killing*, the authorities were under an obligation to take further investigative measures.

116. In the Court of Appeal Gillen LJ decided that what he described as "the *Brecknell* test" was not satisfied. He referred to the discussion by Stephens J of the meetings that Sir Desmond de Silva had had with a number of individuals including Colonel J and to the judge's finding that the evidence that emerged from those meetings was sufficient to revive the article 2 procedural obligation. Gillen LJ disagreed with this finding for a number of reasons.

117. In the first place, he considered, at para 171, that the "new and significant" information which had emerged from these meetings might not "avail the purposes of further criminal investigations". One can accept that this might be so, but it is to be remembered that what the Grand Chamber said in *Brecknell* was that any information or material *which has the potential* to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further would prompt a revival of the procedural obligation.

118. In the report on his review Sir Desmond had said that he was "left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the state" - see para 46 above. This sentence should not be isolated from the overall context of Sir Desmond's report. He had firmly concluded that state agents were involved in the targeting of Mr Finucane. But it matters not as to the precise nature of the doubt entertained by him. The doubt that he expressed must therefore be as to the precise role that state agents played. That was sufficient to warrant further investigation. The doubt, whatever its nature or source, required to be dispelled. The "strands of involvement by elements of the state" needed to be recognised and explained. These were necessary ingredients of an article 2 compliant inquiry.

119. These conclusions are not impelled by the notion that the outcome of the investigation into Mr Finucane's death is unsatisfactory, although it plainly is. They speak to the shortcomings of the procedures that have beset the inquiries that have so far taken place. Those shortcomings have hampered, if not indeed prevented, the uncovering of the truth about this murder. They are discussed in paras 139-141 below.

120. The second reason given by Gillen LJ for his disagreement with Stephens J on the applicability of the *Brecknell* principle was that the new material had been reviewed by PSNI and "it has not afforded any basis for further investigation or prosecution".

121. The investigations carried out by PSNI into the new material uncovered by Sir Desmond were described by Detective Superintendent Jason Murphy in three affidavits. In the first of these, in June 2016, he said that the Chief Constable had decided that that material should be examined to see whether it "provided any opportunities to progress the investigation into Mr Finucane's murder". An investigating officer was appointed to carry out that task. He concluded that there was no reason to review the decision of the PPS in 2007 (see para 30 above).

122. In his first affidavit, Detective Superintendent Murphy had also described various investigations that were continuing by way of reconsideration of all the material that had been examined in the course of the de Silva review. This included the archive of documents generated by the various Stevens inquiries, material that had been provided by government departments and agencies, the security service, the Northern Ireland Office, the Cabinet Office, the Ministry of Defence, the Home Office, the office of the Attorney General of England and Wales, and PSNI. At the time of swearing the first affidavit, the detective superintendent felt unable to say whether this further review might lead to "progress" in the investigation into Mr Finucane's death.

123. In his second affidavit (31 October 2016) the detective superintendent said that the review had been completed. All of the material described by Sir Desmond de Silva as "new and significant" had been assimilated and investigations into this material had been conducted. Detective Superintendent Murphy was then in the process of preparing a report for the PPS.

124. In a final affidavit the officer said that the new material did not relate to individuals "alleged to have any direct role in Mr Finucane's murder". He also considered whether the material "provided any opportunities to pursue criminal investigations for other offences such as conspiracy or incitement to murder and misconduct in public office". He then submitted reports to the PPS on his conclusions. The deputy director of public prosecutions, in a cryptic affidavit of 13 June 2018, deposed that, because of the absence of any further investigations by PSNI, no new prosecutorial decisions had been made.

125. It is important to note that the police and the prosecuting authorities have been concerned to decide whether the "opportunity for further prosecutions" in relation to Mr Finucane's murder had arisen. This is understandable, for it is the principal purpose of both agencies to determine whether criminal offences have been committed and, if so, whether evidence is available that would justify embarking on a criminal prosecution. But, although decisions by the police and the prosecuting authorities are relevant to the question whether the state's procedural obligation under article 2 of ECHR to investigate the circumstances of a death has been met, they cannot alone be determinative of that issue.

126. In a series of cases ECtHR has made it clear that the obligation to protect the right to life under article 2 of the Convention requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force - see, among many others, *Branko Tomašić v Croatia* (Application No 46598/06), para 62, (15 January 2009); *Oğur v Turkey* [GC], (Application No 21594/93), para 88, ECHR 1999-III); *Mladenović v Serbia* (Application No 1099/08) (22 May 2012).

127. The "opportunity to prosecute" as a result of evidence uncovered by Sir Desmond de Silva's review does not foreclose on the question whether an effective investigation into Mr Finucane's death, compliant with article 2, has taken place. The need for an effective investigation into a death goes well beyond facilitating a prosecution.

128. In *Ramsahai v The Netherlands* (Application No 52391/99) ECHR 2007-II, 191 ECtHR considered what effectiveness in this context means. At para 324, the court said:

> "In order to be 'effective' as this expression is to be understood in the context of article 2 of the Convention, an investigation into a death that engages the responsibility of a contracting party under that article must firstly be adequate. *That is, it must be capable of leading to the identification and punishment of those responsible*. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard." (Emphasis added)

See also in this context *Nachova v Bulgaria* [GC], (Application Nos 43577/98 and 43579/98), paras 110-113, ECHR 2005 VII, 1.

129. It was pointed out by the respondent that the dissenting judges in *Ramsahai* had said that "a lacuna or deficiency in an investigation will give rise to a breach of the procedural obligation only if it is such as to undermine its capability of establishing the facts surrounding the killing or the liability of the persons responsible. Whether it does so must be assessed in the light of the particular circumstances of each case." - joint partly dissenting opinion of Judges Costa, Sir Nicolas Bratza, Lorenzen and Thomassen at para 3.

130. In so far as it might be suggested that the majority in *Ramsahai* had implied that *any* deficiency in the investigation might give rise to a breach of the article 2 procedural obligation, that is of no relevance in the present case. It is precisely because of the constraints placed on Sir Desmond de Silva's inquiry that the *capability* of his review establishing vital facts such as the identity of those involved was undermined. The reasons for this are given in para 134 below.

131. Being capable of identifying those responsible must involve having the means to identify those implicated in the death. It should also include the will and the opportunity to expose them. The important issue in this case is whether Sir Desmond de Silva's review had these critical attributes. Much of what he says in his conclusions is qualified or expressed in terms of generality. For instance, he said that the RUC, the security service and the secret intelligence service failed to warn Patrick Finucane of known and imminent threats to his life in 1981 and 1985. Those officers who were in a position to give that warning (and whose plain duty it was to do so) are not identified. The circumstances in which they failed in their duty are not explained.

132. Sir Desmond concluded that one or more officers in the RUC probably did propose Mr Finucane as a target for loyalist terrorists in December 1988 - see para 45(vii) above. No officers have been identified. If it is true that they did propose Mr Finucane as a target, this was a serious criminal offence. It bears directly on the proper investigation of his murder. But, at present, the issue remains entirely unresolved.

133. It was concluded that Ken Barrett had received intelligence about Patrick Finucane from a police source (para 45(viii) above). That police source has not been identified. The circumstances in which the information was imparted have not been disclosed. So far as one can tell, the "police source" has escaped any sanction; has not been made accountable; and has avoided all the legal consequences which should have flowed from his or her activity.

134. In deciding whether an article 2 compliant inquiry into Mr Finucane's death has taken place, it is important to start with a clear understanding of the limits of Sir Desmond de Silva's review. His was not an in-depth, probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what had actually happened. Sir Desmond did not have power to compel the attendance of witnesses. Those who did meet him were not subject to testing by way of challenging probes as to the veracity and accuracy of their evidence. A potentially critical witness was excused attendance for questioning by Sir Desmond. All of these features attest to the shortcomings of Sir Desmond's review as an effective article 2 compliant inquiry. This is not to criticise the thoroughness or rigour of Sir Desmond's review. To the contrary, it is clear that it was conducted with commendable scrupulousness. But the very care with which he carried out his review and the tentative and qualified way in which he has felt it necessary to express many of his critical findings bear witness to the inability of his review to deliver an article 2 compliant inquiry. It is therefore unsurprising that on 17 May 2011, in a memorandum prepared by the Northern Ireland Office, it was accepted that Sir Desmond's review would not be article 2 compliant. Sir James Eadie claimed that, although it was not necessary to do so, if the review by Sir Desmond was taken with what had gone before, it did fulfil the requirements of article 2. For the reasons that I have given, I do not accept that submission.

135. I cannot therefore agree with Gillen LJ's second reason for suggesting that the present case did not meet the *Brecknell* test. As already observed, the Grand Chamber in *Brecknell* had made it clear that earlier inconclusive investigations should be pursued further in order to meet the procedural obligation under article 2. Sir Desmond de Silva's review is, unmistakably, an instance of inconclusiveness.

136. Gillen LJ's third reason for concluding that the *Brecknell* test was not met was, at para 171, that it was not possible "to make any meaningful assessment of the value of the [new and significant] information to the overall investigation".

137. This, with respect, misses the critical point. That is whether an effective investigation has taken place. For the reasons that I have given, that has not occurred. It is unnecessary - and, indeed, misconceived - to speculate on what assessment one might make of the new material. It is on the deficiencies of the inquiries that have been conducted to date that one must focus. Likewise, it is wrong to be distracted from that essential task by the decision not to undertake further prosecutions.

The requirements of an article 2 compliant inquiry

138. An article 2 compliant inquiry involves providing the means where, if they can be, suspects are identified, and, if possible, brought to account. It should also provide the opportunity to recognise, if possible, the lessons to be learned so that a similar event can be avoided in the future. In *Jordan v United Kingdom* (2001) 37 EHRR 2, a case which concerned the shooting of Pearse Jordan in 1992 in Belfast by an RUC officer, ECtHR found a violation of article 2 in respect of failings in the investigative procedures after Mr Jordan's death. At para 107 the court said:

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. … *Any deficiency in the investigation which undermines its ability to establish* the cause of death or *the person or persons responsible* will risk falling foul of this standard." (Emphasis added)

139. Sir Desmond de Silva's conclusion that he was left "in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the state" is, in itself, an eloquent statement about the inadequacy of the inquiries into Mr Finucane's murder and the incapacity of those inquiries to fulfil the requirements of article 2, for the reasons discussed at paras 118 and 119 above. It has proved to be incapable of establishing the identity of the persons implicated in the murder of Mr Finucane. A proper, inquiry along the lines described in preceding paras was the *means* by which an article 2 compliant inquiry would have been achieved.

140. The proposition that the procedural obligation was not one of result but of means does not, therefore, signify in this instance. Sir Desmond's conclusions are not criticised for their failure to identify the people involved in bringing about Mr Finucane's murder. Rather, the means by which he might have done so had been denied him. I have dealt with these in para 134 above. If he had been able to compel witnesses; if he had had the opportunity to probe their accounts; if he had been given the chance to press those whose testimony might have led to the identification of those involved in targeting Mr Finucane; if the evidence of the handler had been obtained, or alternatively, objective, medical evidence of her incapacity to provide it had been forthcoming, one might have concluded that all means possible to identify those involved had been deployed. Absent those vital steps the conclusion that an article 2 compliant inquiry into Mr Finucane's death has not yet taken place is inescapable.

141. I reach that opinion notwithstanding the decision of the Committee of Ministers. As I have observed (at para 31 above), the decision of that body to close the examination of the specific measures taken by the UK on foot of the decision of ECtHR was made on the basis that the government was actively working on proposals for establishing a statutory public inquiry. Quite apart from that consideration, however, the most significant inquiry into Mr Finucane's death took place after the Committee of Ministers had reached its decision. It is to the nature of the investigation which came after the Committee's decision that the closest attention must be paid, in order to decide if an inquiry sufficient to meet the procedural requirement of article 2 has been held.

142. Section 2(1)(d) of HRA requires a court which is determining a question which has arisen in connection with a Convention right to take into account a decision of the Committee of Ministers. The respondent submits that this is a paradigm example of where this court should not only take into account the decision of the Committee but abide by it. I do not accept that submission. The context in which the Committee took its decision is different from that in which this court is asked to decide the question. And it is different in two material and important respects.

143. At the time that the Committee was considering the matter, there was still in distinct prospect a public inquiry in which the full examination of all the circumstances of Mr Finucane's murder would take place. That is no longer the position. Indeed, the scene has shifted significantly since the time that the Committee considered the matter. As a result of Sir Desmond de Silva's review, it is now clear that many important questions remain unanswered. It would be simply wrong to fail to acknowledge the significant change in circumstances which has occurred since the Committee considered the issue fully ten years ago.

144. This does not involve, as the respondent argued, a finding that the article 2 obligations of the United Kingdom are more extensive in the domestic legal order than in Strasbourg. It is no more than a contemporaneous judgment on circumstances which differ widely from those which the Committee had to confront. There is no warrant for concluding that the Committee, if faced with those change of circumstances today, would reach the same conclusion as it did in 2008.

145. The second difference between the Committee's decision and that which the court is required to reach is that the former's conclusion partakes - at least to some extent - of a political judgment. By contrast, the court's decision must be guided solely by its perception of the correct legal principles to be applied.

146. The respondent suggested that a failure to follow the Committee of Ministers' decision would be "the antithesis of the 'mirror principle' and cannot have been the intention of Parliament when enacting the HRA." This argument can be dispatched in short order. The mirror principle (developed in such cases as *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 and *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 is concerned with the need for national courts to follow a "clear and constant line of jurisprudence" from the Strasbourg court. The philosophy underlying the principle is that it would be anomalous if a national court's decision as to the content of a particular Convention right should be at odds with a judicial pronouncement from ECtHR. That is a world away from saying that a decision by the Committee of Ministers pre-empts a decision by this court as to whether the current requirements of article 2 in relation to a particular death have been fulfilled.

147. This is not to say that the decision of the Committee of Ministers can or should be ignored. Of course, it must be considered. But the context and circumstances in which the decision was reached and the change in circumstances which have occurred since that time cannot be left out of account.

Disposal of the appeal

148. Stephens J decided that a limited declaration should be made to the effect that an article 2 compliant inquiry into Mr Finucane's murder had not, at the time his judgment was delivered, taken place. The decision to make the declaration was reached, of course, against the background that, as Stephens J put it, at para 212, "documentary material either directly or indirectly available to the authorities which was received by Sir Desmond de Silva … was not available to Sir John Stevens, Judge Cory or the DPP (NI)." That material has now been made available

and has been considered by PSNI. It is not deemed sufficient to warrant prosecution of any individual. For the reasons that I have given earlier, however, this does not cure the article 2 deficit.

149. The Court of Appeal did not agree that a declaration should be made. Gillen LJ said at para 192 of his judgment that the new information referred to by Sir Desmond de Silva was "something of an unknown quantity". There was no evidence, he said, that it constituted an article 2 violation "as yet". This seems to me to be looking at the question from the wrong end of the telescope. As I have said, the proper focus should be on the inquiries that have been conducted to date and on an examination of whether they constitute an article 2 compliant inquiry, not on whether material yet to be disclosed and considered established that the inquiries were or were not susceptible of meeting the procedural obligation of article 2.

150. Deeny J had a somewhat different perspective on the propriety of making a declaration, although he did agree with Gillen LJ as to the reasons given by him for allowing the cross appeal against the declaration made by Stephens J. Deeny J said (in para 11 of his judgment) that it was wrong to make the declaration because the government had offered an inquiry in 2009 (to be conducted under the 2005 Act) and the appellant had declined it. But this has nothing to say about the respondent's responsibility to observe its procedural obligation under article 2. That obligation arises - and endures - quite independently of any reaction on the part of the appellant.

151. Deeny J also adverted (in para 14 of his judgment) to the fact that counsel for the appellant, Mr Macdonald QC, had declined an invitation to amend the application for judicial review to plead, as a freestanding issue, that the state was in breach of its article 2 obligation. It is to be remembered, however, that both before the Court of Appeal and this court it was argued that the failure of the state to hold an article 2 inquiry meant that the government was required to adhere to its promise to have a public inquiry - cf Gillen LJ's judgment at para 136. The issue of whether there was a breach of the procedural obligation under article 2 is therefore clearly before this court and that issue cannot be shelved simply because the appellant elected not to formulate it as an independent ground of challenge.

152. It appears to me, in any event, that we, as a Supreme Court, cannot ignore the question. The confines of our deliberations in this case are not necessarily to be determined by the manner in which the parties choose to make their presentations to us. If we detect that a violation of a Convention right has taken place, it would surely be wrong for that to go unremarked upon. It would be, at least arguably, a failure on our part to comply with the enjoinder contained in section 6 of HRA which requires any public authority, including a court, not to act in a way which is

in contravention of a Convention right. To fail to acknowledge that there has been a breach of article 2 where that has been established would be in breach of the spirit, if not the literal requirement, of that provision. This is particularly so because of section 6(6) of HRA. It stipulates that an act includes a failure to act. The failure of the Supreme Court to declare that there has been a violation of article 2 of ECHR where one has been detected in a case before it, however incidentally, would not keep faith with that enjoinder. But, it is not necessary to decide that point for the reasons given earlier and I refrain from expressing a final view on it.

153. I would therefore make a declaration that there has not been an article 2 compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement.

154. The appeal should otherwise be dismissed.

The new argument

155. For the first time in this court, objection was raised to the fact that affidavits were not sworn by the relevant ministers, but by two officials, one in the Northern Ireland Office and the other a private secretary to the Prime Minister. The appellant's purpose, in raising the issue, was not as an additional ground of challenge, but because it was said to be objectionable that the ministers' views and reasons should be conveyed by a second-hand means. This argument was not raised in the courts below. As the respondent has submitted, had it been, there was much material that could have been marshalled to counter it. On that account alone, I do not consider that the argument may be entertained.

LORD CARNWATH:

156. I agree with the reasoning and conclusions of Lord Kerr on the principal issues in the appeal. I add a comment on the issue of "legitimate expectation" which was raised in argument and is discussed briefly in his judgment at paras 55ff. I do so only because of the reliance placed by the Secretary of State in argument on a judgment of my own in *United Policyholders Group v Attorney General of Trinidad and Tobago* [2016] UKPC 17; [2016] 1 WLR 3383, and in particular on the concluding paragraph (para 121):

> "… the trend of modern authority, judicial and academic, favours a narrow interpretation of the *Coughlan* principle, which can be simply stated. Where a promise or representation, which is 'clear, unambiguous and devoid of relevant qualification', has been given to an identifiable defined person or group by a public authority for its own purposes, *either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment*, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a 'macro-economic' or 'macro-political' kind." (para 121, emphasis added)

It was submitted for the Secretary of State (inter alia) that, in so far as a relevant promise had been made by the Secretary of State, there had been no "detrimental reliance" by Mrs Finucane.

157. I agree with Lord Kerr (para 63) that the issues raised in that paragraph, including in particular that of "detriment", have no application to this case, which concerns as he says "a policy statement about procedure, made not just to Mrs Finucane but to the world at large". As I hoped I had made sufficiently clear, my reference in that concluding paragraph to the "*Coughlan* principle" was directed to the particular case of a promise made to an identifiable person or group relating to a *substantive* benefit (such as in *Ex p Coughlan* [2001] QB 213 the right to stay in a home, or in *Paponette* [2012] 1 AC 1 the use of a taxi-stand). Earlier in the judgment I had sought to explain why such cases were to be distinguished from other categories of "legitimate expectation" in the wider sense: on the one hand, promises relating to procedure, in relation to which the law was well-settled (my para 82); and, on the other, policy statements made to the public in general (para 116; as to which see also *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546, paras 29-31 per Lord Wilson).

158. My reference in the same paragraph to the need for some form of action by, or detriment to, the person relying on the promise was intended to apply in the same limited context. It has attracted some critical academic comment (Joanna Bell "The Privy Council and the doctrine of legitimate expectation meet again" (2016) 75 CLJ 449; for a more general academic commentary on the judgment, see Joe Tomlinson "The narrow approach to substantive legitimate expectations and the trend of modern authority" (2017) 17 Oxford University Commonwealth Law Journal, 75-84). Although I may not have made this sufficiently clear, my reference in that paragraph was based on the analogy with breach of contract or estoppel in private law, noted in the passages cited earlier in my judgment (paras

94-95): see *R v Inland Revenue Comrs, Ex p Preston* [1985] AC 835, 886-887 per Lord Templeman; *Ex p MFK* [1990] 1 WLR 1545, 1569-1570 per Bingham LJ. On reflection, however, I accept that, even in that limited context the proposition may have been too narrowly stated.

159. The alternative approach was that adopted (without argument) by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 60:

> "… It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power … (citing Laws LJ in *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131)."

That is consistent also with other authorities in the Court of Appeal, and the passage from *Paponette* (para 37 per Lord Dyson) cited by Lord Kerr at para 64. It is also more consistent with the modern approach which has tended to sever any direct link between public and private law, recognising that:

> "'… public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.' (*R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2002] UKHL 8, [2003] 1 WLR 348, para 35 per Lord Hoffmann.)"

160. I note that there was a difference in the Court of Appeal in the present case. Gillen LJ (para 73) followed *Bancoult*, referring to proof of detriment as not essential, but as a relevant consideration in respect of proportionality. Deeny J (para 4) by contrast thought that that it would be "unconstitutional" for courts to say that a new Government cannot depart from a representation given by a previous Government unless a defined group had "acted to their detriment" on the basis of the representation. He saw that requirement as "analogous to consideration in the law of contract …". For the reasons given above, I am inclined now to prefer the former view. However, since the issue does not arise in the present case, it is unnecessary for us to propose a precise formulation of the test. Indeed the distinction may be little more than one of emphasis, and unlikely to make much practical difference in most cases.