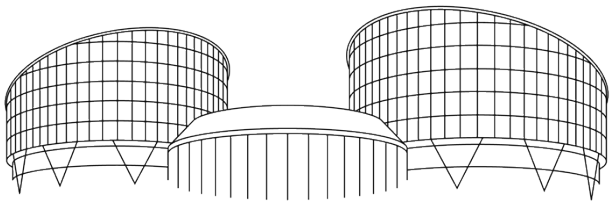

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF McCAUGHEY AND OTHERS
v. THE UNITED KINGDOM

(Application no. 43098/09)

JUDGMENT

STRASBOURG

16 July 2013

FINAL

16/10/2013

This judgment has become final under Article 44 § 2 of the Convention.

In the case of McCaughey and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Ineta Ziemele, *President*,
Davíd Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges*,
and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 25 June 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 43098/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Irish nationals, Mrs Brigid McCaughey, Mr Pat Grew and Ms Letitia Quinn ("the first, second and third applicants"), on 29 July 2009.

2. The applicants were represented by Mr F. Shiels, of Madden & Finucane Solicitors, Belfast. The United Kingdom Government ("the Government") were represented by their Agents, Mr M. Kuzmicki and, latterly, by Ms J. Neenan, of the Foreign and Commonwealth Office.

3. The applicants mainly complained under Article 2 regarding the shooting of their relatives by the security forces and, notably, that there had been an unreasonable use of lethal force and a failure to properly investigate the relevant operation.

4. On 1 February 2011 the application was communicated to the Government. The Court also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1 of the Convention).

5. On 2 June 2011 the Government requested the Court to strike out the application in the light of a recent judgment (*In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)* [2011] UKSC 20). The applicants submitted observations on this request. On 6 September 2011 the Court rejected the Government's request and the parties' observations on the admissibility and merits were then requested and submitted. In July 2012 the Court received another round of observations from each party.

6. On 13 April 2011 the Irish Government declined to exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court). Further to leave accorded by the President (Article 36 § 2 of the Convention and Rule 44 § 3), third-party comments were received from the Committee on the Administration of Justice, the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Mrs Brigid McCaughey, is the mother of Mr Martin McCaughey. She was born in 1934. The second and third applicants are the father and daughter of Mr Desmond Grew. They were born in 1923 and 1990, respectively. All the applicants live in County Tyrone. The case concerns the shooting of Martin McCaughey and Desmond Grew by security forces in 1990 in Northern Ireland.

A. The circumstances of the case

1. The shootings

8. On 9 October 1990 Martin McCaughey and Desmond Grew were shot and killed outside a shed on a farm near Loughgall by soldiers from a specialist unit of the British Army. The autopsy of Martin McCaughey described the cause of death as "laceration of the brain due to bullet wounds to the head", noting that he had been struck by approximately ten high-velocity bullets in all. The autopsy of Desmond Grew described the cause of death as "multiple injuries due to multiple high-velocity bullet wounds of trunk and limbs", noting that there were approximately forty-eight wounds made by bullets entering and exiting his body. No shots were fired by the deceased. These shootings were two of several which took place around that time and which gave rise to allegations of a shoot-to-kill policy by the security forces, including by that specialist unit, in Northern Ireland.

9. The shed had been under surveillance as a suspected arms dump of the Irish Republican Army (IRA). The applicants maintained that the Royal Ulster Constabulary (RUC) had intelligence to the effect that the deceased would collect arms at the shed. The RUC Tasking and Coordination group ("the TCG") assigned the specialist military unit to the mission given that unit's specific training and firepower.

10. On 11 October 1990 the IRA stated publicly that the deceased were IRA volunteers on active service at the time of their deaths.

11. The first applicant claimed that her family learned about Mr McCaughey's death from the media and that a RUC officer rang the deceased's family home, identified himself and taunted the deceased's brother. The RUC formally advised the Grew family of Desmond Grew's death.

2. The investigation by the RUC

12. The RUC conducted an investigation into the deaths, beginning with interviews with the soldiers involved in the operation.

13. The statements of Soldiers A-H, later disclosed to the applicants by the Police Service Northern Ireland (the PSNI replaced the RUC in 2001), stated as follows. Soldier H, the Captain with responsibility for the military unit, received information and briefed Soldiers A, B, C, D, E and F to observe the shed for any terrorist activity and to arrest any persons found to be so engaged. Soldier A was the team leader of the unit with command of the soldiers on the ground. Soldier H was in radio contact with the soldiers on the ground and, on receiving a report of the shooting, he dispatched Soldiers G and I to the scene. The scene was handed over at approximately 12.30 to the RUC and Soldiers A-I returned to base. Later that day (10 October 1990), members of the RUC questioned the soldiers, who were accompanied by Soldier L, from Army Legal Services. Soldier A was the first to fire a shot and he fired twenty rounds. Soldier B fired seventeen rounds, Soldier C fired nineteen rounds and Soldier D fired sixteen rounds, the last two of which were directed at Mr Grew while he was on the ground as the soldier believed Mr Grew had attempted to grab his gun. Soldiers E and F had been close by and did not discharge their weapons. Soldiers A-F believed that they had been under fire, although no shots had been fired at them. Soldier J (involved in pre-deployment training for such specialist military units) and Soldier K (the officer commanding of the unit) were involved in the planning and control of the operation.

3. The Director of Public Prosecutions ("the DPP")

14. In February 1991 the DPP received the investigation file. Between April 1991 and September 1992 the DPP issued eight directions for, *inter alia*, further investigative steps. On 2 April 1993 the DPP issued a direction of no prosecution (*nolle prosequi*) in respect of the soldiers involved in the shooting. The decision was not notified directly to the families.

4. Pre-inquest proceedings including judicial review

15. In 1994 and 1995 the RUC provided certain papers to the coroner which did not include the statements of Soldiers A-I. On 23 December 1997

the coroner advised the applicants that he had received a file from the DPP. This was the first formal contact by the authorities with the applicants.

16. On 23 April 2002 the coroner wrote to the PSNI requesting statements from the soldiers involved in the shooting. The PSNI provided the statements but refused to provide the report of the RUC Investigating Office, the DPP's decision or relevant un-redacted intelligence reports.

17. On 11 June 2002 the applicants wrote to the coroner asking when the inquest would be listed and requesting pre-inquest disclosure. On the same date, they wrote to the PSNI seeking disclosure of all documentation relating to the deaths pursuant to Article 2 of the Convention and section 8 of the Coroner's Act (Northern Ireland) 1959 ("the 1959 Act").

18. On 3 December 2002 the coroner disclosed to the applicants the depositions relating to the inquest. Since statements and documents supplied by the PSNI remained the property of the PSNI, such material could not be disclosed by the coroner to the applicants.

(a) First judicial review proceedings

19. Following lengthy correspondence between the applicants, the coroner and the PSNI about pre-inquest disclosure, in October 2002 the first applicant's husband (now deceased) and the second applicant issued judicial review proceedings against the coroner and the PSNI, challenging the latter's retention of relevant documentation.

20. On 14 February 2003 leave to apply for judicial review was granted.

21. On 21 February 2003 the PSNI provided the applicants with the documents supplied by it to the coroner (see paragraph 16 above). This included the soldiers' statements and two lists of material items of evidence, which lists indicated that certain items could not be located/had deteriorated – there was a reference to a stench on opening the main bag of materials.

22. On 20 January 2004 the High Court (*McCaughey and Another, Re Application for Judicial Review* [2004] NIQB 2) found that the PSNI was under a duty by virtue of section 8 of the 1959 Act and Article 2 of the Convention to provide the coroner with some of the withheld documents and that the inquest had been unduly delayed in breach of Article 2 of the Convention. On 14 January 2005 the Court of Appeal (*Police Service of Northern Ireland v. McCaughey and Grew* [2005] NICA 1, [2005] NI 344) allowed the appeal of the PSNI. Section 8 of the 1959 Act obliged the PSNI to provide the coroner with the information retained when it notified the coroner of the death but the PSNI had no such duty under Article 2 since the Human Rights Act 1998 ("the HRA") did not apply to a death occurring before its entry into force in 2000 (*In re McKerr* [2004] UKHL 12, the appellant was the applicant in *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III).

23. The first applicant's husband appealed. On 28 March 2007 the House of Lords delivered its judgment (*Jordan v. Lord Chancellor and*

Another and *McCaughey v. Chief Constable of the Police Service Northern Ireland* [2007] UKHL 14): this judgment addressed the similar appeal of *Hugh Jordan* (the applicant in *Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001). It found that the HRA did not apply to a pre-HRA death nor, therefore, to the investigation of any such death. However, section 8 of the 1959 Act plainly required the PSNI to disclose to the coroner such information about the deaths as the PSNI was then or thereafter able to obtain, subject to any relevant privilege or immunity.

(b) Subsequent pre-inquest procedures

24. In the meantime, the coronial system had been restructured so that a new coroner was to be appointed.

25. In December 2007 the applicants wrote to the senior coroner asking that the inquest be progressed. On 12 February 2008 the coroner's service responded that the inquest had not yet been allocated to a coroner given workload commitments. However, the senior coroner had written to the PSNI requesting disclosure under section 8 of the 1959 Act.

26. In July 2008 the applicants again wrote to the senior coroner enquiring about the inquest and pre-inquest disclosure. No response was received. Their further letter of 17 December 2008 to the senior coroner was acknowledged by the coroner's service. There was no response to their letter of 16 January 2009 to the coroner's service: they were informally told in February 2009 that a coroner had been appointed.

27. On 25 June 2009 the applicants sent a letter before action to the coroner's service about the failure to hold the inquest. On 30 June 2009 the coroner's service responded stating that the coroner was still awaiting full disclosure from the PSNI which was expected shortly and that the coroner intended to convene a preliminary hearing in September 2009 at which he hoped to be able to set a provisional date for the inquest.

28. In 2009 the Historical Enquiries Team ("the HET") advised the coroner that they anticipated commencing an investigation into the shootings of the deceased in January 2010. By a letter of 26 August 2009, the coroner advised the applicants accordingly and asked whether they would wish the inquest to proceed in advance of the HET investigation.

29. On 4 September 2009 a preliminary inquest hearing was held. The coroner advised that he had received full disclosure from the PSNI. Counsel for the PSNI and the Ministry of Defence (MOD) vouched that this disclosure amounted to full compliance with section 8 of the 1959 Act and that the MOD had no further documentation relating to the incident. Counsel for the PSNI was unable to advise the coroner what steps, if any, had been taken to locate certain missing exhibits. The coroner adjourned the hearing to consider the material and a further preliminary hearing was scheduled for 12 October 2009. The coroner asked for written submissions as to whether the inquest should be adjourned pending the HET

investigation: the applicants opposed this orally. Finally, while the coroner noted the potential impact of the judgment of this Court in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009) on coronial law and on the inquest, he was bound by current domestic case-law (including *In re McKerr*, cited above). Despite this, he considered that it was feasible to conduct a vigorous, thorough and transparent inquest.

30. On 15 September 2009 the applicants requested the HET to expedite its review and the HET responded that it would conduct an initial assessment and report at the coroner's hearing of 12 October 2009.

31. At that hearing on 12 October 2009, the applicants argued that it would be premature to adjourn the inquest pending the HET investigation. They proposed proceeding on certain preliminary inquest issues (disclosure, remit/scope of the inquest and anonymity/public interest immunity matters): the HET issue could be reviewed when the inquest was listed for hearing. The parties and the coroner agreed. The HET agreed to bring forward the start of their investigation.

32. On 1 December 2009 a further preliminary hearing was held. The coroner directed that the applicants be provided with redacted volumes of the documents which had been provided by the PSNI to the coroner. He scheduled hearings on certain questions (anonymity and screening for some witnesses) for January 2010.

33. By letter dated 8 December 2009 the coroner proposed a "preliminary definition" of the scope of the inquest as covering the four basic factual questions – the identity of the deceased, the place of death, the time of death and how the deceased came by their deaths. In relation to how, the coroner stated that he would examine evidence concerning the circumstances in which the deceased came to be at the locus of death, the surveillance operation that culminated in the deaths, with reference, in particular, to the purpose and planning of the operation, the actions and state of knowledge of those involved in the operation, as well as the nature and degree of force used. He invited submissions thereon.

34. In December 2009 files of documents were provided to the applicants. A brief preliminary hearing took place on 22 January 2010. On 2 February 2010 the coroner heard oral submissions on the scope of the inquest and reserved his decision. While the applicants were satisfied with the coroner's preliminary definition of scope noted above, the PSNI argued for a conventional pre-HRA inquest so that the verdict on "how" the deceased met their deaths should be limited to the question of "by what means" rather than including "what broad circumstances".

35. A further preliminary hearing was fixed for September 2010, but did not take place. By letter dated 4 November 2010 the applicants invited the coroner to hold a further preliminary hearing on the questions of disclosure, scope, expert witnesses and site inspection.

(c) Second judicial review proceedings

36. Following the delivery of the above-cited *Šilih* judgment, the first and third applicants began judicial review proceedings arguing that their inquest had, consequently, to be Article 2 compliant.

37. On 23 September 2009 the High Court handed down its decision (*McCaughey and Quinn's Application* [2009] NIQB 77). Leave to apply for judicial review was granted as regards the delay in holding the inquest but it adjourned that question pending any decision at the coroner's hearing due on 12 October 2009. Leave was, however, refused as regards the applicants' submission that the House of Lords' judgment in *McKerr* was no longer good law following the above-cited *Šilih* judgment of this Court.

38. By a judgment of 26 March 2010, the Court of Appeal (*Re McCaughey and Quinn's Application* [2010] NICA 13) granted the applicants leave to apply for judicial review on the two Article 2 grounds not permitted by the High Court but refused those applications on their merits. However, it had a duty under section 3 of the HRA to give effect so far as possible to any relevant legislation compatibly with Convention rights, it was arguable that the Supreme Court could choose to extend *Šilih* (cited above) to domestic law and therefore leave to appeal to the Supreme Court was granted.

39. In November 2010 the applicants requested the continuation of the preliminary inquest hearings on certain matters including disclosure, remit, site inspection and expert reports. While not excluding the possibility, the coroner responded that those matters were preferably examined after the Supreme Court judgment.

40. By a judgment of 18 May 2011, the Supreme Court held by a majority (Lord Rodger of Earlsferry dissenting) that the coroner holding the inquest had to comply with the procedural obligations under Article 2 of the Convention (*In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)* [2011] UKSC 20). In *Šilih* (cited above), this Court departed from its earlier case-law finding that, in certain circumstances, Article 2 imposed a "detachable" investigative obligation even when the death had occurred before ratification. Those circumstances included instances where a significant proportion of the procedural steps had taken place after the Convention had come into force. Accordingly, the Supreme Court found that, as a matter of international obligation, the present inquest had to comply with Article 2 as far as this was possible under domestic law. Parliament was presumed to have intended that there would be a domestic-law requirement to mirror the international requirement and the HRA which came into effect on 2 October 2000 was to be interpreted by reference to this presumed intention. Any future inquest into a pre-HRA death had to comply with Article 2.

41. In a concurring judgment, Lord Brown relied on statistical information submitted by the coroner's service in April 2011 about deaths

occurring prior to October 2000: there were sixteen outstanding "legacy inquests" involving twenty-six deaths, an additional six incidents involving eight pre-2000 deaths (which had been referred by the Attorney General to the coroner); and six inquests had not been held into six deaths which took place between 1994 and 2000 (an inquest into a death in 1995 had just closed in February 2011). Most cases concerned the use of lethal force by the security forces and some concerned killings attributed to paramilitary forces.

(d) Subsequent pre-inquest procedures

42. In response to judgments of this Court (including the above-cited *McKerr* and *Hugh Jordan* cases), decisions not to prosecute became amenable to challenge by way of judicial review. The applicants requested reasons for the decision not to prosecute in April 1993. On 25 July 2011 the Acting Deputy DPP provided the following reasons for the 1993 decision not to prosecute:

> "Having carefully considered all the evidence and information it was concluded that the Test for Prosecution was not met in respect of any soldier for any offence relating to the deaths of Desmond Grew and Martin McCaughey. All soldiers had raised the defence of self-defence in opening fire. As you will be aware, where the defence of self-defence is raised the burden of negativing the defence rests on the prosecution and it is for the prosecution to prove to the very high standard required in a criminal trial that the person was not acting in self-defence. It was concluded that the available evidence was not sufficient to do so."

43. He could not confirm whether the next-of-kin had been informed of the DPP's earlier decision not to prosecute but, at the time, the practice was that the police would inform relevant persons of a DPP decision. He confirmed that his office had directed that a further report be submitted by the coroner on any relevant matters which might arise at the inquest.

44. At a preliminary hearing on 17 October 2011, the coroner determined that the inquest would take place in March 2012. He issued directions for the service of the parties' evidence including ordering the MOD to serve its evidence by 23 December 2011. The coroner selected the jury asking each to notify him if they had any reason to believe they would not be able to consider the evidence impartially.

5. Civil proceedings for damages

45. On 11 January 2012 the applicants issued civil proceedings for damages as regards the shootings. That action was timed to begin within three years of the disclosure to the applicants of ballistic and forensic evidence which they considered as supportive of their allegation that the use of lethal force had not been absolutely necessary and that the operation had not been planned so as to minimise recourse to lethal force.

6. Judicial review involving the HET

46. On 6 March 2012 the first applicant began judicial review proceedings about the failure by the HET to disclose relevant documents to the coroner disputing, *inter alia*, the HET's independence from the military. The HET then issued a preliminary review of the investigation. It found that the deceased were about to embark on a planned provisional IRA operation, it approved the scene examination and the later interviewing of the soldiers and it found the latter to be consistent with the former. Soldier A had been interviewed but he essentially endorsed his earlier statement. On 19 July 2012 the HET indicated that the final report was pending.

7. The inquest and intervening judicial review actions

47. The inquest opened on 12 March 2012 when the applicants were informed that the HET had deferred its investigation pending the inquest. The inquest lasted twenty-seven days, ending on 2 May 2012. The hearing was public and the applicants were legally represented by counsel and a solicitor.

48. Oral evidence was heard from twenty-three witnesses including certain RUC and military witnesses involved in matters of training, planning, command, control and supervision relevant to the mission and from RUC officers concerning the post-mission investigation. Three of the four soldiers (A, C and D) who had opened fire gave evidence. Soldier B refused to travel from the Middle East: his statement prepared in 1990 for the police investigation was read to the jury. Expert evidence was heard as to the post-incident investigation. Witnesses were cross-examined thoroughly by the applicants.

(a) Inquest: the soldiers' involvement in other lethal-force incidents

49. In October 2011 the applicants had requested the coroner to obtain information about the involvement of Soldiers A-H in other lethal-force incidents in Northern Ireland.

50. At the preliminary hearing of 17 October 2011, it appears the MOD agreed to ask Soldiers A-H about their involvement in other such incidents.

51. Further statements from Soldiers A, C, D, E and G-L were served on the applicants from 2 February to 5 March 2012. Since most of those statements mentioned involvement in other lethal-force incidents, on 16 February 2012 the applicants requested this information from the coroner. The coroner obtained the parties' written and oral observations and, on 1 March 2012, he obtained the soldiers' personnel files as well as MOD information about their participation in other lethal-force incidents. On 8 March 2012 he ruled against the applicants, except in the case of one incident involving Soldier A. A statement from Soldier A as regards that incident was provided on 8 March 2012 as was, on application, further

information about that other shooting. On 12 March 2012 the High Court (Weatherup J) refused leave to apply for judicial review of the coroner's ruling of 8 March. It also indicated that, since the inquest had begun after years of waiting, only exceptional circumstances could justify interrupting it and there was nothing exceptional about the application warranting leave at that point. Further to a question to Soldier J about his involvement in other lethal incidents, on 15 March 2012 the coroner ruled out any further questions about the soldiers' involvement in other lethal-force incidents and he directed the removal of references to such incidents from their statements.

52. On 23 March 2012 the coroner excluded reference to the material about Soldier A's involvement in two other lethal-force incidents and the first applicant applied for leave to bring judicial review proceedings in respect of that exclusion. In the meantime, Soldier A gave evidence at the inquest excluding any reference to his involvement in other lethal-force incidents: the coroner undertook (and the MOD agreed) that Soldier A could be recalled should the result of the pending judicial review action be in the applicants' favour. On finishing his evidence, the coroner reminded Soldier A that he might be recalled and the latter confirmed that he would be available. On 28 March 2012 the High Court found in favour of the applicants as regards one of the other lethal-force incidents concerning Soldier A. He remained available and could be questioned at the inquest the following day so that any disruption of the inquest would be justified, the issue being so "fundamental" to the character of the inquest as to amount to an exceptional case where judicial review could intervene prior to the conclusion of the inquest.

53. On 29 March 2012 the applicants raised Soldier A's recall with the coroner: the MOD said he would be available, after his holiday, for the week commencing 9 April 2012. On 2 April 2012 the MOD advised the coroner that Soldier A was out of the jurisdiction and, apart from a holiday in the near future, no difficulty was raised as to his attendance. Soldier A's attendance was revisited at length by the coroner on 4 April 2012: Soldier A would have separate legal representation and the future inquest hearing dates were fixed around juror commitment and Soldier A's holiday plans (by then announced). On 6 April 2012 the coroner directed that Soldier A make himself available to the inquest on 11 April 2012.

54. On 11 April 2012 Soldier A did not appear: his solicitors sent an e-mail to the effect that he was, in fact, beginning three weeks' holiday that day, that he would attend thereafter but that he wished to take legal advice beforehand. On 12 April 2012 submissions were heard on this issue. In the meantime and subject to his later attending, documents concerning Soldier A's involvement in other lethal incidents were read to the jury. On 13 April 2012 the coroner asked the MOD to address conflicting information about Soldier A's availability. On 16 and 18 April 2012 the

applicants requested the coroner to obtain a subpoena. Soldier A's solicitors said they had no instructions but were forwarding correspondence to him. Having invited, received and considered further submissions from the applicants as regards the subpoena request, on 23 April 2012 the coroner ruled that he would conclude the inquest without Soldier A's attendance since there was more value in completing the inquest than in speculatively trying to seek his attendance on the basis of "some open-ended review of his availability". He directed the jury as regards Soldier A's absence.

(b) Inquest: question from the jury

55. During their deliberations, the jury sent a question to the coroner asking if a shot fired into a corpse could legally be defined as excessive force. This concerned the additional two shots directed at Mr Grew while he was on the ground: the pathologists had not agreed on whether he was already dead when those shots were fired. The coroner indicated that, strictly speaking, the interest of the inquest evaporated once the person was dead. The applicants unsuccessfully challenged this direction as too narrow since, notably, this incident was pertinent to the individual soldier's conduct and as to "how" the deceased died.

(c) Inquest: discharge of a juror

56. Between 20 March and 26 April 2012 a number of applications were made to the coroner about a juror who had allegedly fallen asleep on certain occasions and acted in a manner hostile to the next-of-kin. The coroner rejected the applicants' requests to discharge the juror, indicating that he would keep the juror under scrutiny and the matter under review. Further to the same juror allegedly spitting in the street near family members of one of the deceased, the coroner refused a further application to discharge the juror on 27 April 2012 but he warned the jury twice about their joint responsibility for the integrity of the process, indicating on the second occasion that he should be informed if any juror had any concern about bias on the part of a fellow juror. No complaint was made. Throughout the inquest, the coroner emphasised the need for the jury to rely only on the evidence and to consider it impartially. In the final days and in response to the applicants' request, he again emphasised that any concern of a juror about the jury or another juror should be brought to his attention. No jury comment was received.

57. On 27 April 2012 the High Court (Stephens J) refused leave to apply for judicial review of this last decision of the coroner. There was no need to review the coroner's factual assessments. Even if the High Court was wrong in that analysis, exceptional circumstances would be required to postpone the inquest after years of waiting and the removal of one juror at that point would present more difficulties than could be justified (especially as the

jury had begun to deliberate). In any event, there would be a remedy available to the applicants if the jury decision went against their interests.

(d) Inquest: the jury verdict

58. At the conclusion of the evidence, the coroner obtained the parties' written and oral submissions and then fixed the questions for the jury to answer with its verdict. The applicants, the PSNI and the MOD made closing submissions to the jury on those questions, the applicants notably suggesting that the questions did not reflect the correct absolute-necessity test and did not allow the jury to reach a verdict capable of determining whether the force used was justified. The coroner summed up to the jury for approximately four hours.

59. On 2 May 2012 the jury rendered its verdict to the effect that the deceased died of multiple injuries and multiple high-velocity bullet wounds.

60. The jury considered that the purpose of the operation was to continue surveillance, to arrest anyone involved in terrorist activity and to place a camera in the area of the shed. The soldiers opened fire and shot the deceased in the belief that their position was compromised and that their lives were in danger as, possibly alerted to the soldiers' radio "tones", the deceased were approaching the soldiers with their guns at the ready. The soldiers continued firing believing that their own rounds were incoming fire. Soldier A opened fire (believing that their position had been compromised and their lives were in danger) and Soldiers B, C and D followed and continued firing until they believed the threat was neutralised, in which circumstances the jury believed the soldiers had used reasonable force. Soldier D fired two bullets at close quarters into Mr Grew on the ground as he perceived Mr Grew as a threat and Soldier D's reaction was reasonable. As to whether the jury considered there was another reasonable course of action, the jury was not "unanimous on the balance of probabilities" as to whether there was an opportunity to arrest prior to the soldiers feeling compromised. In answer, therefore, to the question about whether the operation was conducted in such a way as to minimise to the greatest extent possible any recourse to lethal force, the jury was not "unanimous in regard to the possibility of an arrest option".

61. As to whether any aspect of the training of, or planning by, any soldier could account for the deaths, the jury found that the soldiers fired, in accordance with their training, at the "central mass" and continued to do so until the threat was neutralised but that, otherwise, there was "insufficient evidence of planning and intelligence available to give further findings". Other than noting that Desmond Grew received two bullets on the ground near the shed, it was "not possible to reach any further conclusions concerning the force used against Mr Grew".

62. As to whether the operation was planned, controlled and supervised by the RUC and the military so as to minimise to the greatest extent possible any recourse to lethal force, the jury responded as follows:

> "Planning
>
> – In planning the operation, TCG tasked a specialist military unit as the most appropriate unit to minimise danger to RUC members and soldiers involved in the surveillance operation and the placing of a camera.
>
> – The placing of the camera was in itself planned to minimise the risk to those on surveillance.
>
> – Given the level of risk involved in the surveillance operation, the specialist military unit were commissioned due to their particular training and firepower which was superior to that of the RUCs.
>
> – There was no definitive information or intelligence available to minimise any recourse to lethal force.
>
> Control
>
> - Each individual involved had specific roles and there was no ambiguity — clear lines of command.
>
> - Clear roles for everyone involved and TCG were the only ones who could call off the operation.
>
> Supervision
>
> - Soldier H had overall control of the operation but Soldier A was the team leader who was in command of the soldiers on the ground and therefore in the best position to make decisions and minimise to the greatest extent possible any recourse to lethal force."

63. The jury highlighted, as important contributing factors, the history of incidents directed towards security forces in the area, the nature of terrorism in Northern Ireland at the time, as well as the heightened state of the minds of the soldiers involved in the operation.

8. Judicial review proceedings after the inquest

64. On 29 June 2012 the first applicant requested leave to apply for judicial review of the inquest requesting, *inter alia*, the quashing of the verdict and a new inquest on the basis that the inquest was not compliant with the procedural requirements of Article 2 of the Convention.

65. She contested the coroner's decisions not to admit probative material concerning the involvement of the soldiers in other lethal-force incidents in Northern Ireland including his refusal to disclose relevant material, his decision not to allow the next-of-kin to question military witnesses about such incidents and his ruling that references to such incidents be edited from the soldiers' statements. These decisions deprived the applicants of effective and full participation in the inquest; meant that there was insufficient public scrutiny of the inquest; and deprived the jury of probative evidence in

relation to whether the specialist military unit was involved in a shoot-to-kill policy, whether that unit was therefore more likely to have recourse to unjustified lethal or excessive force and whether the individual soldier's use of lethal force was justified in the circumstances.

66. She also argued that the coroner failed to take adequate steps to ensure Soldier A's attendance despite the prior High Court judgment and that this deficiency had had the same negative consequences for the applicants' participation in the inquest, public scrutiny of the inquest and the availability of probative material for the jury. She maintained that the questions put by the coroner to the jury failed to ensure that the jury could properly address "how" and "in what circumstances" the deceased came by their deaths. She also argued that the coroner misdirected the jury on the soldiers' "state of belief" when they opened fire and continued to fire, that he failed to direct them to consider the "absolute necessity" of the use of the force used and that he failed to direct the jury properly in response to its question about shooting at a corpse. She claimed that the coroner failed to correct errors in the parties' closing submissions to the jury. Finally, she challenged the coroner's refusal to discharge the juror hostile to the next-of-kin so that the jury was neither fair, impartial nor independent.

67. Those proceedings have not yet been heard by the High Court.

B. Relevant domestic law and practice

1. Inquests – Legislation

68. Coronial law in Northern Ireland was consolidated in the Coroners Act (Northern Ireland) 1959 ("the 1959 Act") and supplemented by the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the 1963 Rules").

69. Section 7 of this Act imposes a duty on certain persons, who have reason to believe that the deceased person died from unnatural causes, to notify the relevant coroner immediately.

70. Section 8 imposes the following duty on the police:

> "Whenever a dead body is found, or an unexpected or unexplained death, or a death attended by suspicious circumstances, occurs, the district inspector within whose district the body is found, or the death occurs, shall give or cause to be given immediate notice in writing thereof to the coroner within whose district the body is found or the death occurs, together with such information also in writing as he is able to obtain concerning the finding of the body or concerning the death."

71. Section 31(1) of the 1959 Act provides:

> "Where all members of the jury at an inquest are agreed they shall give, in the form prescribed by rules ..., their verdict setting forth ... who the deceased person was and how, when and where he came to his death."

72. Rule 15 of the 1963 Rules provides that the proceedings and evidence at an inquest shall be directed solely to ascertaining who the deceased was; how, when and where the deceased came by his death; and the particulars for the time being required by the laws concerning births and deaths registration. However, Rule 16 provides that:

> "Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in [Rule 15]."

73. Rule 22(1) provides:

> "After hearing the evidence the coroner, or, where the inquest is held by a coroner with a jury, the jury, after hearing the summing up of the coroner shall give a verdict in writing, which verdict shall, so far as such particulars have been proved, be confined to a statement of who the deceased was, and how, when and where he died."

74. Rule 23(1) provides:

> "Any verdict given in pursuance of Rule 22 shall be recorded in the form set out in the Third Schedule."

75. The Third Schedule to the 1963 Rules provided a standard form of verdict. The cause of death was to be stated and was defined as "the immediate cause of death and the morbid conditions (if any) giving rise to the immediate cause of death". The form stated that one of the following forms of words should be used to express the verdict of the jury or the conclusion of the coroner as to the death: "died from natural causes; died as the result of an accident/misadventure; died by his own act ...; open verdict (to be used where none of the above forms of verdict is applicable)". Since 1980 a form is provided for inclusion of the verdict of the inquest jury or the conclusions of the coroner under the title "Findings".

76. Section 35(3) of the Justice (Northern Ireland) Act 2002 (replacing section 6(2) of the Prosecution of Offences (Northern Ireland) Order 1972) provides:

> "Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director [of Public Prosecutions] a written report of the circumstances."

2. Inquests – relevant case-law

77. In *R v. Coroner for North Humberside and Scunthorpe, ex parte Jamieson* ([1995] QB 1, concerning England and Wales), the Court of Appeal ruled that "how" meant "by what means", a question directed to how the deceased came by his death. While a verdict could properly incorporate a brief and neutral statement, the verdict was to be factual, expressing no judgment or opinion and it was not the jury's function to prepare detailed factual statements.

78. In the case of *R v. Secretary of State for the Home Department ex parte Amin* ([2003] UKHL 51), the House of Lords ruled on the requirements of an Article 2 compliant investigation. In *R (Middleton) v. West Somerset Coroner* ([2004] 2 AC 182), the House of Lords reviewed the scope of the "Jamieson" inquest and found that, since a Jamieson inquest could not examine whether the conduct of State agents might reasonably have prevented death, it was incompatible with Article 2. To comply with that Article, the inquest had to consider "by what means" and "in what circumstances" the deceased came by his death, so that the inquest verdict would be broader in scope

79. On 11 March 2004 the House of Lords found that there was no obligation to conduct an inquiry compatible with Article 2 when the death had occurred before the HRA came into force (*In re McKerr* ([2004] 1 WLR 807).

80. On 28 March 2007 the House of Lords delivered its judgment in *Jordan v. Lord Chancellor and Another* and *McCaughey v. Chief Constable of the Police Service Northern Ireland* [2007] UKHL 14. It relied on the *McKerr* judgment to the effect that the HRA did not apply to a pre-HRA death or, therefore, to the investigation of any such death. However, section 8 of the 1959 Act plainly required the police to disclose to the coroner such information about the deaths as the police were then or thereafter able to obtain, subject to any relevant privilege or immunity.

81. In a later judicial review action, Hugh Jordan successfully contested a PSNI refusal to disclose to him all documents disclosed by it to the coroner, except those to which valid professional privilege or immunity attached (*In re Jordan's Application* [2008] NIQB 148). The High Court's decision was informed by:

> "... the confusion that has been created by the fragmented production of documents over the years. There has been duplication of some documents and a failure to produce certain documents on some occasions and then their production on other occasions. It has been acknowledged that the level of redactions have on occasions been excessive."

Accordingly, the High Court (under section 8 of the 1959 Act) ordered the PSNI, *inter alia*, to make a full and indexed disclosure to Hugh Jordan.

82. In 2008 alone there were six judicial review applications as regards Pearse Jordan's inquest. In 2009 the Court of Appeal made the following comment about the delay in holding the inquest into Pearse Jordan's death (*Hugh Jordan v. the Senior Coroner* [2009] NICA 64):

> "(3) ... This inquest has taken an extremely long time to reach this point and has been dogged by procedural wrangling, frequent judicial review applications and hearings in the House of Lords and Strasbourg all of which have contributed to the length and complexity of the inquest.
>
> (4) The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal incremental case law. It is marked by an absence of clearly

> drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently. One must sympathise with any coroner called on to deal with a contentious inquest of this nature which has become by its nature and background extremely adversarial. The problems are compounded by the fact that the [PSNI] which would normally be expected to assist a coroner in non contentious cases is itself a party which stands accused of wrong doing. It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect. If nothing else, it is clear from this matter that Northern Ireland coronial law and practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest. What is also clear is that the proliferation of satellite litigation is extremely unsatisfactory and diverts attention from the main issues to be decided and contributes to delay."

83. Following this Court's judgment in *Šilih*, cited above, the Supreme Court reversed the House of Lords' judgment in *McKerr* and accepted that an inquest should be compliant with Article 2 even for a pre-HRA death (*In the matter of an application by Brigid McCaughey and another for Judicial Review* [2011] UKSC 20, see paragraph 40 above).

3. Legal Aid for inquests

84. In July 2000 the Lord Chancellor announced the establishment of an extra-statutory *ex gratia* scheme of public funding for representation in proceedings before coroners in exceptional inquests in Northern Ireland. In March 2001 he published for consultation the criteria to be used in deciding whether applications for representation at inquests should receive public funding. These included, *inter alia,* consideration of financial eligibility, whether an effective investigation by the State was needed and whether the inquest was the only way to conduct it, whether the applicant required representation to be able to participate effectively in the inquest and whether the applicant had a sufficiently close relationship with the deceased.

4. The Historical Enquiries Team ("the HET")

85. The HET is a special investigative unit of the PSNI set up in 2005 to review the investigations conducted into deaths in Northern Ireland between 1968 and 1998. It is answerable to the Chief Constable of the PSNI. It has approximately 3,000 cases to examine. The HET has two primary objectives: to ensure that each case is comprehensively examined to current professional standards to the extent that it can be satisfied that all the evidential possibilities have been explored, and to work closely with families including giving to each family a report on the death of a deceased family member.

5. Relevant Committee of Ministers Resolutions

86. Between 2001 and 2003 the Court adopted six similar judgments concerning the investigation of killings by security forces in Northern Ireland between 1968 and 1998 (see *Hugh Jordan* and *McKerr*, both cited above; *Shanaghan v. the United Kingdom*, no. 37715/97, 4 May 2001; *Kelly and Others v. the United Kingdom*, no. 30054/96, 4 May 2001; *McShane v. the United Kingdom*, no. 43290/98, 28 May 2002; and *Finucane v. the United Kingdom*, no. 29178/95, ECHR 2003-VIII).

87. In interim Resolution CM/ResDH(2007)73 on these cases, the Committee of Ministers urged the Government to take "without further delay all necessary investigative steps ... to achieve concrete and visible progress". In March 2008 and having evaluated the measures taken by the authorities, the Committee of Ministers decided "to close the examination of the issues related to the fact that the inquest proceedings did not commence promptly and were not pursued with reasonable expedition". However, the Committee's examination of individual and of other general measures would continue.

88. The Information Document (prepared by the Department for the Execution of Judgments, CM/Inf/DH(2008)2 revised) of 19 November 2008 reviewed progress in implementing these judgments. As regards individual measures and the *Hugh Jordan* case, the document indicated that it was "concerned that the inquest in this case has still not commenced although it was announced previously that it would begin in April 2008". Information was therefore "awaited on the measures taken or envisaged in order to ensure that the inquest in this case runs without any further delay". As regards *Kelly and Others*, *McKerr* and *Shanaghan,* the Department awaited information on the outcome of, *inter alia*, the ongoing investigations.

89. By interim Resolution CM/ResDH(2009)44 of March 2009, the Committee closed its examination of two general measures (concerning the HET and the State's obligations under Article 34 of the Convention) and of individual measures in *McShane* and *Finucane* for the specific reasons given. However, it continued its examination of individual measures in *Hugh Jordan*, *Kelly and Others*, *McKerr* and *Shanaghan*. In this latter respect, the Committee noted "with concern that progress with regard to the individual measures in these cases has been limited, in particular in the case of *Hugh Jordan* where the inquest will not start before June 2009 although it was announced previously that it would begin in April 2008" and it strongly urged the authorities to "take all necessary measures with a view to bringing to an end, without further delay, the ongoing investigations while bearing in mind the findings of the Court in these cases".

THE LAW

90. The applicants made a number of complaints under the substantive and procedural aspects of Article 2 of the Convention regarding the deaths of Martin McCaughey and Desmond Grew and, under Article 13, concerning the lack of an effective domestic remedy in those respects.

91. Article 2 reads as follows:

> "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.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

92. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 13

A. The parties' submissions

1. The Government

93. The Government maintained that the applicants had failed to exhaust domestic remedies as regards the substantive complaint because their civil action was pending. While the Government noted that there appeared to be two lines of jurisprudence, they considered that the governing authority lay with the line of case-law in *Caraher v. the United Kingdom* ((dec.), no. 24520/94, ECHR 2000-I); the six judgments concerning Northern Ireland cited at paragraph 86 above; and *Bailey v. the United Kingdom* ((dec.), no. 39953/07, 19 January 2010). The cases which the applicants regarded as showing a contrary line on victim status were distinguishable.

94. In any event, there had been no violation of the substantive or the procedural aspects of Article 2 of the Convention and the Government relied mainly on the scope, procedure and result of the inquest which, pursuant to the judgment of the Supreme Court in May 2011 (see paragraph 40 above), was conducted in an Article 2 compliant manner.

95. As to the substantive complaint about the planning and conduct of the operation, the inquest provided a full and public investigation into the facts surrounding those deaths. The inquest jury found that the soldiers had used reasonable force, that there had been no flaws in the planning or control of the operation and that no further steps could have been taken to minimise the risk of lethal force being used.

96. The Article 2 compliant inquest also meant that there had been compliance with the procedural guarantees of Article 2. The inquest was transparent and rigorous. It took place in public. There was significant document disclosure: while a certain number of documents were no longer available due to the passage of time, the evidence gathered by the inquest was such that the unavailability of some documentary evidence did not diminish the ability of the inquest to resolve the issues required for it to comply with Article 2. Legal aid was granted and the applicants were represented by a solicitor and two counsel. They were permitted to participate fully in the inquest.

97. While there had been significant delay in holding that inquest, there was no evidence that this delay had prejudiced the integrity of the inquest process. The Government noted that the High Court had found a violation of Article 2 of the Convention in January 2004 and in May 2011 it was accepted that the inquest had to comply with Article 2.

98. The scope of the inquest allowed the jury to explore and rule on the relevant matters. As to the command and control of the operation, the inquest heard Officer Y (a senior officer in the RUC TCG who had, with others, tasked the specialist unit for the present operation); Soldier K (the officer commanding of the specialist military component that provided capability to the RUC in Northern Ireland); Solider H (the captain with responsibility for the military unit involved in the operation); Soldiers A, C, D, E, F, G and I; and Soldier J (who gave evidence as to the training of the relevant SAS unit). All those soldiers (apart from Soldier J) also gave evidence as to the planning of the operation, including its objective, as well as on the briefings prior to the operation and on what was known about the deceased. Those military witnesses, in particular Soldiers A, C, D and H, gave evidence on steps taken to reduce the risk of lethal force being used and Soldiers A, C and D gave evidence as regards the justification for the use of lethal force in the particular circumstances.

99. The conclusions of the earlier investigation were the same as those reached by the inquest jury, a fact which supported the submission that the RUC investigation was sufficiently robust and independent as to ascertain all the facts and reach correct conclusions on the basis of the information available. The RUC officers who carried out the original investigation denied in evidence that they had not carried out a sufficiently independent or probing investigation into the incident.

100. Reasons for not prosecuting had been provided by the DPP and the DPP would have to reconsider that decision should a reference be made under section 35(3) of the 2002 Act, which decision would, in turn, be amenable to judicial review.

101. Finally, the Government argued that there had been no violation of Article 13 of the Convention. The pending civil action for damages indicated that the applicants accepted the existence of an effective civil remedy. In any event, the inquest provided a thorough and effective investigation, and judicial review otherwise provided a remedy allowing the applicants to challenge decisions of the coroner and, were it to be relevant in the future, any decision by the DPP not to prosecute.

2. The applicants

102. The applicants complained of a violation of the substantive aspect of Article 2 arguing that the use of lethal force was not absolutely necessary in that the operation had not been planned and controlled so as to minimise the risk to life and, indeed, that there had been a deliberate decision to kill the deceased. Given the inquest's failure to comply with the procedural requirements of Article 2, the inquest verdict could not be relied upon.

103. As to the victim exception on which the Government relied as regards the pending civil proceedings, the applicants relied on the line of jurisprudence represented by *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, §§ 55-56, 20 December 2007; *Beganović v. Croatia*, no. 46423/06, § 56, 25 June 2009; *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, §§ 31-48, 27 May 2010; *Kopylov v. Russia*, no. 3933/04, § 121, 29 July 2010; *Gäfgen v. Germany* [GC], no. 22978/05, § 119, ECHR 2010; and *Darraj v. France*, no. 34588/07, §§ 22-53, 4 November 2010. Ineffective investigative, inquest and prosecution processes undermined the civil action so, even if that action was pending, that did not deprive them of their victim status or suggest that they had not yet exhausted domestic remedies.

104. The applicants also complained of a breach of the procedural obligation to carry out an independent and effective investigation.

105. They argued that the RUC post-operation investigation lacked independence and was ineffective. There was no hierarchical independence between those involved in the operation (RUC officers and soldiers) and those investigating it (RUC officers). The RUC investigation also lacked practical independence: the RUC regarded themselves as liaising with, as opposed to investigating, the soldiers so that, for example, the shooters were not separated before making their statements and the statements were perfunctory. The investigation was inadequate in that it focused disproportionately on whether civilians in the vicinity were responsible for the weapons and this was supported by the evidence of Soldier L at the inquest. While the briefing notes of soldiers before and after the shooting as

well as radio logs of communications between the shooting soldiers and headquarters had existed and were under RUC control, the RUC officers investigating the incident were not provided with those notes and logs and, as confirmed by witnesses at the inquest, a significant body of documents (including these notes and logs) had since disappeared. There had also been inadequate public scrutiny of the investigation and the inquest did not resolve that.

106. They also argued that the DPP had failed to inform the applicants of the decision not to prosecute and the reasons eventually given in July 2011 were inadequate. In addition, the criminal-justice system, as it applied to the prosecution of killings by State agents, was not Convention compatible. The applicants challenged the standard evidential test for prosecution and the breadth of the law on self-defence.

107. They further maintained that the involvement of the next-of-kin was inadequate to safeguard their interests. The first applicant was not formally advised of her son's death and, indeed, the RUC had taunted her family about his death. The first formal contact by the authorities was in 1997 when the coroner advised that he had received papers in the case and they were not kept informed by the DPP (see the preceding paragraph). Later, certain decisions during the inquest by the coroner prevented them from effectively participating in the inquest (see paragraph 110 below).

108. They also argued that the inquest, which took place after the introduction of the application, had not fulfilled the procedural obligations.

109. In the first place, they considered the inquest ineffective. The exclusion of documentary and oral evidence about other incidents of lethal force excessively limited the scope of the inquest because it precluded scrutiny of the role of specialist military units in lethal-force incidents when the allegations were of a "shoot-to-kill" policy and, at the least, of such units being more likely to use lethal and/or excessive force unnecessarily. In addition, the coroner's questions to the jury undermined the jury's ability to scrutinise effectively the planning and control of the operation so as to minimise any recourse to lethal force as well as the acts of each soldier in using lethal force. Moreover, the coroner's response to the jury question about shooting at a corpse was a significant misdirection: it unduly narrowed the scope of the investigation towards the limited "cause of death" and away from the "circumstances whereby the deceased came by his death". The coroner's direction was also incorrect on the issue of excessive force: it concerned the shooting of someone who could not pose a threat and it was also illustrative of the conduct of the soldiers individually and collectively.

110. Secondly, as a result of the deficient rulings as regards other lethal-force incidents, the next-of-kin were prevented from participating in the inquest to the extent necessary to protect their legitimate interests and there was insufficient public scrutiny of the proceedings to secure accountability.

111. Thirdly, the continued involvement of the juror who was demonstrably hostile towards the next-of-kin meant that the jury could be considered neither fair nor impartial nor, therefore, independent. The applicants emphasised the unique and particularly sensitive role of inquest juries in Northern Ireland.

112. Finally, they argued that the delay of over twenty-one years before an Article 2 compliant inquest was opened was excessive and unexplained and that such delays were demonstrably endemic. Their primary argument was that this delay amounted, of itself, to a breach of the obligation to provide an investigation that began promptly and proceeded expeditiously. Further, they contended that the delay had actually compromised the effectiveness of the inquest process in different ways. In this latter respect, they claimed that the delay had led to the loss and/or destruction of a significant body of contemporaneous documentation. The delay had also prejudiced the attendance of witnesses: certain witnesses could not be compelled because they no longer resided in the jurisdiction (Soldier B did not attend at all and Soldier A did not re-attend) and others had died or were ill (only one RUC officer involved in planning and control could attend and his recollection was limited). The applicants specifically highlighted the delay in granting them legal aid for the inquest and pointed out that the onus had been placed entirely on them to ensure the inquest progressed.

113. The HET investigation could not, in the applicants' view, remedy these deficiencies. It was not an investigation but a paper review: only Soldier A was interviewed and he essentially confirmed his prior statement; it did not identify any soldier; it had an undisclosed agreement with the MOD on security issues; it failed to review ballistics or forensic evidence and to conduct expert studies; and it failed to investigate the involvement of military witnesses in other lethal-force incidents. The HET review was ineffective, lacked independence, failed to involve the next-of-kin and had no adequate element of public scrutiny.

114. Finally, the applicants complained under Article 13, taken in conjunction with Article 2, that they had no effective domestic remedy since the HRA did not apply to deaths occurring before it came into force. The judgment of the Supreme Court of May 2011 meant that they could rely on their Convention rights to secure an Article 2 compliant inquest thereafter but not to complain about past investigative failings. Thus it could not be said that they could enforce the substance of their Convention rights in the domestic legal system.

3. The Committee on the Administration of Justice ("the CAJ")

115. The CAJ is a non-governmental organisation affiliated with the International Federation of Human Rights. The CAJ considered the delay in holding the present inquest to be illustrative of a wider problem concerning controversial inquests in Northern Ireland.

116. The CAJ referred to the delay in executing the six judgments of this Court concerning Northern Ireland, especially as regards the expediting inquests. There was an unacceptable and endemic pattern of State delay punctuated by proceedings by the next-of-kin attempting to move the process forward. The CAJ submitted a list from the coroner's service dated July 2011 (updating the list submitted to the Supreme Court in April 2011) which listed thirty-eight cases in which inquests were either outstanding or had just finished: five of the deaths had taken place in 1971 and 1972 and only one inquest had taken place (in June 2011); eight deaths had occurred in the 1980s and while provisional dates had been set, no inquests had been held; and eighteen concerned deaths in the 1990s in respect of which only one inquest had been held. Most of the cases concerned the use of lethal force by the security forces and some concerned killings attributed to paramilitary forces. Delay since the above-mentioned six judgments of this Court was, according to the CAJ, an aggravating factor and it referred to numerous public declarations of various bodies concerning reform of the Convention system which emphasised the need to execute judgments effectively and speedily. Indeed, the Government itself recognised that inquest delay had violated Article 2 (Command Paper 7524, "Responding to Human Rights Judgments: Government Response to the Joint Committee on Human Rights' Thirty-First Report of Session 2007-08" (January 2009).

117. The CAJ proposed a number of alternative ways in which the Court's judgment could address this endemic issue. Damages could be increased to reflect additional non-pecuniary damage given the delay since the lead judgments. A timetable could be imposed for future proceedings and/or a graduated schedule of compensation could be laid down to cover any subsequent period of delay. The Court could find a violation on the delay aspect and adjourn the remainder of the case pending the State's response. The Court might consider making the case a pilot judgment and giving operative directions about delay under Article 46 of the Convention.

4. The Equality and Human Rights Commission (EHRC) and the Northern Ireland Human Rights Commission ("the NIHRC")

118. The EHRC is an independent statutory non-departmental public body tasked with monitoring equality and human rights. The NIHRC is a statutory body created pursuant to the Belfast Agreement of April 1998 and it promotes human rights standards in Northern Ireland. Both have intervened in cases before this Court, the latter in the above-cited cases of *McKerr*, *Hugh Jordan*, *Kelly and Others* and *Shanaghan*. They also appeared before the Supreme Court in the applicants' recent judicial review action.

119. The EHRC and NIHRC raised an issue not addressed by either party. They endorsed and repeated the submissions of the EHRC in another pending case before this Court (*Armani da Silva v. the United Kingdom*,

no. 5878/08). They contended that the standard evidential test for prosecution failed adequately to comply with the State's positive obligation to prosecute. The need for a lower evidential test was enhanced by the fact that the law of self-defence in English law was drawn very widely, was partially subjective in its formulation and was inconsistent with the requirements of Article 2 § 2. The standard evidential test, combined with the law of self-defence, meant that prosecutions of State officials for causing death were exceedingly rare. Moreover, the scope for review by the domestic courts of the application of the evidential test was also limited and failed to meet the strict procedural requirements of Article 2.

120. They provided statistics on deaths caused by the use of lethal force by State agents and argued that the comparatively low number of prosecutions raised concerns about the impunity of such agents. Various authorities (the coroner's service, the Office of the Police Ombudsman and the HET) were overwhelmed with requests for reinvestigations. All of this had, in turn, caused enduring damage to the rule of law in Northern Ireland.

B. Admissibility

121. Save in relation to the complaint about investigative delay, the Court is not in a position to consider the merits of the complaints under the substantive and other procedural aspects of Article 2 because the applicants' civil action is pending (see for example, *Caraher*, cited above; *Hay v. the United Kingdom* (dec.), no. 41894/98 ECHR 2000-XI; *McKerr*, cited above, §§ 19-23; and *Bailey*, cited above) and because, given the pending judicial review proceedings, the initiation of further relevant investigative procedures, including of a criminal and/or disciplinary nature, remains possible (see for example, *Nikolova and Velichkova*, cited above, §§ 55-56; *Gäfgen*, cited above, § 119; and *Darraj*, cited above, §§ 22-53).

122. The applicants' civil action, issued in 2012, is pending. The Court does not accept that there is any demonstrated factor which can be considered to have deprived the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of the deaths and within any applicable limitation period, although the present and any future inquest verdict as well as any future criminal or disciplinary proceedings (see immediately below) could clearly inform the civil action. While the lapse of time would make it difficult for the civil court to piece together the evidence, any such attempt should in principle take place in a domestic, not in an international, forum (see *McKerr*, cited above, § 118; and *Hugh Jordan*, cited above, §§ 111-12).

123. As to further relevant investigative procedures, it is true that the inquest has now taken place, ending in May 2012. However, the Court considers, for the reasons detailed below, that that inquest was an unusual fact-finding exercise, key aspects of which have been challenged in some

detail for their compliance with Article 2 in pending judicial review proceedings.

124. The present inquest procedure was a relatively novel one, which evolved significantly by dint of several judicial review actions initiated by the applicants, each of which was important in terms of coronial law and practice in Northern Ireland and many of which ended in their favour.

125. Their first action ended in March 2007 with a House of Lords judgment clarifying, in the applicants' favour, a fundamental issue concerning the disclosure obligations of the PSNI (see paragraph 23 above). The second action ended, also in the applicants' favour, with a judgment of the Supreme Court of May 2011 of some significance, as it overturned the prior judgment of the House of Lords in *McKerr* and provided that inquests into pre-HRA deaths had to be compliant with Article 2 of the Convention (see paragraph 40 above). This broadened the scope of the inquest (covering, notably, "in what circumstances" the deceased came by their deaths, see paragraph 78 above) and provided the applicants with a range of additional procedural rights.

126. This judgment of the Supreme Court of May 2011 then had to be interpreted and applied by the coroner to the peculiarities of the present legacy case including its historical context (for example, the related shoot-to-kill allegations) and the delay since the deaths (for example, the intervening disclosure obligations, the loss of material evidence and the unavailability of witnesses). Consistently, the applicant launched three judicial review actions during the inquest hearing. However, at that point the delay was such (over twenty-one years) that the High Court felt obliged to raise the threshold for leave to apply for judicial review to "exceptional" circumstances warranting the adjournment of the inquest, the High Court on one occasion noting that there was, in any event, a post-inquest remedy. Two judicial review applications were rejected on this basis. Not unsurprisingly therefore the first applicant began another judicial review action in June 2012 after the inquest, repeating two arguments rejected by the High Court as not "exceptional" and raising several new procedural issues (see paragraphs 64-66 above). The High Court has yet to hear the pending judicial review action. The applicants have requested the High Court to quash the inquest verdict and to order a fresh inquest, in which case the coroner's decision to refer or not to the DPP and the DPP's decision to prosecute or not would both be open to judicial review.

127. The applicants also argued that certain past deficiencies as well as the delay to date had already prejudiced the investigation and inquest processes. It is also true that this Court identified certain procedural deficiencies before the inquest had even taken place in the above-cited *Hugh Jordan* case. However, in contrast to the domestic law in issue in that case, the Supreme Court judgment of May 2011 meant that domestic law required the present inquest to comply with the procedural requirements of

Article 2. This the coroner set out to do and the pending judicial review action will review key aspects of the inquest against the procedural guarantees of Article 2. Pending the outstanding domestic proceedings, the Court considers that it cannot examine whether the inquest has been deprived, by prior investigative shortcomings or delay, of its ability to establish the facts and determine the lawfulness or otherwise of the deaths in question (see *McKerr,* § 117; *Hugh Jordan*, § 111; and *McShane*, § 103, all cited above).

128. In all of the above circumstances, the complaints under Article 2, other than the complaint about investigative delay itself, are inadmissible as being premature and/or on the ground that domestic remedies have not yet been exhausted within the meaning of Article 35 § 1. The associated complaint under Article 13 must also therefore be rejected in accordance with Article 35 §§ 3 (a) and 4. The Court notes that, should the applicants be dissatisfied in the future with the progress or outcome of those domestic procedures, it would be open to them to reintroduce these complaints under the substantive and procedural aspects of Article 2 of the Convention.

129. However, the consequence of the pending judicial review proceedings is that the investigative process into the shootings of the applicants' relatives, including the inquest, has still not finished twenty-three years later. As to the admissibility of this remaining complaint about the investigative delay itself, the Government did not explain how the High and Supreme Court judgments to which they referred provided effective redress for such delay. The Court considers that this complaint under Article 2 about investigative delay is not manifestly ill-founded within the meaning of Article 35 § 3 (a) or inadmissible on any other ground. It must therefore be declared admissible, along with the related complaint under Article 13.

C. Merits

130. Turning to the merits of the admissible complaint, it is established that Article 2 requires investigations to begin promptly and to proceed with reasonable expedition (see the six judgments concerning Northern Ireland, at paragraph 86 above), and this is required quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Hugh Jordan*, cited above, §§ 108 and 136-40).

131. The Court considers it striking that the present deaths occurred in 1990 and that the inquest hearing proper did not begin until March 2012,

more than twenty-one years after those deaths. It has noted the following periods of delay which the Government have not attempted to justify.

132. The decision of the DPP not to prosecute was not taken until two and a half years after the deaths. While it is not clear when the applicants found out about the decision (the DPP was not obliged by domestic law at the time to notify the next-of-kin directly), it was clearly some time thereafter.

133. The RUC did not forward material to the coroner until four years after the deaths; a further disclosure followed a year later in late 1995. Thereafter over two years went by before the coroner made his first contact with the applicants and this was only to inform them of the disclosure made years earlier by the RUC. An additional four and a half years passed before the coroner requested the relevant soldiers' statements from the PSNI, which statements appear to have been furnished to the coroner in mid-2002 when other documents were refused. At this point, the deaths had taken place almost twelve years previously.

134. There followed lengthy correspondence between the applicants, the coroner and the PSNI about disclosure. It was only after the applicants took judicial review proceedings in October 2002 that the PSNI provided the applicants, in February 2003, with the documents already forwarded to the coroner. While it is true that three instances examined the action for judicial review, the proceedings took in total four and a half years and the result in March 2007 was favourable to the applicants.

135. Disclosure continued to be disputed thereafter: over two years after the above-noted House of Lords' judgment, disclosure of certain material from the PSNI to the coroner was still outstanding (July 2009). Despite the applicants' numerous follow-up letters, the first preliminary inquest hearing did not take place until September 2009 and redacted PSNI material was furnished to the applicants in December 2009. Further pre-inquest exchanges with the coroner, initiated by the applicants, appear to have concerned the scope of the inquest. Issues of disclosure, expert evidence and site inspection remained open until they were resolved in the applicants' favour by the Supreme Court judgment of May 2011. Although the three instances examined this second action quickly, resolving it in the applicants' favour, this action nevertheless added another two years to the delay in starting the inquest. It took a further nine to ten months for more soldiers' statements to be furnished to the applicants (in February and March 2012), just prior to the opening of the inquest in March 2012. Thereafter the inquest proceeded quickly, ending in May 2012 with a detailed verdict.

136. This period of over twenty-two years can be broadly divided into three phases, which are illustrative of the nature of the delay the present applicants encountered.

137. The first, from 1990 to 2002, was marked by inordinately long periods of inactivity during which some disclosure was made by the RUC and the PSNI, which disclosure was later shown to have been inadequate.

138. The second, from 2002 to March 2012 when the inquest began, is characterised by the applicants' and others' legal actions and initiatives which were demonstrably necessary to drive forward their inquests and to ensure the clarification of certain important aspects of coronial law and practice including, notably, those pertaining to the rights of next-of-kin. In particular, the principles flowing from the judgments of this Court of 4 May 2001 were applied in domestic law, not through legislation, but through a series of complex and overlapping domestic judicial review applications. The entry into force of the HRA in 2000 brought with it further questions of relevance to coronial law and, notably, its application to investigations into pre-HRA deaths, a key issue not finally resolved until the judgment by the Supreme Court in the applicants' case of May 2011 which, indeed, overturned an earlier judgment of the House of Lords in *McKerr* (see paragraph 40 above). The present applicants were centrally involved in these important legal developments. Their inquest was postponed, effectively from 2002 to 2012, pending their main two judicial review actions, the legal issues clarified in those two actions were, as noted above, crucial for coronial law and practice and the findings were in their favour.

However, this manner of proceeding inevitably delayed the investigations and inquests into security force killings in Northern Ireland significantly and this was aptly described by the Court of Appeal in one of Hugh Jordan's numerous judicial review actions about the death of his son, Pearse Jordan (see paragraph 82 above). The fact that it was necessary to postpone the applicants' inquest so frequently and for such long periods pending clarifying judicial review actions demonstrates to the Court that the inquest process itself was not structurally capable at the relevant time of providing the applicants with access to an effective investigation which would commence promptly and be conducted with due expedition (see *Hugh Jordan*, § 138, and *McKerr*, § 155, both cited above).

139. By the time the third and last phase began with the inquest hearing, the delay at that point was such that the High Court considered itself obliged to raise the threshold of leave to apply for judicial review to "exceptional circumstances", which made the clarification of the procedural rights of the applicants exceedingly difficult and which therefore rendered rather inescapable another post-inquest judicial review action. That action remains pending before the High Court.

140. These delays cannot be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however it is organised under national law, must be commenced promptly and carried out with reasonable expedition. To this extent, the foregoing finding of

excessive investigative delay of itself entails the conclusion that the investigation was ineffective for the purposes of Article 2. There has, accordingly, been a violation of Article 2 of the Convention under its procedural aspect by reason of excessive investigative delay. The Court also concludes that no separate issue arises under Article 13 in that respect (see *Hugh Jordan*, cited above, §§163-65).

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

141. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> ..."

142. The Court reiterates that, by virtue of Article 46 of the Convention, the Contracting Parties have undertaken to abide by the final judgments of the Court in any case to which they are parties, with execution being supervised by the Committee of Ministers of the Council of Europe. It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation, whether or not the applicant has requested just satisfaction, to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. Subject to monitoring by the Committee of Ministers, the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V; *Lukenda v. Slovenia*, no. 23032/02, §§ 89-98, ECHR 2005-X; *Apostol v. Georgia*, no. 40765/02, §§ 70-71, ECHR 2006-XIV; and *Abuyeva and Others v. Russia*, no. 27065/05, §§ 235-43, 2 December 2010).

143. The applicants and the CAJ suggested that delay in carrying out inquests, in cases of killings by the security forces in Northern Ireland, is an endemic problem and the CAJ proposed, *inter alia*, that the Court make a ruling under Article 46 of the Convention.

144. The Court has found that the investigative delay in the present case was such that it was incompatible with the procedural guarantees of Article 2. In so doing, it considered that throughout the relevant period of time the inquest process itself was not structurally capable of providing the applicants with access to an investigation which would commence promptly

and be conducted with due expedition (see paragraphs 136-40 above). Information furnished by the coroner's service of Northern Ireland in April 2011 to the Supreme Court and in July 2011 to the CAJ (see paragraphs 41 and 116 above) is noted. The Court considers that the carrying out of investigations, including the holding of inquests into killings by the security forces in Northern Ireland, has been marked by major delays. It further considers that such delays remain a serious and pervasive problem in Northern Ireland. While the contents of the Committee of Ministers Resolution of 2008 are noted, the Committee more recently expressed its concern about investigative delay (Resolution of March 2009) as regards four of the above-cited six judgments concerning Northern Ireland (see paragraphs 86-89 above). These four judgments reflected a pattern of delay very similar to that which took place in the present case (see, in particular, *McKerr* and *Hugh Jordan*). Almost twelve years after those four judgments were delivered, the Committee of Ministers continues to supervise individual measures of execution concerning investigative delay.

145. The Court recalls that it falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – may be required of the respondent Government by way of compliance (see *Abuyeva and Others*, cited above, § 243). However, the Court considers that, whatever the specific modalities chosen, this must involve the State taking, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

146. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damages

147. The applicants did not submit a claim for pecuniary or non-pecuniary damages. Accordingly, the Court considers that there is no call to award them any sums on that account.

B. Costs and expenses

148. The applicants claimed 42,811.27 pounds sterling in legal costs and expenses before the Court, submitting relevant vouchers and bills. The Government considered this amount to be excessive (notably, the hours billed for the solicitor since the application and observations had been drafted by leading Counsel).

149. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, the two sets of observations required of the applicants and the total hours of work claimed, the Court considers it reasonable to award the sum of 14,000 euros, plus any tax that may be chargeable to the applicants on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement.

C. Default interest

150. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the complaints under Articles 2 and 13 of the Convention concerning investigative delay admissible and the remainder of the application inadmissible;

2. *Holds*, unanimously, that there has been a violation of the procedural requirements of Article 2 of the Convention by reason of excessive investigative delay;

3. *Holds*, by six votes to one, that no separate issue arises, under Article 13 of the Convention taken in conjunction with Article 2, as regards that investigative delay;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 14,000 (fourteen

thousand euros), plus any tax that may be chargeable to the applicants on this sum, in respect of costs and expenses of the application, to be converted into pounds sterling at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

(c) that the Government must take, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 of the Convention are complied with expeditiously.

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 16 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Kalaydjieva;

(b) concurring opinion of Judge Mahoney.

I.Z.

F.E.P.

CONCURRING OPINION OF JUDGE KALAYDJIEVA[1]

It would be difficult not to agree with the majority that the applicants' complaints that, in violation of the requirements of Article 2 of the Convention, "the investigative process ... has still not finished twenty-three years later" in the case of the present judgment (see paragraph 129) and fifteen years later in the case of the *Hemsworth* judgment (see paragraph 68 of that judgment) are not manifestly ill-founded. The fact that the Government failed to investigate "expeditiously" appears flagrant. This cannot in itself justify a downgrade of the usual analysis performed by the Court in cases under Article 2 to one appropriate for cases concerning the "unreasonable length of proceedings".

The wrong premise of this analysis is that the requirement of Article 2 for investigations "to begin promptly and to proceed with reasonable expedition" is "quite apart from any question of whether the delay actually impacted on [its] effectiveness". This premise seems to have little support in the Court's position in hundreds of other cases, where the Court held that "any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness" (see, among many other authorities, *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001; *Anguelova v. Bulgaria*, no. 38361/97, § 139, ECHR 2002-IV; and *Mojsiejew v. Poland*, no. 11818/02, 24 March 2009). Moreover, the case-law is clear in indicating that in certain cases a criminal investigation is required regardless of whether or not civil proceedings were or were not instituted seeking compensation for the damage allegedly sustained. In this regard the present two cases must be distinguished from the case of *Hugh Jordan v. the United Kingdom* (no. 24746/94, 4 May 2001), where the applicant had not availed himself of the opportunity of civil proceedings, as well as from the case of *Caraher v. the United Kingdom* ((dec.), no. 24520/94, ECHR 2000-I), where the applicant had in fact come to an agreement on compensation. In any event this Court has never defined civil compensation proceedings as the sole appropriate forum for the determination of the issue whether or not there has been a violation of Articles 2 or 3 of the Convention.

The analysis followed by the majority then continues along the line of the delays "attributable to" the fact of the "exceptional" complexity of the traditional scope and competence of the coroner's inquest and/or the time necessary for the domestic judiciary to overcome them at the request of the applicants (see paragraph 126 in the present judgment and paragraphs 69-70

1. This is an opinion common to the present judgment and the judgment in *Collette and Michael Hemsworth v. the United Kingdom*, no. 58559/09, 16 July 2013 (hereinafter "the *Hemsworth* judgment"), both delivered on the same date.

in *Hemsworth*). The Convention does not prescribe any specific form in which the required prompt investigation should take place. The procedure, in which the establishment of the facts takes place is irrelevant in so far as they were made known to those affected as a result of the authorities' prompt and reasonable steps to this end (see, among many other authorities, *Stoyanovi v. Bulgaria*, no. 42980/04, §§ 64-69, 9 November 2010).

In these circumstances I am far from convinced that it was open to the Government to rely on the deficiency or "complexity" of the existing domestic procedure, which seem to have been known to the authorities for some years after the first judgments of this Court in similar cases against the United Kingdom, or that they may rely on the time necessary to overcome the difficulties in the process of interpreting whether or not the domestic law "required [this] inquest to comply with the procedural requirements of Article 2" of the Convention (see paragraph 127 in this judgment and paragraph 70 in the *Hemsworth* judgment). The fact remains that the Government failed to demonstrate that they had, of their own motion, taken any, still less "all reasonable steps" to investigate with a view to establishing the facts.

The rationale of the analysis appears further to rely on the delays "attributable" to the applicants' own "understandable" conduct. The fact that the applicants in the two cases in question were required to make long and painful efforts in order to trigger a proper and effective investigation into the deaths of their next-of-kin and have the scope of the coroner's inquest expanded, thus bringing it into conformity with the requirements of Article 2 of the Convention, cannot be held to reverse the positive *ex officio* obligation of States Parties into a remedy which affected parties are expected to exhaust. While it is true that States Parties to the Convention are required to provide effective access to the investigation for the next-of-kin, this neither changes the burden of the *ex officio* duty of the authorities nor limits it to "providing the applicants with 'access' to an ... investigation which would commence promptly and be conducted with due expedition" (see paragraph 138 of this judgment, and paragraph 73 of the *Hemsworth* judgment). That the applicants "understandably" availed themselves of whatever procedure was open and available to them cannot be held against them.

This approach inevitably led the majority to the limited conclusion that the "unusual fact-finding exercise" of the coroner's inquest itself was "not structurally capable ... of providing the applicants with access to an investigation which would commence promptly and be conducted with due expedition". I fully agree with this conclusion. However, I question its usefulness at a time when more than ten years have elapsed since the adoption of the first judgments in similar cases concerning the United Kingdom (see paragraph 85 in this judgment and paragraph 14 in the *Hemsworth* judgment). The principles concerning the duty to investigate

were indicated already in *Hugh Jordan* (cited above, §§ 72-74) and were followed with regard to all other States Parties to the Convention.

The circumstances of the two cases in question concern the first and primary purpose of the investigation prescribed by Article 2 – the establishment and disclosure of the facts and circumstances known only to the authorities. The determination of appropriate effective redress, including administrative, disciplinary, criminal or pecuniary responsibility, is only possible as a result of such disclosure (see, for example, *Iliya Petrov v. Bulgaria*, no. 19202/03, 24 April 2012, or *Nencheva and Others v. Bulgaria*, no. 48609/06, 18 June 2013). An investigation appears to be unnecessary where the facts giving rise to the arguable complaints were known to the affected parties *ab initio* (see *Nencheva and Others*, cited above).

There is nothing to explain, still less to justify, the failure of the domestic authorities to meet their obligations through more appropriate and expeditious means of their own choice, including by introducing appropriate legislative changes in choosing "as a matter of some priority" any other "specific modalities".

The question remains, however, whether in the face of a clearly ineffective domestic investigation which may be seen as amounting to a refusal to investigate, the Court may find itself in a situation where it may be prevented from subjecting such grave complaints to any scrutiny or must declare the domestic authorities "finally free" to discharge their obligations as they deem appropriate.

Looking at what appear to be ample, but missed, opportunities to do so for more than fifteen or even twenty years, I am not convinced that "the respondent State remains free to choose the means by which it will discharge its legal obligations" under Article 2 of the Convention. Such a conclusion falls short of those reached more than ten years ago in similar cases against the United Kingdom, where the Court indicated that "a prompt response by the authorities may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts" (see *Hugh Jordan*, cited above, §§ 108 and 136-40). The conclusions in that case were premised on the assumption that there were no reasons to believe that the applicant would be unable to assert his rights at the national level. This assumption remains valid only where the affected party was not already continuously confronted with obstacles to learning and establishing the facts – as in the two cases in question.

The majority in these two cases failed to scrutinise whether in the last two decades the authorities genuinely pursued – and the extent to which they finally achieved – this primary purpose of disclosure and establishment of facts, which would in its turn make possible any further steps required for the determination of disciplinary, criminal or pecuniary responsibility as

appropriate. In this regard the majority merely noted the missing documents and witnesses and observed that "criminal and disciplinary proceedings, of central relevance to the investigative obligation under Article 2, can now be initiated" and that "future criminal or disciplinary proceedings ... could clearly inform the civil action" instituted in 2001 (see paragraphs 63 and 61 respectively of the *Hemsworth* judgment). In its earlier practice this Court declared that a finding of delay on the part of the domestic authorities (see paragraph 92 of the present judgment) was insufficient to deprive the injured party of victim status in the absence of a remedy in this regard (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178 et seq. and 193, ECHR 2006-V).

It should not be overlooked that the Court developed its views on the positive obligations to investigate precisely in cases where the national authorities had failed to act promptly and effectively in establishing the circumstances and disclosing them to the public and to the injured parties. Where this is not done, the Court shall always be faced with the necessity of dealing with the facts submitted by the parties as a first-instance court. In addition to their failure to investigate promptly and officially, the Government did not find it necessary to inform the Court of its views as to whether or not the circumstances known to them disclosed a violation of Article 2.

After decades of being faced with demonstrated reluctance and what would appear to be an attempted obstruction of justice (see paragraph 23 in the *Hemsworth* judgment), the applicants in that case were advised that the matter of the appropriateness of any potential criminal responsibility for the use of force against a person who was not even suspected of terrorist activities was now the subject of "active consideration" by the DPP (ibid., § 31), while in the present judgment there was allegedly still a possibility that the DPP would have to reconsider his decision. Any subsequent decision would, "in turn, be amenable to judicial review" (see paragraph 100 of this judgment).

Having declared that "save in relation to the complaint about investigative delay, the Court [unlike in cases against other countries] is not in a position to consider the merits of the complaints under the substantive and other procedural aspects of Article 2" (see paragraph 121 of this judgment), the majority in fact reverted the applicants to further indefinitely long proceedings, advising them that "should [they] be dissatisfied in the future with the progress or outcome of those [forthcoming] procedures, it would be open to them to reintroduce their complaints [before the Court] (see paragraph 67 in the *Hemsworth judgment*) .

In these circumstances I remain unconvinced that the domestic investigation was intended to "lead to the identification and punishment of those responsible" (see *Assenov and Others v. Bulgaria*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII, with further

reference to *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324; *Kaya v. Turkey*, 19 February 1998, § 86, *Reports* 1998-I; and *Yaşa v. Turkey*, 2 September 1998, § 98, *Reports* 1998-VI).

The absence of any plausible explanation for the failure to collect key evidence at the time when this was possible, and for attempts even to obstruct this process, should be treated with particular vigilance. In fact the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Articles 2 and 3 seem as a matter of principle to make it possible for at least some agents of the State to benefit from virtual impunity as a result of the passage of time.

I refer to my separate opinion in the case of *Oleksiy Mykhaylovych Zakharkin v. Ukraine* (no. 1727/04, 24 June 2010). "In such circumstances the victims of alleged [violations] will be further humiliated by the fact that the open denial of an investigation successfully prevented the Court's scrutiny and limited its role to witnessing acts which appear to be better qualified as 'collusion in or tolerance of unlawful acts'".

I would prefer not to comment on the amount of the applicants' compensation, which seems inappropriate even for "delays only", and/or the risk of creating an impression of cynicism. My concern is that the overall effect of this judgment not only multiplies the ineffectiveness already observed, but also renders this Court's subsidiary role clearly redundant. This role would have been unnecessary had the domestic authorities fulfilled their primary role in time.

CONCURRING OPINION OF JUDGE MAHONEY

This opinion is not intended to detract in any way from the reasoning of the Chamber's judgment, with which I fully agree, but merely to add some observations on a point that is addressed in the judgment but not gone into in much detail, namely the relationship between two contrasting lines of authority concerning the interplay between the substantive and procedural requirements of the right-to-life clause under the Convention (Article 2).

Two lines of authority

The Government relied on a line of British cases exemplified by *Caraher v. the United Kingdom* ((dec.), no. 24520/94, ECHR 2000-I – see paragraphs 86 and 93 of this judgment). This line of authority is usually summarised as entailing that where a breach of Article 2 – or Article 3, the clause prohibiting torture and inhuman or degrading treatment or punishment – has been acknowledged and adequate compensation paid in civil proceedings brought at national level, or where civil proceedings are pending or available, the Strasbourg Court should confine itself, in the international proceedings brought before it, to an examination of any plausible complaints made under the procedural aspect of Article 2 (or 3), it being accepted that payment of damages at national level cannot discharge the State from its duty under the Convention to secure the accountability of States' agents for acts or omissions amounting to a breach of Article 2 (or 3).

The applicants, on the other hand, relied on a line of authority originating in *Nikolova and Velichkova v. Bulgaria* (no. 7888/03, §§ 55-56, 20 December 2007 – see paragraph 103 of this judgment), which suggests that the examination of a substantive complaint under Article 2 (or 3) should be tied to the Court's assessment of all the procedural protections available, including investigative processes and not being limited to any civil action brought or available. On one reading of this case-law, it requires that, for the Court to refrain from considering the substantive complaint in the international proceedings brought before it, there must be a domestic procedure capable of leading to the identification and punishment of the perpetrator, not that that procedure must in fact have done so (see, for example, the language used in *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, § 39, 27 May 2010, and *Ablyazov v. Russia*, no. 22867/05, § 54, 30 October 2012).

Reconciling the two lines of authority

My approach is that these two lines of authority can well be read as being reconcilable and not divergent.

What is said in the *Nikolova and Velichkova* judgment goes to the content of the obligation imposed on the Contracting States by Article 2 and to the implications for the kind of strict scrutiny that should be carried out by this Court when examining Article 2 claims: in cases of wilful ill-treatment by State agents resulting in death, the breach of Article 2 cannot be dealt with by the State concerned exclusively through an award of compensation to the relatives of the victim. This judgment cites (at paragraph 55) the risk, failing proper prosecution and punishment of those responsible, of "buying off" the violation, of purchasing immunity for the perpetrators. As it was similarly put in *Fadime and Turan Karabulut* (cited above):

> "39. ... Confining the authorities' reaction to incidents of deprivations of life to the mere payment of compensation would ... make it possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity ...
>
> 44. ... Article 2 imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions ... Compliance with the State's positive obligations under Article 2 requires the domestic legal system to demonstrate its capacity to enforce the criminal law against those who have unlawfully taken the life of another ...
>
> 45. While there is no absolute obligation for all prosecutions to result in conviction, or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence, ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts ..."

The point was also succinctly made in *Berganović v. Croatia* (no. 46423/06, § 56, 25 June 2009) as regards complaints under Article 3:

> "... The civil remedies relied on by the Government cannot be regarded as sufficient for the fulfilment of a Contracting State's obligations under Article 3 of the Convention in cases such as the present one, as they are aimed at awarding damages rather than identifying and punishing those responsible ..."

Thus, the claim under Article 2 in relation to the procedural protection to be afforded in the national legal system in cases of killings by State agents will remain extant even if either sufficient compensation for conduct acknowledged as amounting to a substantive violation has already been awarded at national level or an effective domestic remedy capable of providing such acknowledgment and compensation is available. The possibility for the victim's relatives to seek and receive compensation represents only one part of the measures required of the national legal system under Article 2 in relation to deaths resulting from action taken by State agents and, in particular, where the action was deliberate ill-treatment.

In sum, ensuring proper investigation, followed, where appropriate, by prosecution of the perpetrators is a procedural obligation incumbent on States under Article 2 that continues to call for strict scrutiny on the part of

this Court even where a substantive violation has been acknowledged at national level and sufficient compensation awarded or an effective domestic remedy capable of providing such acknowledgment and compensation is available. Put another way, the extancy of this obligation means that on the international level an application alleging a procedural violation must be examined on its merits by this Court even where the substantive violation, for its part, has been, or is susceptible of being, acknowledged and compensated for at national level.

But these related conclusions do not in themselves and of themselves carry the consequence that an applicant is dispensed from the obligation incumbent on him or her under Article 35 § 1 to exhaust an appropriate domestic remedy, for example by bringing a civil action to obtain compensation for the substantive violation, if such a remedy is available and has not had its effectiveness undermined by the absence of adequate investigations. The differing obligations under Articles 2 (or 3) and 35 § 1 of the Convention, one incumbent on the State and the other on potential applicants to the Court, should not be confused and run into one.

This was brought out in the Court's Grand Chamber judgment in *Akdivar and Others v. Turkey* (16 September 1996, *Reports* 1996-IV), one of the first cases to establish the State's duty to investigate under the Convention (for "Turkish" judgments employing similar reasoning, see *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-IV, and *Menteş and Others v. Turkey*, 28 November 1997, *Reports* 1997-VIII; the "Turkish" case-law in this regard was then developed by the Court, through reading a duty to investigate directly into Article 2, in *Kaya v. Turkey*, 19 February 1998, §§ 86-87, *Reports* 1998-I, relying on the earlier British "Death on the Rock" case of *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 161-63 Series A no. 324). By virtue of the operation of the burden of proof, as the Court explained in the *Akdivar and Others* judgment, a complaint should not be rejected by reason of the mere existence of a theoretically adequate civil remedy if the applicant could demonstrate that the remedy was for some reason inadequate and ineffective in the particular circumstances or that there existed special circumstances absolving him or her from the requirement of exhaustion. One such reason may be constituted by the failure of the domestic authorities to undertake investigations in the face of serious allegations of misconduct or infliction of harm by State agents (§ 68). The Court recognised that in the particular circumstances obtaining in south-east Turkey at that time,

> "... the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative enquiries on which such remedies depend may be prevented from taking place". (§ 70)

The Court's conclusion on the facts was as follows:

> "... Against such a background [of severe civil strife, coupled with the applicants' position of insecurity and vulnerability following the destruction of their homes], the prospects of success of civil proceedings based on allegations against the security forces must be considered to be negligible in the absence of any official inquiry into their allegations, even assuming that they would have been able to secure the services of lawyers willing to press their claims before the courts. ..." (§ 73)

Not only would it sit ill with the Court's aversion to blanket rules, but it would also fly in the face of the *Akdivar and Others* case-law to deduce from the *Nikolova and Velichkova* line of authority any blanket rule to the effect that the failure to carry out an effective investigation and prosecution, as required by Article 2 (or 3), will always and automatically make it necessary for this Court to examine on its merits a substantive complaint made under the Article. As the Court was careful to state in *Akdivar and Others*:

> "The Court would emphasise that its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that applicants are absolved from the obligation ... to have normal recourse to the system of remedies which are available and functioning. It can only be in exceptional circumstances such as those which have been shown to exist in the present case that it could accept that applicants address themselves to the Strasbourg institutions for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts." (§ 77)

On the other hand, it does of course follow from *Nikolova and Velichkova*, as it does from *Akdivar and Others*, that the possible rejection of the substantive complaint on the ground of non-exhaustion of domestic remedies should be tied to an assessment of all the procedural protections available, notably the existence or not of an adequate investigation; and this in order to see if an effective remedy to complain about the alleged substantive violation could indeed be said to be available to the applicant in practice. It can readily be acknowledged that in many cases the *Nikolova and Velichkova* approach will indeed require the Court to go into the merits of the substantive complaint.

In terms of the Court's procedure, the result may well either be that, as in *Akdivar and Others*, the inadequacies of the investigation are so evident that the ineffectiveness in practice of the remedy relied on by the Government can be found at the outset; or, where a plausible procedural complaint of inadequate investigation is made, that the question of exhaustion or not of domestic remedies has to be joined to the merits. But it cannot and should not be excluded that, in some cases, it is clear on the evidence that the effectiveness of the available domestic remedy to look at the substantive allegations of unjustified killing by State agents has not been so adversely affected as to render the remedy ineffective. In such circumstances, it is difficult to see any reason (i) why the applicant should be dispensed from his or her normal obligation under Article 35 § 1 to exhaust an available and effective remedy in relation to that particular, namely substantive, complaint

and (ii) why the national system should not be allowed by this Court to do its subsidiary task.

A distinction should be drawn between two aspects of the Convention's operation. On the one hand, there is the strict scrutiny that this Court should always carry out in relation to Article 2 claims, notably as regards the procedural safeguards of proper investigation and prosecution, both in their own right as a ground for finding a violation of Article 2 and as a preliminary factor capable of affecting the effectiveness of legal and other remedies available to relatives of the victims. On the other hand, there is the "subsidiarity" obligation incumbent on applicants under Article 35 § 1 to exhaust available domestic remedies, even if those remedies relate to one branch only of their claim under Article 2, namely the substantive branch. There is overlap and linkage between these two aspects of the Convention's operation, but the two are not 100% coextensive. As was intimated in *Akdivar and Others*, a finding of inadequate investigation and prosecution does not automatically, in a blanket fashion, render nugatory the applicant's obligation to exhaust an available and effective domestic civil remedy to recover compensation for the substantive breach of Article 2 or Article 3, as the case may be. The inadequacy of the investigation and prosecution undertaken, if any, may well be a factor, a powerful factor, pointing to ineffectiveness of the civil remedy for compensation in the circumstances, but it is not decisive in itself or in all circumstances.

In conclusion on this point of general principle, it would, in my view, be simplistic, and mistaken, to take the *Nikolova and Velichkova* jurisprudence as entailing an automatic obligation for this Court to examine on its full merits, substantive as well as procedural, a right-to-life case whenever there has been no adequate investigation and prosecution.

The position regarding civil remedies in Northern Ireland

The courts in Northern Ireland have at their disposal various procedural tools to establish the facts and, notably, to oblige witness attendance, to order disclosure and discovery of documents, and to manage evidence that is sensitive in terms of national security so as to find a fair balance between genuine security needs and a plaintiff's legitimate interest in establishing the facts. The standard of proof required to establish liability is the civil one of proof on the balance of probabilities, not the stricter criminal or Convention standard of proof beyond reasonable doubt. As I understand it, the underlying logic in previous Northern Ireland cases, such as *Hugh Jordan v. the United Kingdom*, no. 24746/94, 4 May 2001, is that the system of civil remedies in Northern Ireland (and indeed in the United Kingdom in general) is sufficiently well armed and strong to constitute, in principle, an effective means of establishing facts and liability and of obtaining adequate compensation, as appropriate, in relation to killings or serious ill-treatment

allegedly committed by State agents. As a consequence – and this is in accord with the reasoning developed in *Akdivar and Others* – as regards a substantive complaint of unlawful killing under Article 2, the civil claim is in principle to be exhausted. It would have to be demonstrated, in a particular case before this Court, that the deficiencies in the process of investigation and of prosecution of perpetrators were so serious that the civil remedy was compromised to the point where it would be unreasonable to expect the applicant to exhaust it. Arguably such a situation could arise where, for example, as a result of delay key evidence had been lost or destroyed, key witnesses had died or become untraceable, and so on.

A similar logic can be seen to have been applied in cases concerning other countries, but with a different result: in these cases, the system of civil remedies was considered to be such that, in the absence of an effective investigation, it did not offer any real chance of establishing either the facts relating to the death or liability on the part of State agents.

The particular circumstances of the present case

The Chamber found (at paragraph 122 of its judgment) that in the present case "[no] demonstrated factor ... can be considered to have deprived the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of the deaths ...". The case file shows that the applicants are already well informed as regards the identity both of the authorities responsible for the planning of the operation and of the individual soldiers and police officers involved in the operation and then in the investigations. There is a wealth of information disclosed and available in relation to the circumstances impugned by the applicants. It cannot be said at this point that the bringing of the civil action by the applicants has been rendered ineffective in practice by reason of the alleged lack of adequate investigation and proper prosecution. As the Chamber's judgment points out, "[w]hile the lapse of time would make it difficult for the civil court to piece together the evidence, any such attempt should in principle take place in a domestic court, not in an international forum". The domestic civil action brought by the applicants is capable of enabling them to obtain the same kind of finding that they are seeking in the proceedings before this Court, namely a finding of unjustified killing by the public authorities whom they hold responsible, as well as the same kind of redress, namely an award of financial compensation. As a matter of general principle, subject, where applicable, to the specificities of the procedural protection afforded by virtue of Article 2 of the Convention, this is precisely the kind of situation that the rule of exhaustion of domestic remedies provided for under Article 35 § 1 is meant to cover.

In *Nikolova and Velichkova*, as in a number of other similar cases, an already exhausted civil remedy granting compensation was held to be

incapable of providing adequate redress for wilful ill-treatment by State agents resulting in death because of serious deficiencies in the completed investigation and criminal and/or disciplinary prosecution of the perpetrators. The most notable flaw being that the criminal and/or disciplinary proceedings brought against the perpetrators had ended with a result involving "a manifest disproportion between the gravity of the offence [found to have been committed] and the punishment imposed" (see, for example, *Nikolova and Velichkova*, cited above, §§ 62-63; and *Fadime and Turan Karabulut*, cited above, § 47; see also *Gäfgen v. Germany* [GC], no. 22978/05, §§ 123-25, ECHR 2010, in relation to conduct contrary to Article 3). Far from bringing the requisite procedural protection under Article 2, the outcome of the terminated investigative and prosecution process was judged to foster a sense of impunity on the part of the State agents responsible for the killing (see, for example, *Nikolova and Velichkova*, cited above, § 63 *in fine*).

In that respect the present applicants' Convention claim, unlike that in the above-mentioned cases, is premature "because, given the pending judicial review proceedings, the initiation of further relevant investigative procedures, including of a criminal and/or disciplinary nature, remains possible" (see paragraph 121 of this judgment), with the complaints made by the applicants before this Court, notably their outstanding procedural complaints, capable of being addressed and, if upheld, remedied at national level in that on-going process (see paragraphs 123-27). In particular, since "the pending judicial review action will review key aspects of the inquest against the procedural guarantees of Article 2 of the Convention", "the Court ... [before knowing the results of that action,] cannot examine whether the inquest has been deprived, by prior investigative shortcomings or delay, of its ability to establish the facts and determine the lawfulness or otherwise of the deaths in question" (see paragraph 127 *in fine*).

As the judgment points out (at paragraph 128 *in fine*), should the present applicants be dissatisfied with the progress or outcome of the various, as yet uncompleted, domestic procedures, it would be open to them to reintroduce before this Court both their substantive complaints and their outstanding procedural complaints under Article 2.

Concluding remark

It may doubtless appear somewhat anomalous that, twenty-three years after the deaths of the applicants' relatives, the applicants' substantive complaints and most of their procedural complaints under the Convention's right-to-life clause can be legally characterised as "premature". However, the position is so precisely because the innumerable and excessive delays in the inquest proceedings prevented the investigative process from beginning promptly and from being carried out with reasonable expedition. For this

reason, even before the completion of the applicants' civil action and their latest judicial review proceedings, the Court could not but find a procedural violation of Article 2 on the basis that the United Kingdom had, in relation to this requirement of promptness and reasonable expedition, failed in its obligation to the applicants to ensure, through the legal system in Northern Ireland, the effectiveness of the investigative process concerning the deaths of their relatives at the hands of the security forces.