THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 21 J.R.]

BETWEEN

THOMAS FOX

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 24th day of November, 2017

1. In these proceedings, the applicant challenges the decision and/or the respondents' ongoing failure or refusal to establish two commissions of investigation pursuant to the Commission of Investigation Act 2004 ("the 2004 Act") as per the recommendations of the Houses of the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights ("the Oireachtas Joint Committee") Final Report on the Report of the Independent Commission of Inquiry into the Murder of Seamus Ludlow.

2. To put the present application in context it is necessary to set out in detail the background to the case.

Background

3. Seamus Ludlow was murdered on 2nd May, 1976. He was 45 years of age at the time of his murder. He lived with his mother and his sister's family at Mount Pleasant, Dundalk, Co. Louth. At the time of his death, he was unmarried and was employed as a forestry worker. He was a catholic and had no connections with any paramilitary organisation. On Saturday 1st May, 1976, Mr. Ludlow had spent the evening at various hostelries in Dundalk. He left the Lisdoo Arms and was seen shortly after midnight outside a garage hitching a lift home, which was about two miles away. He failed to return home. The next morning, his sister began a search. His body was found that day by a tourist at approximately 3pm in a lane half a mile from his home.

The murder investigation

4. A post mortem examination was carried out by Dr. John Harbison State Pathologist. The post mortem concluded that Mr. Ludlow died from shock and haemorrhage as a result of bullet wounds to his heart, right lung and liver. The report offered no opinion regarding the calibre of bullets that killed Mr. Ludlow. The murder investigation team at Dundalk Garda Station concluded that Mr. Ludlow had been murdered elsewhere and his body dumped near his home. The investigation was headed by Superintendent Dan Murphy from Dublin Castle, together with a team of 30 detectives from Dublin and Dundalk. The applicant contends that the murder investigation was suspended after three weeks without explanation. According to the applicant's grounding affidavit sworn 18th January, 2016, a local garda had informed Mr. Ludlow's family of his belief that orders to halt the investigation into the murder came from Dublin.

5. The applicant avers that an important line of inquiry was ignored by the Gardaí, namely that Seamus Ludlow was a victim of either British Army or loyalist paramilitaries intent on murdering a senior Provisional IRA man and had mistaken Mr. Ludlow for that individual. He also avers that the Gardaí failed to question a group of eight SAS men who were discovered in the Republic of Ireland shortly after the murder. Mr. Ludlow's family also believed that, at the time, the Gardaí were conducting an orchestrated and persistent smear campaign against Mr. Ludlow by making unfounded allegations that he was murdered by the IRA for being an informer. Mr. Ludlow's family believe that this theory was circulated without any supporting evidence. Two family members were told separately and by different members of the Gardaí that Mr. Ludlow had been killed by the IRA for informing and that other family members had known about the planned killing beforehand.

6. It is averred by the applicant that in the immediate aftermath of the murder, Mr. Ludlow's brother-in-law, Kevin Donegan (now deceased), contacted the Gardaí on a regular basis to enquire about the progress of the investigation. The applicant avers that the late Mr. Donegan was consistently advised that Seamus Ludlow had been killed by the IRA and that family members had colluded with that organisation. The IRA denied any responsibility for the murder of Seamus Ludlow.

7. The history disclosed by the applicant in his affidavit is that the British Army took a close interest in the investigation being conducted by the Gardaí. Following Mr. Ludlow's funeral, a British Army Patrol called to Mr. Donegan's home in Northern Ireland. He was informed that they had been sent by the RUC to find out about the line of inquiry being pursed by the Gardaí. Mr. Donegan refused to speak to them but later went to Forkhill Barracks to talk with the RUC but met only British Army personnel on arrival. The applicant avers that Mr. Donegan was kidnapped and airlifted to Bessbrook British Army Base where he was questioned over an hour on the Garda investigation. According to the applicant, no member of the RUC has ever questioned any member of the Mr. Ludlow's family about the case nor shown any interest in it.

8. To date, nobody has been charged in relation to the killing of Seamus Ludlow either in this jurisdiction or elsewhere.

9. The applicant and other members of Mr. Ludlow's family have campaigned for many years for an inquiry arising out of concerns that the garda investigation into the murder was flawed.

10. On 24th March, 1998, the then Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue, was asked in the Dáil to make a statement on the circumstances surrounding the murder of Mr. Ludlow and the Minister confirmed that he had requested a report into the circumstances from the Garda Commissioner. As will become clear later, this was in the context of the investigation into Mr. Ludlow's murder having been re-activated in 1996.

11. Further questions were raised by Dáil Members on 14th May, 1998. Minister O'Donoghue's response at that time was that he had received the requested report from the Garda Commissioner and that certain matters had been referred to the Director of Public Prosecutions (DPP) for Northern Ireland for consideration and that any further action that might be taken by the Gardaí in the case

would depend on the outcome of that consideration. He confirmed that the garda investigation into the murder of Mr. Ludlow remained open. Minister O'Donoghue provided a similar response to a question raised by Seamus Kirk T.D. on 20th October, 1998.

12. On 26th July, 1999, in response to a letter from the applicant's then solicitors MacGuill & Co., Mr. O'Donoghue's private secretary advised that a direction had been given in 1996 by the Garda Commissioner, following a meeting with the Ludlow family, that a senior officer from the Garda National Bureau of Criminal Investigation (GNBCI) should further pursue the investigation into Mr. Ludlow's murder. This was duly done in conjunction with RUC officers. A number of people were arrested in Northern Ireland. The investigation file was duly forwarded to the DPP for Northern Ireland. MacGuill & Co. were also advised that the Garda Commissioner was also finalising a report on the investigation that had been re-activated in this jurisdiction and that same would receive careful consideration by the Minister when received.

13. In or about August, 1999, in a report entitled "A Place and A Name", Victims Commissioner, John Wilson, recommended that Mr. Ludlow's case should be the subject of a private inquiry. The Ludlow family were not happy with this approach. On 20th September, 1999, MacGuill & Co. wrote to the Secretary of the Department of Justice advising that "the murder of Seamus Ludlow fulfils all the normally accepted criteria for the conduct of a public inquiry. Indeed the case satisfies all the criteria accepted by the Government itself in its own submission to the Government of the United Kingdom calling for a public inquiry into the murder of Patrick Finucane."

14. On 21st October, 1999, MacGuill & Co. wrote to the Department of An Taoiseach enclosing a copy letter dated 15th October, 1999, from the DPP for Northern Ireland which confirmed that no prosecution would take place in relation to the murder of Mr. Ludlow. MacGuill & Co. asked for confirmation that since "the fear of compromising any possible prosecution … was the only impediment to the holding of a complete and public inquiry", it was presumed that the Government would now reconsider its position with regard to a public inquiry.

15. On. 8th December, 1999, Mr. O'Donoghue met with the Ludlow family. On 31st January, 2000, MacGuill & Co. were informed that the Minister was minded to recommend to the Government that the Ludlow case be included in the remit of the late Mr. Justice Liam Hamilton's Commission of Inquiry into the Dublin/Monaghan and Dundalk bombings. On 25th February, 2000, MacGuill & Co. wrote to the Minister for Justice emphasising that, given the "striking similarities" of the Ludlow case to the case of the late Patrick Finucane, "the case for a public enquiry [with regard to Mr. Ludlow] is compelling and unanswerable".

16. On 9th June, 2000, MacGuill & Co. wrote to the then Taoiseach, Bertie Ahern, urging that there was "an urgent public interest in the murder of Seamus Ludlow" and that the family would welcome an early meeting for the purposes of discussing the arrangements which might be put in place to secure a public judicial inquiry into Mr. Ludlow's murder and its subsequent investigation. On 28th July, 2000, the Taoiseach's private secretary advised MacGuill & Co. that, as had been indicated, the Taoiseach was convinced that the most appropriate approach was to proceed broadly on the lines of the Commission of Inquiry into the Dublin/Monaghan and Dundalk bombings. The letter went on to state that "under this approach, a public judicial enquiry is not ruled out at this stage. It would be one of a number of options that could be considered, following on the completion of an examination by an eminent legal person." The letter also stated that the examination by Judge Hamilton would not preclude the family continuing, if they wished, to campaign for a public enquiry, "as the Justice for the Forgotten Group continue[d] to do in regard to the Dublin/Monaghan bombings."

17. In a letter of 21st September, 2000, MacGuill & Co. expressed to the Taoiseach the family's disappointment with the proposed form of inquiry. They repeated their request for a public inquiry with full judicial powers.

18. In or about October, 2000, the late Mr. Justice Barron took over the Commission of Inquiry into the Dublin/Monaghan and Dundalk bombings.

19. In February, 2002, the Ludlow family and their solicitor met with the then Attorney General, Michael McDowell S.C. On 27th February, 2002, MacGuill & Co. wrote to the Attorney General advising, *inter alia*, that "the family are anxious to achieve a public inquiry into all the circumstances surrounding Seamus Ludlow's brutal and untimely death, with as little delay as possible" and that "they regard the referral of their case, without any consultation with them by the Government to the Barron Commission as an unnecessary impediment". The letter confirmed that the family intended no criticism of Judge Barron and that were Judge Barron to chair a public inquiry, they would be quite content. The letter went onto state that the Attorney General "did not raise any point of principle against a public inquiry" but had stated "that the Government was determined that there will be no public inquiry unless Judge Barron recommends one".

20. The Attorney General's response of 5th March, 2002, was to indicate Judge Barron's willingness to meet with the Ludlow family in order to explain his proposed *modus operandi* in respect of his Inquiry and the reasons for it.

21. A meeting between the Ludlow family and Judge Barron duly took place. Judge Barron referred to this meeting in a letter to Jane Winter of British/Irish Watch on 3rd March, 2004:

> "In the course of the meeting with the Ludlow family on the 23rd February [2002] in the offices of James MacGuill, I did express the view there might be a stronger case for a public inquiry than in the case of the Dublin/Monaghan bombings. However, it was not said on the basis there was more hard evidence of collusion, but because there were more matters that might be followed up within the jurisdiction".

22. On 26th March, 2002, Mr. Paul McGarry, of the Department of An Taoiseach, wrote to MacGuill & Co. referring to the meeting which had taken place with the Attorney General in February, 2002 and the question which had arisen at the meeting regarding the follow-up process to the examination into the circumstances of Mr. Ludlow's death by the Barron Inquiry. The letter stated as follows:

> "This is to confirm that Judge Barron will set out the results of his examination in a report and that report will be submitted to the Government.
>
> …[I]t is proposed that:
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> 1. [T]he report will be examined in public session at the Joint Oireachtas Committee on Justice, Equality, Law Reform, Defence, and Women's Rights or a sub-committee of that Committee. Because of the separation of powers in the Executive and the Legislature, it is not possible for the Government to direct the Oireachtas or a Committee thereof to take a particular action. However, the Government will do everything within its power to ensure that the Committee took this action and as cross-party support is expected for this approach, the Government are confident that matters would unfold along the lines envisaged.

> 2. The Joint Oireachtas Committee would direct that the report prepared by Judge Barron would be submitted to it, in order for it to advise… the Oireachtas as to what further action, if any, would be necessary to establish the truth of what happened.
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> …
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> As the Government sees the matter, there would be three approaches open to the Committee:
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> > (i) advise that the report achieved as far as possible the objective of finding out the truth and that no further action would be required or fruitful;
> >
> > (ii) advise that the report did not achieve the objective which could only be done through a public inquiry; or
> >
> > (iii) advise that the report did not achieve the objective and the Committee or a sub-committee of that Committee should examine the matter further (as outlined previously the options available to such committees or sub-committees include public hearings and powers to send for persons, papers and records)."

Judge Barron duly conducted his Inquiry and he reported to the Taoiseach on 19th October, 2004 ("the Barron Report").

23. By motions of referral by Dáil Eireann and Seanad Éireann dated 3rd November, 2005, both houses of the Oireachtas requested the Oireachtas Joint Committee or a sub-committee thereof to consider, including in public session, the Barron Report on the murder of Seamus Ludlow and the observations made thereon by the former Garda Commissioner and Judge Barron. The Oireachtas Joint Committee duly established a Sub-Committee on the Barron Report. The Sub-Committee was asked to consider the report in public session in order that the Oireachtas Joint Committee could report back to Dáil Eireann and Seanad Éireann by 31st March, 2006, for the purposes of making, *inter alia*, such recommendations as the Oireachtas Joint Committee considered appropriate.

24. The Sub-Committee held a series of public hearings on the matter and issued its report (the "Sub-Committee report") on 6th March, 2006. It was adopted by the Oireachtas Joint Committee on 23rd March, 2006.

The principal findings of the Barron Report and its consideration by the Sub Committee

25. On the basis of the information available to it, the Barron Inquiry concluded that Seamus Ludlow had been returning home from Dundalk, where he had been socialising, and was picked up by a car, probably as he was thumbing a lift home. The car was driven by a named individual (a Corporal in the Ulster Defence Regiment) and contained three other named individuals. All had loyalist paramilitary connections. For his part, Mr. Ludlow had no known political affiliations, republican or otherwise, and there was never any information to connect him with any subversive organisation. The Barron Report stated:

> "It would appear that the murder was a random, sectarian killing of a blameless catholic civilian by loyalist extremists."

Judge Barron did not recommend any other inquiry under the Tribunal of Inquiry (Evidence) Act 1921 as amended ("the 1921 Act").

26. As his was a private inquiry, Judge Barron did not have powers of compulsion in respect of disclosure of evidence or the attendance of witnesses. However, Judge Barron was satisfied that he had the full co-operation of An Garda Síochána, the Department of Justice and other Departments of State in terms of his seeking to examine all documentation relating to Mr. Ludlow's murder and the Garda investigations into same. He observed however that some relevant garda files were missing or incomplete. The Report stated that the Inquiry had a measure of cooperation from the authorities in Northern Ireland, including a copy of an RUC file which was sent to the DPP for Northern Ireland in 1998 with a view to prosecuting one or more of the suspects for Mr. Ludlow's murder. Certain other records on the British side were not forthcoming.

27. The Barron Inquiry looked in detail at the garda investigations into Mr. Ludlow's murder. The initial investigation had taken place in 1976 in the immediate aftermath of the murder. In 1979 and 1980, there was a renewed investigation following the receipt of additional information from the RUC, as earlier referred to. The manner in which the 1979 investigation was conducted was a key focus of the Barron Inquiry and of the later Sub-Committee hearings. A third investigation and review took place between 1996 and 1999, following public complaints from Mr. Ludlow's family about the inadequacy of the earlier investigations. There was fourth investigation and review following the Barron Report and Oireachtas Joint Committee Report. The garda investigation into Mr. Ludlow's murder is not closed.

28. According to the Barron Report, at the time of the original investigation, there was a complete dearth information around the killing, which appeared almost inexplicable. A number of theories as to why Mr. Ludlow might have been killed were put forward and tested, among them that he had been murdered by the Provisional IRA on the basis that he had been working for British Intelligence Service or even An Garda Síochána, that he was murdered by loyalists who mistook him for being a member of the Provisional IRA or even that his own family might have been responsible. The Barron Inquiry concluded however that the Gardaí in question carried out the 1976 investigation competently and diligently. The failure to identify suspects at the time was attributed to a lack of reliable intelligence being available to Gardaí.

29. It is accepted by all concerned that in the early days of the Garda investigation into Mr. Ludlow's murder, his family were treated by turns, heavy-handedly, and with indifference. Some of this was as a result of pursuit of lines of inquiry which implicated the family in Mr. Ludlow's murder. These lines of inquiry were considered by Judge Barron to be legitimate at the time even though they were discounted. It was found that the Gardaí failed to liaise with and update the Ludlow family as to the progress of the investigation. Much of the early contact was investigative in nature rather than family liaison, which was in keeping with the nature of the speculation at the time that the family was somehow implicated in the killing of Mr. Ludlow.

30. There was a failure to notify the Ludlow family of the original inquest into Mr. Ludlow's death in 1976 in sufficient time to allow them to attend. The Barron Inquiry considered this a legitimate source of hurt and grievance to the family. In light of the Barron Report, and following a direction from the then Attorney General, Michael McDowell S.C., a second inquest was held over two days on 5th and 6th September, 2005 and returned a verdict of unlawful killing. The Ludlow family were legally represented at this inquest.

31. A key question for the Barron Inquiry was why information which had been supplied in 1979 by the RUC to the Gardaí was not pursued. In January, 1979, the RUC had written to An Garda Síochána stating that they had information from a reliable source that a loyalist paramilitary group called the Red Hand Commandos were involved in the murder of the Mr. Ludlow and named four persons (already referred to) as those responsible. The evidence to the Barron Inquiry makes its clear that this information had been available

to the RUC for some eighteen months previously. Following the correspondence from the RUC, there were communications and meetings between the Gardaí and the RUC, at which the possibility that the four suspects might be interviewed was canvassed. However, this course of action was not pursued. The failure to do so was a significant factor in the Barron Report and in the Oireachtas Joint Committee Report.

32. In 2003, the then Garda Commissioner, Pat Byrne, provided his written views on the failure of the Gardaí to interview the four named suspects to the Barron Inquiry, having reviewed the garda files on the case.

33. Judge Barron concluded that the only credible reason for the failure to pursue the questioning of the four suspects was that a direction was given from Garda management that led the investigating Gardaí not to do so. Furthermore, the Inquiry concluded that the only credible explanation for the giving of such a direction was to avoid the possibility that it would lead to a demand for a forward reciprocal arrangement with the RUC in respect of interviews in this jurisdiction and that such an outcome was perceived to be contrary to Government policy. Judge Barron put it as follows:

> "Such a policy could have arisen out of a combination of one or more of the following factors:
>
> (a) A risk that republican subversives would target RUC officers coming to this jurisdiction;
>
> (b) A risk that republican subversives would view such co-operation with the RUC as a justification for attacking members of An Garda Síochána; and
>
> (c) A fear of the political consequences arising from the fact that a certain sector of the population would perceive any cooperation with the RUC in this State as acceding of sovereignty with the British Government.".

34. The Barron Report concluded that:

> "The inquiry believes it most probable the decision was made by Deputy Commissioner Laurence Wren (C 3). Before doing so, it is likely that he would have discussed the matter with other senior Gardaí and possibly senior officials in the Department of Justice. However the absence of files means that this cannot be confirmed."

35. In his evidence to the Barron Inquiry, former Garda Commissioner Byrne thought this would have been likely. The absence of any relevant files, the death of individuals involved and conflicts of recollection relating to matters several decades old gave rise to Judge Barron's consideration that it would be next to impossible that the foregoing thesis might be confirmed. The only surviving departmental official who might have conceivably been dealing with such matters, James Kirby, who was Assistant Principal Officer in the Security Division of the Department of Justice at the relevant time, gave evidence to the Barron Inquiry and said that he had no memory of the Ludlow case. Mr. Kirby declined to evidence to the Sub Committee hearings but communicated in writing with the Sub-Committee to similar effect.

36. In respect of the 1979 investigation, the Barron Report concluded:

> "In the final analysis it seems that the reason for the failure to pursue the questioning of the suspects lies in the perception that it was contrary to Government policy to do so. If that was the correct view, then it would have been known to Deputy Commissioner Wren. While it may or may not have been discussed with officials in the Department of Justice, it would have been something of which they were all aware."

37. The lack of follow up on the information provided by the RUC in 1979 was found both by Judge Barron and the Oireachtas Joint Committee to be a serious failure on the part of the Garda Síochána. As a failure, it was compounded by the ignorance of local rank and file Gardaí of the fact that four suspects had been identified. Accordingly, they were unable to inform the Ludlow family of such a crucial development at the time. All of this was accepted by the first named respondent's predecessor, Michael McDowell S.C., and the former and serving Garda Commissioners who gave evidence to the Barron Inquiry and to the Oireachtas Sub-Committee. In his public evidence to the Sub-Committee, Mr. McDowell stated as follows:

> "What happened in 1979 cannot be stood over. I do not think any member of the Garda Síochána has since attempted to do so. I cannot do a better job of highlighting these issues than was done by the inquiry. On the basis of the findings of the Barron Report, the Ludlow family undoubtedly, has a sound basis for feeling very aggrieved at a number of events surrounding the murder, including those relating to the interview of the suspects and the original coroner's inquest."

38. Before the Sub-Committee, the then Garda Commissioner Noel Conroy addressed the failures of the Gardaí, in particular the failure to follow up on the information supplied by the RUC, as follows:

> "Thereafter the trail went dead. Unfortunately we are in a situation today where we have not resolved that crime. From a Gardaí point of view, I regret this very much as insofar as I can see it, it was failure on the part of the Garda Síochána not to have had the crime thoroughly investigated and brought to a satisfactory conclusion …
>
> I have no difficulty apologising to the family on two fronts: regarding the overall investigation, insofar as we did not bring it to a successful conclusion; and in respect of our handling of the inquest I apologise to the family in that regard. As I said earlier, I regret the Garda Síochána did not bring this investigation to a satisfactory conclusion. I have no doubt that management within the organisation feels the same".

39. Former Commissioner Pat Byrne stated to the Sub-Committee:

> "I am a great believer that we should say we are wrong if I believe that it is the case, rather than waiting for others to say it. Without pointing the finger at anybody, we, as an organisation, failed in terms of following through the next step in this investigation. There is no issue of conspiracy. There was a human failure that there was no follow up."

40. When he appeared before the Sub-Committee, Judge Barron reiterated his finding that the 1979 inquiry had come to a halt because of policy reasons:

> "The report has drawn the conclusion that if there was not a policy, it was certainly a perception of the Garda that there was such a policy."

41. It is common case that in the course of the hearings before the Oireachtas Sub- Committee, conflicting accounts were given in respect of the stopping of the Garda investigation in 1979. There were substantial differences in the accounts given by former Commissioner Wren and Detective Inspector Courtney as to why the information provided by the RUC was not pursued. A further individual, namely Detective Sergeant Danny Boyle, who the Committee found might have assisted in determining the conflict, declined to attend the hearings.

42. The fact that the RUC contacted the Gardaí in January, 1979, had come to light prior to the Barron Inquiry. In 1995/1996, a journalist provided information to the Ludlow family claiming that named members of a loyalist gang were responsible for Mr. Ludlow's murder and that the Gardaí were aware of the identity of the alleged culprits within weeks of the murder. Judge Barron did not accept that this was in fact the case. However, the information the Ludlow family received in this regard prompted them to write to the then Garda Commissioner expressing their strong concerns about the Garda investigation into Mr. Ludlow's murder. On foot of this, the Garda authorities carried out a re-examination and review of the case. This brought to light the fact that the Gardaí had received information from the RUC in 1979 and that it had not been followed up. As already stated, in 1996, contact was made with the RUC, which arrested the four suspects whose names had been provided by the RUC in 1979, and they were interviewed with the assistance of the Gardaí. As already stated, ultimately, in 1999, the DPP for Northern Ireland directed that no prosecutions should be taken. Judge Barron was afforded access to the investigation file by the Police Service of Northern Ireland (PSNI), which had succeeded the RUC as the police service in that jurisdiction. Having considered the decision of the DPP for Northern Ireland, and consulted with the DPP in this jurisdiction, Judge Barron concluded that the decision of the Northern Ireland DPP was appropriate and reasonable.

43. The report of the Oireachtas Joint Committee addressed the manner in which the Gardaí had handled Mr. Ludlow's murder in, inter alia, the following terms:

> "Mr. Justice Barron attended before the Sub-Committee and explained that he dealt with this Inquiry and prepared his Report in the same way as he dealt with the other matters on which he reported. Essentially, the information came from Gardaí and he had to analyse that and see where that would bring him. He spoke to the family on a number of occasions and he sought information from the then RUC but, apart from some very limited information it supplied regarding the 1977 to 1979 period, that was as much as he got. He was satisfied that he had received full co-operation from the Gardaí and from the Department of Justice, Equality and Law Reform. He felt that people had been willing to tell him what they knew but importantly he stated that it was obvious that he was not given the full picture by one or more people. In response to a question from Senator Walsh as to whether the absence of powers of compellability and the given of sworn evidence represented a serious shortcoming in his Inquiry, Mr. Justice Barron responded by saying:
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> > *"I do not think so. The people we spoke to seemed willing to tell us what they knew. It is obvious we were not given the full picture by one or more people but, generally speaking, we were given the full picture."*
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> The Sub-Committee is of the view that this comment must be viewed in light of the fact that Mr. Justice Barron had no powers either to compel persons to attend or to compel documents to be produced. This absence of powers is of obvious significance in the light of Mr. Justice Barron's view that he was not given 'the full picture by one or more people'."

44. Arising from the consideration of the Barron Report, the Oireachtas Sub Committee went on to make a number of recommendations, duly adopted by the Oireachtas Joint Committee. Most germane to the within application are the recommendations made regarding the conduct of the investigation of Mr. Ludlow's' murder by the Gardaí and the issue of missing documents.

45. The Sub Committee concluded that "a further inquiry is essential in order to ensure justice is both done and seen to be done. It is also necessary to address the potential damage to the rule of law that would occur if the investigation into the murder of any citizen of the State is not treated in a thorough and professional manner as is the right of every citizen."

46. Ultimately, it settled on recommending two commissions of investigation into, respectively, the conduct of the investigation by the Gardaí of Mr. Ludlow's murder and missing garda documents. At paras. 202 and 205, respectively, the Report states:

> "The Sub-Committee recommends that a commission of investigation be established to investigate the following:
>
> > (i) Whether the evidence collected at the scene of the murder of Seamus Ludlow in 1976 was available in 1979 and if not, why not?
> >
> > (ii) Why were credible leads given to the Gardaí by the Northern Ireland police force not followed up?
> >
> > (iii) Why were the four named suspects not interviewed?
> >
> > (iv) Was there a policy in existence not to interview suspects in Northern Ireland for crimes committed in this jurisdiction?
> >
> > (v) Was a decision taken not to actively pursue investigation of the murder of Seamus Ludlow and if so, who took that decision and why?
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> …
>
> The sub-committee is deeply concerned that, yet again important and relevant documents and files are missing. As noted in the Barron Report, some Gardaí files are either missing or were never brought into existence. The relevant security intelligence files also are either missing or non-existent. Files in the Murder Investigation Unit were also found to be incomplete and there appeared to be no contemporaneous file on the murder of Seamus Ludlow in the Department of Justice.
>
> The Sub-Committee recommends that a commission of investigation be established to investigate the following:
>
> > *(a) What documents were created or maintained by An Garda Síochána including security intelligence C3 Section in relation to the murder of Seamus Ludlow?*

(b) Where are those documents?

(c) If those documents are not available for inspection what is the reason for this?

(d) What documents were created or maintained by the Department of Justice (and Departments of An Taoiseach, Foreign Affairs and Defence, in respect of the Cabinet Sub-Committee on Security), in relation to the murder of Seamus Ludlow.

(e) Where are those documents?

(f) If those documents are not available for inspection what is the reason for this?"

Events post the Oireachtas Joint Committee's Report

47. Following upon the Oireachtas Joint Committee's report, between 2006 and 2009, the Gardaí carried out a review of the Seamus Ludlow case and of the earlier investigations. A superintendent from the GNBCI reviewed the entirety of the information available to An Garda Síochána, which review included liaison with his counterparts in the PSNI, with living retired Gardaí who were involved in the case previously and re-engagement with some of the named suspects in Northern Ireland. As part of the review, a file was submitted to the DPP. The DPP forwarded a "Formal Request for Mutual Legal Assistance in Criminal Matters", pursuant to the European Convention on Mutual Assistance in Criminal Matters, to the competent Authority in Northern Ireland in respect of the interview of two suspects. This was acceded to and members of An Garda Síochána were present at the subsequent interview in Northern Ireland of the said suspects. Ultimately, the DPP directed that in the absence of any of the suspects being willing to testify in court as to the events in question, it would not be possible to advance a prosecution in this jurisdiction.

48. On 9th May, 2006, the then Minister for Justice, Michael McDowell S.C., was asked in the Dáil as to his plans to implement the recommendations of the Oireachtas Joint Committee. The question was answered to the effect that the Garda Commissioner had established a review of the murder investigation and that the primary recommendation that a commission of investigation be established to investigate aspects of the State's handling of the murder of Mr. Ludlow was under consideration by the Department of An Taoiseach.

49. On 22nd January, 2008, the Ludlow family met with the then Taoiseach, Bertie Ahern, at Government Buildings to make their case for a further inquiry. As noted in a letter of 11th June, 2014, from the applicant's then solicitors, MacGuill & Co., to the first named respondent, in 2008, Mr. Ahern appeared disinclined to take action to set up a commission of investigation but had suggested that the family press their case in that regard with the office of the Attorney General.

50. On 23rd January, 2008, MacGuill & Co. wrote to the then Attorney General, Paul Gallagher S.C., putting the case for a Tribunal of Inquiry to inquire into the central issues as had been identified in the Oireachtas Joint Committee's report. There followed a meeting between the Ludlow family, their legal representative and the Attorney General, and personnel within his office on 7th February, 2008, following which by letter of the same date, MacGuill & Co. wrote to the Attorney General in the following terms:-

> "It is accepted by the family that you must advise Government on the basis of whether or not the facts of this case meet the demanding test for a public inquiry to be held and in particular, in the context of the long history of this case, that the need for the inquiry is one of urgent public importance."

51. The case was put that "as would be plain from the correspondence it was never intended that [the Barron Inquiry] should be an end in itself but rather a process to inquire further into disquieting matters." The letter went on to state:-

> "The [Barron Report] was subsequently considered at the Oireachtas Committee and considerable useful material came to light during that process. Central to this submission is the fact for the first time the Commissioner of An Garda Síochána and the Minister for Justice, Equality and Law Reform acknowledged the shortcomings on the part of the State and made a public apology in those hearings to the family."

52. The letter continued:-

> "Dealing with the issue of the lapse of time, we freely acknowledge that it would be preferable if the events being reviewed were more recent. That however is in no way due to any dilatory conduct on the part of the family, quite the reverse, as they have been pressing now for many years for a public inquiry to be held. Delays of similar order did not curtail the holding of an inquiry into the events of Bloody Sunday, and if the newspaper reports of recent weeks are accurate we understand that your own office has conceded that an inquiry in relation to the events of the Dublin/Monaghan bombings would not be futile by virtue only of the passage of time.
>
> It might be appropriate at this juncture to again emphasise the limited nature of inquiry which the family seek. The family are entirely satisfied that they are aware of the identities and the modus operandi of those responsible for the murder. Difficult as it is for them they nonetheless accept there is no prospect of those responsible being prosecuted and punished for their crimes.
>
> What the family wished to be inquired into are the issues addressed in the submission to the Oireachtas sub-committee dealing with the manner of the investigation. It is of no little significance that was (sic) only faced with public hearings that apologies for the conduct of the State towards this family were forthcoming. The family believed that a proper public inquiry would be a convenient method to establish in a transparent way the relevant facts connected with investigation and to dispel, at least address the significant public concern that still attends this issue. I do not believe it is necessary to repeat observations we have already made in relation to the Commissioner of Inquiry Act, 2004 model and why we urge the holding of an inquiry under the 1921 Act."

53. This letter was acknowledged by the Attorney General's office on 15th February, 2008, which advised that the points raised in the letter would be discussed with the Department of An Taoiseach.

54. On 28th May, 2008, the Ludlow family were advised in the course of a meeting with Mr. McGarry of An Taoiseach's Department that the Attorney General had taken a strong view that there was no urgent public importance in relation to the Seamus Ludlow issues and that therefore there was no need to have an inquiry.

55. On 2nd June, 2009, MacGill & Co. wrote to the Department of An Taoiseach advising that the garda review which was put in place post the Barron/Oireachtas Joint Committee reports, and the intended liaison between the Gardaí and the Ludlow family had not progressed as had been envisaged and that, consequently, it was necessary to arrange another meeting to review how the matter might be advanced given that the suggested interview between the family and then Deputy Garda Commissioner Callinan was not considered a suitable vehicle by either the family or the Deputy Commissioner. The letter stated:-

> "A further commission of enquiry has previously been suggested and this may be the manner to advance matters."

56. On 11th February, 2010, MacGuill & Co. wrote again to the Taoiseach's Department outlining difficulties in the procedure which had been set up whereby the Ludlow family could get answers from the Gardaí in relation to the original investigation, albeit that this did not include being given access to the original investigation file itself. A reminder letter was sent by MacGuill & Co. in this regard on 11th June, 2010.

57. On 30th March, 2011, MacGuill & Co again advised the Taoiseach's department that the proposal whereby the Ludlow family would be facilitated by An Garda Síochána in relation to the investigation file had not gone to plan and that the family were anxious to bring finality to "this long running painful episode".

58. The Court was not advised as to what, if any, correspondence passed between the applicant's legal representatives and the respondents in the period April, 2011, to June, 2014.

59. However, on 17th April, 2014, two questions were raised in the Dáil by Gerry Adams, T.D., with regard to the Oireachtas Joint Committee's recommendations for the establishment of commissions of investigation into the murder of Mr. Ludlow. The first named respondent replied, inter alia, in the following terms:-

> "The Barron Inquiry's report on the murder of Seamus Ludlow was reported on by the Oireachtas Joint Committee on Justice, Equality Defence and Women's Rights in 2006 and the Committee made many recommendations with regard to various aspects of the case which have been followed through. There are, however, no plans at present to establish a Commission of Investigation into the case.
>
> It is a matter of regret that to date nobody has been made amenable for this crime. The Garda investigation remains open and any credible new information that is brought to attention will be pursued vigorously by the investigators. I have asked the Garda authorities for a report on the up to date position and I will communicate further…when it is to hand."

60. On 11th June, 2014, MacGuill & Co. wrote to the first named respondent in the aftermath of a meeting between members of the Ludlow family and the first named respondent. The letter advised that the primary objective of the family was for the Government to give effect to the recommendation made in March, 2006, by the Oireachtas Joint Committee that two commissions of investigation be established. The letter went on to advise:-

> "While there is no doubt of the identity of those who were present at the murder of Seamus Ludlow, the family concede that there will never be a successful prospection brought against any of them by virtue of the garda mismanagement of the investigation into his murder.
>
> The family are concerned they have in the past been misrepresented as believing that a Commission of Investigation would lead to successful prosecutions in these cases. They do not believe that that could be the outcome.
>
> In point of fact they believe the fact that there will never be a single successful prosecution is the very reason why there remains an urgent public interest in a Commission establishing why the failings on the part of An Garda Síochána arose in the first instance.
>
> …
>
> The family simply seek to establish the truth surrounding the flawed investigation into the murder of Seamus Ludlow. Senior Gardaí have conceded the investigation was flawed but the public interest requires that it is established why, and how this came to be. If there was a policy to sabotage the investigation who authorised it.
>
> …
>
> While the family had a preference for a 1921 Act Inquiry, they have supported the recommendation of the Committee since it was made in March 2006. They believe that public confidence suffers when a joint committee makes a recommendation that a matter is of serious concern and requires a Commission of Investigation and that all party committee's report is ignored.
>
> That failing was bad enough in 2006 but takes on a much more sinister complexion when this Commission is not being established and so many others are, in cases where the issues, viewed objectively, are no more serious than ours and if anything the reverse."

61. This letter was followed up on 19th January, 2015, with a further request to the first named respondent to give an indicative timescale as to when the family might expect an answer "definitively".

62. The first named respondent replied on 25th February, 2015, in the following terms:-

> "I write further to my meeting with the relatives of Seamus Ludlow and you in June last and subsequent correspondence with me in the matter of the murder of Seamus Ludlow in 1976, at which the family members set out their concerns and their demand for the immediate establishment of a Commission of Investigation into the Garda handling of the original murder investigation
>
> …
>
> At our meeting I committed to examine the material which you provided to revert to you on the family's call for a Commission of Investigation. This process has taken some time but I hope you will understand this was inevitable in order to give the issues at hand a full and proper consideration.

The callous brutality with which Seamus was killed is a particularly sad feature of this case. I am struck by the late Judge Henry Barron's characterisation of Seamus' murder as '…a random, sectarian killing of a blameless Catholic civilian by loyalist extremists'. I have no doubt whatever that the death of this innocent man at the hands of a gunman is the cause of untold grief to his family and friends and I convey my sympathy once again to Seamus's family on their loss.

Against this background, I regret that what I have to say in this letter will most likely prove a disappointment to Seamus's relatives who have been so affected by his murder. However, having considered in detail the matters raised, I must conclude that nothing put forward in the document which you gave me that represents new or substantial information which would in the public interest warrant an inquiry of the kind that is sought. I am keenly aware that Seamus's relatives will find it difficult to accept this conclusion readily but I feel it is right to explain, as best I can why I came to this conclusion.

I have had a full review carried out by my Department of the papers which you sent to me following our meeting, other material already held on file in the Department, the Barron Inquiry's report and the report and hearings of the sub-committee of the Joint Oireachtas Committee…The review also involved consultation of the Garda Authorities.

At the outset I would say that the lack of follow up of the information provided by the RUC to the Garda Authorities in 1979 cannot be considered to have been anything other than a serious regrettable failure on the part of the Garda Síochána. It was rightly found to be so by Judge Barron and the sub-committee of the Joint Oireachtas Committee. Importantly, it was also accepted as such the former Garda Commissioners who gave evidence to the Barron Inquiry and at the hearings sub-committee of the Joint Oireachtas Committee.

For my part, I reiterate the apology to Seamus's family. The handling for the Garda investigation – what happened was inexcusable and should not have happened.

The report of the sub-committee of the Joint Oireachtas Committee recommended the establishment of two Commissions of Investigation into events surrounding Seamus's murder. One Commission was to examine the conduct of the Garda investigation and co-operation with the police in Northern Ireland in this regard; the other was to examine issues relating to the absence of relevant documentation.

It is to be noted that the matters which were recommended by the sub-committee… into the Garda investigation were, in fact, central to Judge Barron's inquiries in this case. Indeed, "*The nature, extent and adequacy of Garda investigations, including co-operation with and from relevant authorities in Northern Ireland*" was one of the Barron Inquiry's four terms of reference for its report on the killing of Seamus Ludlow.

It is clear from the Barron Inquiry's report that Judge Barron explored the conduct of the Garda investigation in great detail both through his examination of the documentation available and through his interviews with such witnesses as were available to him at that time. It is evident also that his inquiry was hampered to some degree by a lack of contemporaneous documents, by the decease potential witnesses, by the impact of the passage of time on the recollection of others.

Although it was not possible for Judge Barron to be conclusive on the matter, he found that the most credible explanation for the lack of follow-up on the information received from the RUC was that a direction was given which led the investigating Garda not to pursue this line and that such a direction was given by a former senior Garda.

In the interest of fairness, I should say that the former senior Garda in question emphatically denied giving any such direction.

It is clear that the sub-committee… devoted suitable time to examining the conduct of the Garda investigations into Seamus's murder. The report of the sub-committee makes clear that despite its detailed examination of the issues it could not advance any further the questions surrounding the failures in the investigation.

I appreciate that you and the Ludlow family make the point that a Commission of Investigation could be a superior avenue of inquiry and that it would have powers of compellability as to persons and documents which were not available to the Barron Inquiry and which, it is assumed, could require or reveal more information than has been made available to date.

However, I note that in his report Judge Barron made clear his view that he had received the full co-operation of the Garda Síochána. In his evidence to the sub-committee … Judge Barron when asked whether the absence of powers of compellability were a shortcoming in his inquiry, said:

> *"I do not think so. The people we spoke to seemed willing to tell us what they knew. It is obvious we were not given the full picture by one or more people but, generally speaking, we were given the full picture."*

The McEntee Commission of Investigation was established after the Barron Inquiry to look, inter alia, into the issue of missing/unavailable Garda and departmental documentation relating to the Dublin and Monaghan bombings of 1974. Mr. McEntee's final report in March 2007 is critical of deficiencies identified with regard to record keeping and file management, particularly with regard to some sensitive Garda intelligence records. The file management systems in the Garda Síochána examined by the Mr. MacEntee pre-dated Seamus Ludlow's murder by only two years and were those still in operation in the Garda Síochána at that time.

However, Mr. McEntee did not identify any deliberate suppression or withholding such material in the context of the Barron Inquiry into the Dublin and Monaghan bombings and there is no reason to suggest a different approach was adopted with regard to Judge Barron's inquiry into the shooting of Seamus Ludlow.

While I agree that due weight must be accorded to the recommendation of the sub-committee of the Joint Oireachtas Committee, in the circumstances where

> – an independent judicial inquiry has already been carried out which focussed in great detail on the question of the conduct of the Garda investigation and found that it could not advance the issues to a conclusive outcome;

- the independent judicial inquiry did not consider the absence of powers of compellability to be a shortcoming to its work;

- an Oireachtas committee has carried out an examination of the same issues and found also that it could not conclusively address questions relating to the Garda Investigation;

- a Garda review of the original investigation and the original evidence (in effect a re-investigation) has been conducted;

- the Director of Public Prosecutions directed that no prosecution should be brought, and

- a public apology for Garda failings in the investigation has been made with the Ludlow family by a former Garda Commissioner and a former Justice Minister

it is not clear to me that the question of why the 1979 information was not more rigorously followed up at that time can be answered any more conclusively at this point than when Judge Barron and the sub-committee of the Joint Oireachtas Committee enquired into the matter.

While this is regrettable, it is not apparent that more might be gained from the establishment of a Commission of Investigation in further resolving these issues nor can I conclude there is a significant public concern at issue sufficient to merit establishment of one.

I have considered also the possibility that the matters arising in this case might be considered by the independent review panel which I established last year to review of certain allegations of Garda misconduct, or inadequacies in the investigation of certain allegations, which have been made to the Minister for Justice and Equality or the Taoiseach, with a view to determining to what extent and in what manner further action may be required in those cases. However, the independent review panel was established specifically in order to examine more contemporary cases which had been brought to the attention of the Taoiseach or the Minister or to public attention owing the recent controversy examined in the Guerin Report and which is to be the subject of a commission of investigation.

It is not envisaged that the independent review panel be charged with or in a position to deal with or specific issues which arises in relation to historical/or troubles – related cases. For these reasons I do not propose to refer this case to the independent review panel.

You will be aware, of course, that on the more general question of dealing with matters relating to the legacy of the troubles in Northern Ireland, the Stormont House Agreement established in December 2014 by the parties in Northern Ireland and the Irish and British Governments, contain a serious (sic) of valuable measures.

The process of implementation of the Stormont House Agreement is now underway with the detailed nature and scope of the mechanisms to be elaborated under it remains to be established. I hope that … those mechanisms may provide an opportunity for Seamus's relatives to access further information about his murder.

I have no doubt, and it is a matter of regret to me, that my conclusion will be a disappointment to Seamus Ludlow's family members and, indeed, to you having campaigned on their behalf for many years. I do hope, however, they will understand the reasoning behind my decision and that I have not taken it lightly."

63. The Minister's letter was responded to by MacGuill & Co. on 2nd April 2015, who expressed the view that the Minister's decision was wrong and was supported neither by the facts nor by principle. It was stated that the Minister failed to acknowledge that at the conclusion of lengthy processes (the Barron Inquiry and the Joint Oireachtas Committee Process) "a cross party group of experienced parliamentarians, who had seen many of the relevant witnesses personally" had recommended the establishment of two commissions of investigation. It was stated that "the Committee were uniquely placed to make this assessment and they [unequivocally] came to the opposite conclusion [to that of the Minister]".

64. The letter went on to state:

> "It is beyond argument that neither the late Mr. Justice Barron and the Joint Committee had available to them resources necessary both in terms of legal powers and logistical support to fully examine the issues that are and will remain a cause of significant public concern. It is accordingly no answer to our client's complaint to suggest, as you do, that by virtue of what took place prior to the Oireachtas resolution, that that resolution needs not be acted on".

65. The view was expressed that it was "neither here nor there" that Judge Barron was satisfied with his own inquiry. It was also pointed out that the proceedings before the Sub Committee did not provide the Ludlow family with an opportunity of testing the witnesses and that the shortcomings of the Oireachtas Joint Committee were acknowledged by the Committee itself.

66. Particular issue was taken with the Minister's conclusion that it was not clear how shortcomings in the 1979 investigation could be answered any more conclusively in a commission of investigation when both Judge Barron and the Sub-Committee had inquired into that matter. The case made on behalf of the family members was that it was this wrongful conduct [in 1979] which compromised the investigation into the death of Seamus Ludlow and that "it is therefore from this point that enquiries must commence".

67. The letter concluded with the request for a further meeting with the first named respondent to discuss the observations set out in the letter of 25th February, 2015 and to provide the first named respondent with the more detailed analysis as to why it was believed that the conclusion reached therein was wrong, with a view of inviting a re-consideration of the decision.

68. MacGuill's &Co's letter was formally acknowledged on 7th April 2015.

69. By letter of 6th June 2015, MacGuill & Co. wrote stating that it was their understanding that the first named respondent "continue to review the family request for the establishment of a Commission of Investigation" and that "[t]he point remains that despite the apparent antiquity of the Ludlow case, those who had the opportunity of seeing witnesses first hand, namely [the Minister's] parliamentary colleagues, formed the view that a Commission of Investigation was required."

70. The letter went to state that the family believed it would be appropriate that the first named respondent reconsider the decision.

71. On 10th July, 2015, the applicant's present solicitors, KRW Law LLP, wrote the first named respondent advising that they had recently taken instructions in relation to the death of Mr. Ludlow and would welcome an update on the position of the case and the recommendations for a further commission of investigation. This correspondence was acknowledged on 14th July, 2015. However, it appears that the substance of MacGuill &Co's letters of 2nd April, 2015 and 6th June, 2015 and KRW's letter of 10th July, 2015, was not engaged with thereafter by the first named respondent.

72. In late 2015, the applicant's solicitors wrote to the then Taoiseach, Mr. Enda Kenny TD, regarding a proposed meeting with the Ludlow family. On 25th November, 2015, a letter was sent on behalf of the Taoiseach to the applicant's solicitors advising, *inter alia*, as follows:

> "This case was one of those inquired into previously by the late Mr. Justice Henry Barron and examined subsequently by a sub-committee of the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights. As you will be aware, last year the Minister for Justice, Equality and Law Reform met with family members and their legal representatives at the time to hear their concerns about aspects of the Garda investigation of the murder of their loved one and their call for an inquiry. Officials in this Department have also been in regular contact with legal representatives of the family over many years regarding their case.
>
> Since meeting the family in 2014, the Minister for Justice, Equality and Law Reform had a review undertaken of the material which the family provided to her and other available material regarding this murder. The Taoiseach is aware that the Minister wrote to the family earlier this year setting out the conclusion that she could not recommend the establishment of a Commission of Investigation in this case and detailing her reasoning in this regard. The Taoiseach understands that this was, inevitably, a disappointment for the family. He is aware that the family has written to the Minister again to request a re-consideration of the matter, and that the Minister is in the process of finalising that consideration. The Taoiseach has asked to be kept updated on any developments in relation to this matter, and the family will be contacted as soon as possible once those considerations are complete".

The leave application

73. On 18th January, 2016, by order of Humphreys J., the applicant was granted leave to apply by way of judicial review for:

> • An order for *mandamus* compelling the respondents to establish two commission of investigation as per the recommendations made in March 2006;
>
> • A declaration that the respondents establish the said commissions of investigation in the manner and with terms of reference that are compliant with the State's obligations and the applicant's rights pursuant to Article 2 of the European Convention on Human Rights ("ECHR" or "the Convention"), the constitution and at common law;
>
> • An order of *mandamus* requiring the respondents to take all necessary steps to establish the said commissions of investigation forthwith;
>
> • A declaration that the continuing failure by the respondents to establish the said commission of investigation is unlawful by reason of being in breach of State's obligations and the applicant's rights pursuant to Article 2 ECHR, the Constitution and at common law; and
>
> • An order of *certiorari* by an application for judicial review of the decision of the respondents not to establish the said commissions of investigation.

Issues for preliminary determination: Whether a decision refusing to establish the recommended commissions of investigation was in fact made by the first named respondent and, if so, whether the applicant has delayed in challenging such decision.

74. In the course of hearing of the within application, counsel for the applicant indicated that orders of *mandamus* were no longer being sought. The applicant was now restricting the reliefs sought to a declaration that the continuing failure of the respondents to establish the said commissions of investigation was unlawful by being in breach of the State's obligations and the applicant's rights pursuant to Article 2 ECHR, the Constitution and at common law, and/or an order of *certiorari* of the first named respondent's decision, as set out in the letter of 25th February, 2015, if the Court determined that the contents of that letter constituted the first named respondent's decision not to propose the two commissions of investigation recommended by the Oireachtas Joint Committee. However, counsel contended that, notwithstanding the letter of 25th February, 2015, it was the applicant's case that no final decision was made by the first named respondent to establish the two commissions of investigation despite the calls made on her consequent to the recommendations made by the Oireachtas Joint Committee in March 2006. It is thus submitted on behalf of the applicant that the first named respondent's ongoing failure to do so was tantamount to a refusal and that this gave rise to the application for leave for judicial review, as commenced on 18th January, 2016. Counsel submits that even if the Court finds that the letter of 25th February, 2015, constitutes the decision, there are more than ample grounds upon which to extend the time for the bringing of the within proceedings.

75. The respondents contend that the letter of 25th February, 2015, constitutes the decision on the question of the establishment of commissions of investigation and that the within proceedings are out of time.

76. At para. 4 of the statement of opposition it is pleaded as follows:

> "The applicant is guilty of serious and prolonged delay and acquiescence [and] is now out of time to apply for judicial review of the impugned decision of the First Respondent not to propose the establishment of two Commissions of Investigation to the Government. Further and/or in the alternative the within proceedings are an impermissible collateral attack on previous decisions of the Respondents not to conduct such Commissions of Inquiry that the Applicant failed to challenge in good time".

77. In his replying affidavit to the within proceedings, Mr. Dermot Woods, principal Officer in the first respondent's department, avers

as follows:

> "I do not accept that the First Respondent's refusal to propose to the Government the establishment of a commission of investigation as communicated on 25th day of February 2015 was merely 'apparent' as the Applicant alleges. This was as it appears and was a final determination. Although the Applicant and the remainder of the Ludlow family were represented by and in receipt of advice from very reputable and experienced solicitors at this time, namely MacGuill & Company, there was no attempt to institute judicial review proceedings in the respect of the decision within the three-month time limit or any reasonable time. The letter from the Department of the Taoiseach of 25th day of November 2015 was mistaken to the extent that it might have indicated the First Respondent had not yet made a final determination with regard to the matter."

78. It is the respondents' contention that the applicant ought to have issued his proceedings by 25th May, 2015. They submit that, beginning with correspondence on 6th June, 2015, there was a recourse to procedural stratagems by the applicant to reset the clock artificially, first by requesting the first named respondent to reconsider the decision, thereafter engaging in further correspondence with the Department of the Taoiseach, and then sending "pre-action protocol" letters, which the respondents say have no place in the procedural rules in this jurisdiction.

79. It also contended that the applicant has delayed and barred himself from relief long prior to 25th February, 2015. The submission is made that it was increasingly apparent over the course of almost ten years subsequent to the report of the Oireachtas Joint Committee in March, 2006, that no Minister was willing to propose and no Government was willing to order the establishment of a commissions of investigation into the Ludlow case. Counsel for the respondents submits that the letter of 25th February, 2015, was no more than another confirmation of a consistent refusal on the part of the Executive.

80. It is also submitted that the applicant, to a large extent, acquiesced in the approach adopted by the respondents. There was long and detailed engagement between the Executive and Ludlow family after March, 2006, and it was made clear to them for many years that the first named respondent's view was that there was no basis for the holding of either a Tribunal of Inquiry or a commissions of investigation. Throughout that period the applicant refrained from applying for judicial review and instead advocated the cause through political channels. The respondents submit while the application for judicial review represents a change of strategy as part of a campaign for a further inquiry, that does not excuse the delay in this case. The respondents contend that there are no good reasons for extending the period within which the application for leave should have been made. It cannot be argued that the circumstances which resulted in the failure to make an application for leave within the relevant period were outside control or could not reasonably have been anticipated by the applicant. It is submitted that the applicant has not offered any reasons for the delay or sought an extension to overcome it.

Discussion

81. Before addressing the issue of the alleged delay, it is I believe first necessary to determine whether there is substance in the applicant's contention that the decision of 25th February, 2015 was not the first named respondent's final decision and that in fact no final decision was made by the first named respondent on the issue of the establishment of two commissions of investigation, as recommended by the Oireachtas Joint Committee. In aid of the argument that there was a failure to make a decision on this issue, the applicant points to the letters sent by his former solicitors on 2nd April, 2015 and 6th June, 2015, which remain unanswered by the first named respondent, save the acknowledgment to the earlier letter on 7th April, 2015. The applicant also relies in no small measure on the letter of 25th November, 2015, from the Department of An Taoiseach wherein reference is made to the Ludlow family's request that the first named respondent reconsider the decision contained in the letter of 25th February, 2015. In particular, counsel points to the applicant having been advised via the 25th November, 2015 letter that "the Minister is in the process of finalising [her] consideration".

82. In his affidavit grounding the *ex parte* application for leave, sworn 18th January, 2016, the applicant avers as follows:

> "3. I say there are a number of reasons why these proceedings are being brought more than 3 months after the First Respondent issued a letter dated 25th February 2015 apparently indicating that she had reached a final determination that the State was refusing to establish the commissions of investigation as recommended by the Justice Committee.
>
> 4. In the months following receipt of the said letter, the family were not advised that it was possible to bring judicial review proceedings of the nature now sought to challenge the apparent refusal. There are over 20 members of the family who have been actively involved in the campaign. It was only after 27th November 2015 that the entire family agreed that we instruct new solicitors with a view to taking advice and seek an opinion from senior counsel on whether there was a challenge for the apparent refusal. It was only when the family decided to instruct my new solicitors now on record for this application and on the basis of advice did the family become aware that a judicial review was an option open to the family to challenge the apparent refusal.
>
> 5. Further, I say that a letter from the Department of the Taoiseach dated 25 November 2015 stated that following representations made by the family, the First Respondent was "in the process of finalising that consideration", viz. her previous apparent indication not to order a commissions of investigation. This provided me with the belief that the apparent indication was not final and that the State had not yet reached a final determination on the issue. At the very least, therefore, there has been a failing by the State to act promptly."

83. To my mind, the applicant's averments are instructive. Firstly, they establish the applicant's intent, as of 18th January, 2016, to challenge the first named respondent's "apparent refusal" of 25th February, 2015. Secondly, he explains the delay in doing so on two grounds, namely his not having been advised until 27th November, 2015, that it was possible to do so and, secondly, that by virtue of the content of the letter of 25th November, 2015, from An Taoiseach's Office, he was of the belief that the decision of 25th February, 2015, was not final.

84. Overall, based on the contents of the applicant's affidavit, and indeed having regard to his further affidavit, also sworn on 18th January 2016, wherein he avers, inter alia, that "by way of letter dated 25th February, 2015, the First Respondent refused to establish the Commissions of Investigation", I am satisfied that the applicant understood the first respondent's letter to be a refusal to set up the two commissions of investigation recommended by the Oireachtas Joint Committee. I am also satisfied from MacGuill & Co.'s letter of 2nd April, 2015, to the first named respondent that it was clearly understood that the letter of 25th February, 2015 constituted the first named respondent's decision.

85. Turning now to the issue of the delay in instituting the within proceedings. In the first instance, I note that in the Order of 18th January, 2016, the applicant was granted an extension of time in which to bring his application.

86. As to the respondent's plea that the applicant has delayed in initiating judicial review proceedings is such that the Court should not entertain the challenge to the first respondent's decision, having regard to the contents of the letter of 25th February, 2015 itself and the course of dealing between the applicant and the first named respondent, the Taoiseach's Office and other agents of the Government over a long period of time, the Court does not consider that the respondents' plea that the applicant is guilty of undue delay is sustainable in all the circumstances. I so find firstly on the basis that an extension of time has been granted to bring the within proceedings and, secondly, on the basis that the letter of 25th February, 2015, suggests that the first named respondent's decision was the culmination of the engagement between the Ludlow family and the first named respondent, and other agents of the Government, following the publication, in March, 2006, of the Oireachtas Joint Committee's Report. While there were points along the way at which it could be suggested that there was a disinclination expressed by various agents of the State, including the first respondent's predecessors and at least two Attorney Generals, to establish either a public inquiry under the 1921 Act or a commission of investigation under the 2004 Act, I find that there was no definite decision communicated to the Ludlow family until 25th February, 2015. I have also had regard to the contents of the letter of 25th November, 2015. While I accept that that letter cannot be construed as re-setting the clock for the applicant, to my mind, there is sufficient information in it to forgive the applicant's tardiness in challenging the decision of 25th February, 2015, particularly when viewed against the considerable history of the dealings between the Ludlow family and the respondents over a long number of years.

87. The Court now turns to the grounds on which the first named respondent's decision of 25th February, 2015, is challenged in the within proceedings.

The grounds of challenge
88. In summary, the applicant pleads six grounds of challenge which can be summarised as follows:

> (a) The impugned decision is contrary to the applicant's legitimate expectation that the investigatory process, once commenced, would be concluded and/or that two commissions of investigation would be established and/or the applicant has a substantive legitimate expectation by reason of the representations made by the respondents that the commissions of investigation would be established;
>
> (b) The impugned decision is contrary to the fair procedures as guaranteed by the Constitution and/or common law;
>
> (c) The respondents failed to take into account relevant considerations including the applicant's legitimate expectation and/or the Oireachtas Joint Committee's recommendation of two further commissions of investigation;
>
> (d) The impugned decision was disproportionate, unreasonable and amounted to a fettering of discretion and was an abuse/misuse of power or made for an improper purpose;
>
> (e) The impugned decision amounts to an unjustified departure from a prior policy; and
>
> (f) The impugned decision was in breach of Article 2 ECHR and the right to the truth.

89. In the course of his oral submissions, counsel for the applicant distilled the grounds of challenge under three broad headings, namely legitimate expectation; common law fairness/irrationality of the decision; and Article 2 ECHR.

Legitimate expectation

The applicant's submissions
90. It is the applicant's contention that his legitimate expectation that there would be an inquiry into the death of Mr. Ludlow, was created at the moment of the announcement by the respondents of the private inquiry ultimately conducted by Judge Barron, the outcome of which was to be the subject of consideration by the Oireachtas Joint Committee. That expectation was renewed from time to time thereafter as that investigative process took its course and steps were taken. It is contended that the expectation was that the investigative process would follow its own contours and only conclude after the investigators themselves – Mr. Justice Barron and the Oireachtas Joint Committee – agreed that the investigation had concluded. It is submitted that the breach of the applicant's legitimate expectation arises by reason of the respondents' refusal to implement the Oireachtas Joint Committee's recommendation that it is "essential" and "necessary", in the interest of justice, that two further commissions of investigation be established.

91. It is submitted that the applicant does not expect, legitimately or otherwise, that the commissions of investigation will actually get to the truth of what occurred in relation to the murder of Mr. Ludlow and the subsequent Garda investigation. Nor does he expect that the perpetrators of the murder be identified. What the applicant expects is that the investigation process be continued in circumstances where the investigators (the Oireachtas Joint Committee) themselves have deemed it necessary and essential to do so in the interests of justice. Thus, the substantive benefit of the truth or identifying the perpetrators of the murder of Mr. Ludlow is not what the applicant seeks. Rather, it is the procedural expectation that once the investigation was initiated, that it would be concluded.

92. Additionally, or in the alternative, it is submitted that the establishment of further commissions of investigation was something which was generated within the applicant by the actions and representations of the respondents and other State agents, as outlined in the applicant's grounding affidavit, and, which, it is submitted, is apparent from the course of dealing between the applicant and the respondents over a considerable period of time.

The respondent's submissions
93. It is acknowledged that for many years the Ludlow family sought a public inquiry. It is submitted, however, that this particular request was not engaged with by or on behalf of the first named respondent such as might constitute a promise or representation of a further inquiry. It is further submitted that while the Ludlow family were encouraged to engage with the Barron Inquiry, this was indicative only of the fact that the first named respondent and previous Ministers for Justice had an open mind; it was not a concession or a promise that a further inquiry would follow on from the Barron Inquiry.

94. The respondents assert that the applicant's expectation that commissions of investigation would be established in accordance with the recommendations of the Oireachtas Joint Committee is not sustainable. At no point did the respondents cede either a public inquiry under the 1921 Act or a commission of investigation under the 2004 Act. It is also the respondents' case that there is no clear or consistent call by the applicant, in the course of his dealings with the respondents, and particularly with the first named respondent, for the establishment of commissions of investigation. It is further submitted that whatever the course of dealing between the applicant and the respondents pre-2004, same cannot bind the first named respondent in the exercise of her statutory

remit under the 2004 Act.

95. The respondents also contend that the absence of any reference in the correspondence, which emanated from the applicant's legal advisers, to the respondents having promised in 2002 to hold a public inquiry belies the applicant's contention that it was expressly or impliedly represented to the applicant or the Ludlow family in 2002 that a further inquiry was promised, be that a Tribunal of Inquiry under the 1921 Act or, post 2004, a commission of investigation. The correspondence from the applicant's former legal representatives demonstrates the Ludlow family's wish for a full public investigation but does not assert that a prior promise to establish such an investigation was aborted or abandoned by the respondents.

96. In 2006, the then Minister for Justice, Mr. McDowell, was reported in the media as having advised the Oireachtas Sub-Committee that there were serious concerns about setting up an inquiry, which was indicative of the respondents' thinking at the time. The respondents further submit that when, on 28th May, 2008, the applicant was advised by Mr. McGarry, that the then Attorney General, Mr. Paul Gallagher S.C., had taken the strong view that there was no urgent public importance in establishing commissions of investigation, this was not met with a submission that a prior promise in this regard had been made to the Ludlow family. Furthermore, in answer to Dail questions on 17th April, 2014, the first respondent stated that there was "no plans at present to establish a commission of investigation". It is submitted that this pronouncement was not met in subsequent correspondence from the applicant by the argument that it constituted a breach of an earlier promise.

97. It is also contended that nowhere in the correspondence upon which the applicant relies is it posited that the applicant relied on a promise or representation by the first respondent whose remit it is, pursuant to the provisions of the 2004 Act, to propose the establishment of a commission of investigation. Nor, counsel contends, could such a claim have been made by the applicant since no such promise or representation was ever forthcoming from the first respondent. Accordingly, any contrary view held by the applicant is ill-founded. Furthermore, insofar as the applicant takes issue with the first respondent's failure to address the applicant's legitimate expectation in her letter of 25th February, 2015, this assertion is also misconceived since no promise or representation was ever made by the first respondent or her predecessors that a commission of investigation or a public inquiry would be established.

98. The respondents also reject the applicant's contention that there was a "halting" of the investigative process. It is submitted that this could not have occurred since there was no promise or representation made to establish either a public inquiry or a commission of investigation.

99. It is further asserted on behalf of the respondents that even if the Court were to find the existence of a legitimate expectation, the first named respondent has stayed within the parameters of s. 3 of the 2004 Act by virtue of the finding in the letter of 25th February, 2015, that the creation of the commissions of investigation as recommended by the Oireachtas Joint Committee was not of significant public concern.

Discussion

100. It is posited on behalf of the applicant that it was the understanding of the Ludlow family from the beginning of the process initiated by the Barron Inquiry that further steps would be taken if that Inquiry did not provide full answers into the murder of Seamus Ludlow and the manner in which his murder was investigated.

101. To this end, counsel for the applicant points, in particular, to the contents of the letter of 26th March, 2002, from Mr. McGarry of the Department of An Taoiseach to the applicant's then solicitors, MacGuill & Co. The applicant contends that it was not suggested in Mr. McGarry's letter that the first named respondent, or the Government, would second guess the Oireachtas Joint Committee as to what steps might be necessary and essential post the Barron Inquiry. It is thus submitted that by virtue of the contents of the Mr. McGarry's letter of 26th March, 2002, and the respondents course of conduct over many years, it was expressly and/or impliedly represented to the applicant and the Ludlow family that if they engaged with the Barron Inquiry and the Oireachtas Joint Committee (which they did), and if it was found that further investigation was necessary (which happened as per the recommendations of the Oireachtas Joint Committee), that a further inquiry would be forthcoming.

102. Thus, the crux of the applicant's submission is that over a course of many years, it was expressly and/or impliedly represented to the Ludlow family that the investigative processes which were commenced by the respondents from 1999 onwards- firstly with the establishment of the private inquiry, subsequently undertaken by Judge Barron, and followed by the Oireachtas Sub-Committee hearings- would be brought to their natural conclusion, namely by means of a further inquiry, if that was considered necessary. The applicant's case is that such an inquiry has been considered necessary and essential, as found by the Oireachtas Joint Committee, albeit that the recommendation is for the establishment of two commissions of investigation pursuant to the 2004 Act, and not a public inquiry under the 1921 Act.

Was there an unequivocal promise of an inquiry?

103. With regard to Mr. McGarry's letter of 26th March, 2002, I am satisfied, in the first instance, that the letter does not contain an unequivocal promise by the respondents to set up a public inquiry following the completion of the Barron Inquiry, but rather, effectively, it promised that the Government of the day would "do everything in its power", without trespassing on the separation of powers between the Executive and the Legislature, to ensure that the Oireachtas Joint Committee or a sub-committee thereof would examine the Barron Report in public. The letter also makes clear that the purpose of submitting the Barron Report, once received, was for the Committee "to advise …the Oireachtas as to what further action, if any, would be necessary to establish the truth of what happened". As can be seen from the letter, the Government of the day envisaged that after its consideration of the Barron Report in public, three approaches would be open to the Oireachtas Joint Committee. In short, that it would advise (i) that no further action was necessary consequent to the Barron Report; (ii) that the objective sought to be achieved by the Barron Inquiry could only be achieved through a public inquiry; or (iii) that there would be a further examination of the matter by the Committee.

104. It is common case that some four months or so before the delivery of the Barron Report in October, 2004, the 2004 Act was enacted (18th July, 2004). Thus, by the time the Oireachtas Joint Committee concluded its report in March, 2006, there was a further inquiry mechanism on the statute books, over and above the 1921 Act, for the Committee to consider, if it was minded to recommend a statutory inquiry. Ultimately, insofar as further statutory inquiries were concerned, the Committee opted to recommend two commissions of investigation under the 2004 Act. This was in the teeth of a "forceful submission" from the Ludlow family in support of a public inquiry under the 1921 Act. As the records demonstrate, the Ludlow family's stance in this regard was not new. In the period 1999 to March, 2002, they and their legal representatives met and communicated with government Ministers, Attorney Generals and other government officials calling for a public inquiry.

105. It would appear that from an Irish Times report of 2 February, 2006, of the then Minister for Justice, Michael McDowell S.C.'s appearance before the Oireachtas Sub-Committee, he was of the opinion that "there were serious constitutional issues" in setting up a public inquiry into Mr. Ludlow's murder.

106. However, that being said, in the immediate aftermath of the publication of the Oireachtas Joint Committee's Report, the Committee's recommendation that a commission of investigation be set up in relation to two aspects of the Ludlow case was under consideration by the Department of An Taoiseach, albeit it would appear, as already referred to, that the then Taoiseach, Mr Ahern, at a meeting with the Ludlow family on 22nd January, 2008, was "disinclined to take action to set up a Commission of Investigation", although suggesting to the family to pursue the matter with the Attorney General. On the same day, MacGuill & Co. wrote to An Taoiseach, urging, *inter alia*, the establishment of a "sworn public inquiry".

107. On 23rd January, 2008, MacGuill & Co wrote to the then Attorney General, Paul Gallagher S.C., calling for the establishment of "a limited and focused" public inquiry into the investigation of Mr. Ludlow's murder and emphasising that the family did not believe that "the energies of a public inquiry ought properly be directed to establishing by whose hand Seamus Ludlow was murdered". Thus, as of January, 2008, the family's stance was that they were largely in agreement with matters to be investigated, as recommended by the Oireachtas Sub-Committee, but that the mechanism of the inquiry had to be a public inquiry. In a further letter of 7th February, 2008, to the Attorney General, following a meeting between the Ludlow family and the Attorney General, the call was again made by the family's legal representative for a public inquiry. As referred to in the earlier chronology, on 28th May, 2008, the family were told that the Attorney-General had advised that there was no urgent public importance in relation to the Ludlow case and that there was no need to have an inquiry.

108. By June, 2008, there is somewhat of a sea change on the part of the Ludlow family, as to the form any further inquiry would take. In a letter of 18th June, 2008, to Mr. McGarry, of An Taoiseach's Department, in the context of advising that the solicitor for one of the named suspects in Mr. Ludlow's murder had communicated with the Ludlow family to the effect that his client was willing to give evidence to "an established Tribunal or Commission of Inquiry", MacGuill & Co urged that "no further time be lost in setting up a satisfactory inquiry, whether Tribunal or Commission" Again, as can be seen from the chronology set out in the judgment, by June, 2009, MacGuill &Co are canvassing that the commissions of investigation as recommended by the Oireachtas Joint Committee "may be the manner to advance matters". As previously set out, on 11th June, 2014, MacGuill & Co called unequivocally on the first named respondent to establish the commissions of investigation recommended by the Oireachtas Joint Committee.

109. It is noteworthy that in the various letters sent on behalf of the Ludlow family to various organs of the State over the years there is no reference to any expectation that a public inquiry would be set up by reason of prior promises either expressly or impliedly made in the course of the family's dealings with the respondents, or with the first named respondent or her predecessors. Nor is there any reference in the letters sent on the family's behalf to the various State agencies, to Mr. McGarry's letter of 26th March, 2002, as constituting a promise of a public inquiry. There is no reference in MacGuill & Co's correspondence of 11th June, 2014, when the call is made unequivocally for the establishment of a commission of investigation, as recommended by the Oireachtas Joint Committee, to Mr. McGarry's letter as constituting a promise made by the respondents in 2002 to hold a further inquiry of any nature.

110. The course of dealing between the Ludlow family and the respondents over a large number of years is relied on by the applicant in aid of the argument that the investigative procedure initiated by the Barron Inquiry would be seen through to a conclusion, if found necessary in the interests of justice, as was found to be the case by the Oireachtas Joint Committee. The case is also made that the respondents are guilty of a breach of the Ludlow family's procedural legitimate expectation that the process commenced with the Barron Inquiry would be continued in circumstances where the Oireachtas Joint Committee recommended two commissions of investigation.

111. The question which thus arises for consideration is whether the recommendations of the Oireachtas Joint Committee can be said to bind the respondents, in particular the first named respondent.

112. The starting point for a consideration of whether the applicant has made out a case on this issue is the decision of the Supreme Court in *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84. Fennelly J. set out the applicable principles on legitimate expectation as follows:-

> *"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine." (at pg. 162)*

113. In *V.I. v. Commissioner of An Garda Síochána* [2007] 4 I.R. 47, Clarke J. also considered the parameters of the doctrine of legitimate expectation where the claim is based on a failure by a public authority to respect a legitimate expectation. In the course of his judgment, he referred*, inter alia*, to *Keogh v. C.A.B.* (Unreported High Court, McKechnie J., 20th December, 2002):

> *"Having conducted a thorough review of those and other authorities McKechnie J. helpfully summarised the principles applicable as follows at p. 19:-*
>
> > *'(a) The existence of a legitimate expectation that a benefit will be conferred does not, on its own, give rise to any legal or equitable right to the benefit itself which can be enforced by an order of mandamus or otherwise. However, in cases involving public authorities, other than cases involving the exercise of statutory discretionary powers, an equitable right to the benefit may arise from the application of the principles of promissory estoppel to which effect will be given by the appropriate court order.*
> >
> > *(b) In cases involving the exercise of a discretionary power, the only legitimate expectation relating to the conferring of a benefit that can be inferred from words or conduct, is a conditional one, namely that a benefit will be conferred provided that at the time the Minister considers it, it is a proper exercise of the statutory power, in the light of current policy, to grant it. Such a conditional expectation cannot give rise to an enforceable right should it later be refused by the Minister in the public interest.*

(c) In cases involving the exercise of a discretionary statutory power in which an explicit assurance has been given which gives rise to an expectation that a benefit will be conferred, no enforceable, equitable or legal right to the benefit can arise. No promissory estoppel can arise because the Minister cannot stop himself or his successors from exercising the discretionary power in the manner prescribed by parliament at the time it is being exercised.'

It is therefore clear (from cases such as Fakih v. Minister for Justice [1993] 2 I.R. 406) that a legitimate expectation can exist as to the process to be followed in the consideration of conferring a benefit. Furthermore it would appear that legitimate expectation may extend to the substance of the matter provided that the issue does not involve the exercise of statutory discretionary powers." (at paras. 38-39)

114. At this point it is apposite to refer to the provisions of s. 3 of the 2004 Act, which provides:-

"(1) Following a proposal made by a Minister with the approval of the Minister for Finance, the Government may, by order, establish a commission to—

(a) investigate any matter considered by the Government to be of significant public concern, and

(b) make any reports required under this Act in relation to its investigation.

(2) An order may be made under this section only if—

(a) a draft of the proposed order and a statement of the reasons for establishing the commission have been laid before the Houses of the Oireachtas, and

(b) a resolution approving the draft has been passed by each House.

(3) The order establishing a commission shall specify—

(a) the matter that is considered by the Government to be of significant public concern and that is to be investigated by the commission, and

(b) the Minister responsible for overseeing administrative matters relating to the establishment of the commission, for receiving its reports and for performing any other functions given to him or her under this Act.

(4) A commission may be established under this section even if the matter considered by the Government to be of significant public concern arose before the passing of this Act."

115. The relevant Minister for the purpose of these proceedings is the first respondent.

116. The limitations of the doctrine of legitimate expectation involving the exercise of statutory discretionary powers in the setting up of inquiries expressly fell to be considered in *McStay v. Minister for Health* [2006] IEHC 238. In that case, the plaintiff pleaded a breach of a legitimate expectation that a proper, effective and lawful inquiry would take place into the unlawful retention of the organs of her deceased child and that the respondent Minister in that case had negligently failed to discharge an undertaking that an effective and lawful inquiry would take place.

117. In the course of his judgment in that case, Smyth J. had occasion to consider the remit of the Executive in the context of the establishment of statutory inquiries and whether the bodies charged with the establishment of such inquiries could be bound by legitimate expectation. He opined as follows:-

"I am satisfied that as a matter of law it is a matter for the Executive, at least in the first instance, as to whether to establish an inquiry and what form such inquiry is to take if it is sought to confer on such inquiry compulsory powers under the Tribunals of Inquiry (Evidence) Act1921-2004 or under the more recently enacted Commission of Investigation Act, 2004 the approval of both Houses of the Oireachtas must be obtained.

…

I am satisfied and find as a fact and as a matter of law that neither the Constitution nor any statutory provision (whether a provision of of the Tribunals of Inquiry (Evidence) Acts, the Commission of Investigation Act or otherwise obliges the Executive to establish an inquiry of a particular kind. What is in issue here is truly a power rather than a duty. There is no right in the Applicant or anyone else to have an inquiry or an inquiry of a particular form established by the Executive. The establishment of a tribunal with statutory powers of compulsion, given that such powers arise only upon a decision of the Houses of the Oireachtas, is not a matter that can be forced on by a decision of the courts."

118. Smyth J. went on to address the legitimate expectation argument as made in the case before him, in the following terms:

"Legitimate expectation: This matter was the central plank of the case advanced by the Applicant at the hearing. There are a considerable number of Irish authorities relating to the doctrine of legitimate expectations which, as McCracken J. noted in Abrahamson -v- Law Society [1996] 1 I.R. 403 are difficult to reconcile. A particular point of controversy in this jurisdiction and elsewhere is whether the doctrine 'can have a substantive effect or whether its role is confined to that of a procedural guarantee.

…

The essential ingredients for a claim of legitimate examination (sic)have been considered by the supreme court in Glencar and also in Daly -v- Minister for the Marine [2001] 3 1.R. 513. The jurisprudence in our courts is not radically different from that as expressed by Scott Baker J. in R (Howard) -v- Secretary of State for Health [2003] Q.B. 830 at

853:- 'strict conditions have to be fulfilled before a legitimate expectation arises.'

The starting point, in my judgment, is to ask whether there is evidence of a 'clear or unambiguous' representation by the Minister or anyone else, that there would be a public inquiry of the sort for which the Plaintiff contents. In my judgment, no, there is no such evidence. The material relied on by the Plaintiff makes it clear that no such representation was ever made. The authorities suggest that the existence of a clearly defined practice may suffice to satisfy this requirement.

…

In regard to the third element identified by Fennelly J. it is, in my submission, fatal to the Applicants' case because the obstacle to the Plaintiffs' legitimate expectation claim is that the establishment of an inquiry of the nature sought by the Plaintiff is, simply not, within the power of the Defendants. For an inquiry to be conferred with statutory powers set up either under the Tribunals of Inquiry (Evidence) Acts, or the Commission of Inquiry Act requires a decision of that effect of the Houses of the Oireachtas. That is a matter for judgment for that institution and not for the court.

In my judgment the public interest remains the overriding consideration. While Fennelly J. referred to the principle that freedom to exercise properly a statutory power is to be respected, it is clear that the same principle applies to the exercise of non statutory powers by the Executive. The court must be careful not to fetter unduly the Executive's freedom of decision."

119. In the present case, the respondents submit that the applicant cannot satisfy the first of the conditions set out by Fennelly J. in *Glencar*, as, effectively, the representation founding the legitimate expectation upon which the applicant relies came from an Oireachtas Joint Committee, a body that has no statutory role, not even a limited one, in the establishment of a commission of investigation. I find that I have to agree with this submission. Whatever way one looks at the matter, there is no lawful basis for the applicant to seek to bind the first named respondent by virtue of the recommendations of the Oireachtas Joint Committee, having regard to the doctrine of the separation of powers, and more particularly, having regard to the provisions of s. 3 of the 2004 Act. Thus, even if it had been established (and I am not satisfied it has, from the history outlined in this judgment) that a clear or unambiguous promise or representation had emanated from the first respondent or her predecessors, upon which the applicant relied, the fact of the matter is that the power to establish a commission of investigation is vested in the Houses of the Oireachtas and not in the first respondent. While the 2004 Act provides that the initiating step is to be taken by "a Minister" (in this case the first respondent) by means of bringing a proposal, duly approved by the Minister for Finance, to Government, the mere fact that, as would be the case here, the first respondent would have such a statutory role in bringing a proposal to Government is a far remove from what is ultimately required for the establishment of a commission of investigation under the 2004 Act.

120. On the clear ratio of *McSta*y, the establishment of a public inquiry under the 1921 Act, or a commission of investigation under the 2004 Act, is a matter for the Houses of the Oireachtas and not the courts. Accordingly, even if an expectation could be said to have been created by virtue of what was recommended by the Oireachtas Joint Committee in March, 2006, I find that that it cannot bind the first respondent, given that the power of establishment of a commission of investigation is vested in the Houses of the Oireachtas and not the first respondent. Accordingly, the legitimate expectation ground is not made out.

Article 2 ECHR

The applicant's submissions

121. Counsel for the applicant contends that both the Barron Report and the Report of the Oireachtas Joint Committee have manifestly cast doubt on the effectiveness of the original investigations into the murder of the Mr. Ludlow and have raised new and wider issues concerning UK State agent collusion and the institutionalised failure by An Garda Siochana to previously investigate those matters either properly or at all. It is submitted that the right pursuant to Article 2 ECHR, which includes an obligation on the State to provide a legal and administrative framework that effectively protects life, and to make available a means of investigating deaths and holding those responsible to account, is engaged in the present case. As put by Lord Bingham in R *(Amin) v. Secretary of State* [2004] 1 AC 653:

"The purposes of such an investigation are clear: to ensure as far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of the deliberate wrong-doing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others." (at para. 31)

122. It is submitted that the procedural duty to investigate a death before the European Convention on Human Rights Act 2003 ("the 2003 Act") came into force, namely 31st December 2003 – the "critical date" – will come about where a significant proportion of the procedural steps to determine the cause of the death and hold those responsible to account have taken place after the critical date. Counsel contends that this retrospective approach is well established by the jurisprudence of the European Court of Human Rights ("EctHR") (*Silih v. Slovenia* (2009) 49 EHRR 996 and *Janowiec v. Russia* (2013) 58 EHRR 792 refers). This was a departure by the European Court from a previous line of case law which had held that the procedural obligation was derived from the original killings and therefore inextricably linked to the positive Article 2 right for the purposes of the temporal scope of the Convention. Counsel also cites the decision of the UK Supreme Court in *R* (*Keyu) v. Secretary of State* [2016] AC 1355.

123. Counsel argues that the circumstances of the present case meet the test set out by the EctHR in *Silih* and reprised in *Janowiec*. It is further submitted that the Court should not adopt the reasoning of Laffoy J. in *Byrne v. An Taoiseach* [2011] 1 I.R. 190, but rather adopt the approach articulated by Lord Neuberger in *R(Keyu).* The case made is that the Court should mirror the jurisprudence of the EctHR and find that the respondents' obligations under domestic law include the obligation under Article 2 ECHR to provide an effective investigation.

124. It is further contended, in reliance on the decision of the EctHR in *Brecknell v. United Kingdom* (2008) 46 EHRR 957, that where only insignificant procedural steps have been taken (as is submitted is the case here) prior to the critical date, an obligation on the State authorities may arise when a plausible, credible allegation or piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible for the death.

125. Additionally, counsel cites *Rantsev v. Cyprus and Russia* (2010) 51 E.H.R.R. 1 as authority for the proposition that for an investigation into a death to be effective, Member States must take such steps as are necessary in order to secure relevant evidence whether or not it is located in the territory of the investigating State.

126. Accordingly counsel submits that given the unquestionable jurisprudence of the EctHR that the Article 2 duty to investigate historic killings is a separate and autonomous duty, and not inextricably linked to the substantive/positive prohibition on killing, the Article 2 procedural duty can be relied upon even though Mr. Ludlow's death preceded the coming into force of the 2003 Act.

The respondents' submissions
127. The respondents contend that there is no basis in Irish law for the applicant's reliance on Article 2 ECHR since there is no freestanding application of the Convention under Irish law, save to the extent provided for in the 2003 Act. It is also submitted that even if the Court were to adopt the approach of the UK Supreme Court in *R (Keyu)*, the applicant cannot establish either that a significant proportion of the procedural steps required by Article 2 have been carried out since the 31st December, 2003 (the "critical date"), or that there is a "genuine connection" between the death of Seamus Ludlow on 2nd May, 1976 ("the trigger date") and the entry into force of the Convention in the State, as required by *Silih* and *Janowiec*, and which are cumulative conditions. Counsel also submits that even if the Court were to find that a significant proportion of the investigative steps have in fact occurred post 31st December, 2003, the applicant would not succeed given the that the expanse of time between Mr. Ludlow's death and the "critical date" far exceeds the ten year time limit posited in the jurisprudence of the EctHR.

128. It is further contended that while the EctHR has extended the ten year time limit advocated in *Janowiec* in the context of the "*genuine connection*" requirement, that has only been done in the context of where a triggering event "*was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case if serious crimes under international law, such as war crimes, genocide and crimes against humanity…*" (para. 150 of *Janowiec*).

129. The respondents also point to the applicant's acknowledgement, in these proceedings, that the identity of the perpetrators of Seamus Ludlow's murder is known and that, accordingly, the identification and prosecution of the perpetrators of the murder (which is the detachable right to an effective investigation as recognised by the case law of the EctHR) is not the objective which the applicant wishes to pursue in calling for the establishment of commissions of investigation recommended by the Oireachtas Joint Committee.

130. It is further contended that even if Article 2 were applicable, the first named respondent's decision accords, in any event, with the jurisprudence of the EctHR.

131. More fundamentally, it is the respondents' contention that even if the applicant has a right under Article 2 to an effective investigation into the investigation of death of his relative (which is not conceded), it does not follow that it grounds the relief sought on Article 2 grounds in the within proceedings given that there is no corresponding right in Irish domestic law.

132. Insofar as the applicant relies on the decision of the UK Supreme Court in *R (Keyu)* and requests the Court not to follow *Byrne v. An Taoiseach*, it is submitted that *R (Keyu)* does not depart from *R (McKerr) v United Kingdom* [2004] UKHL 12 and, accordingly, the reliance by Laffoy J. in *Byrne v. An Taoiseach on R (McKerr)* is not undermined.

Discussion
133. The issue to be decided is whether the applicant has a valid claim on Article 2 grounds under the laws of this State for the establishment of two commissions of investigation. In aid of his argument, the applicant relies on the jurisprudence of the EctHR in *Silih* and *Janowiec*, which defines the evolution of the procedural obligation on a State to carry out an effective investigation under Article 2 of the Convention as "*a separate and autonomous duty*" (para. 132 Janowiec), which is a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the "date when the Convention became binding on the State".

134. In Janowiec, the obligation was articulated by the EctHR, as follows:

> *"133. However, having regard to the principle of legal certainty, the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occur before the critical date is not open-ended. In the Silih judgment, the Court defined the limits of its temporal jurisdiction in the following manner:*
>
> > *'162. First, it is clear that, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date can fall within the Court's temporal jurisdiction.*
> >
> > *163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.*
> >
> > *Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account – will have been or ought to have been carried out after the critical date.*
> >
> > *However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.'"*

135. The Court went on to state:

> *"143. The Court further considers that the reference to "procedural acts" must be understood in the sense inherent in the procedural obligation under Article 2 or, as the case may be, Article 3 of the Convention, namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party…*
>
> *144. The mention of "omissions" refers to a situation where no investigation, or only insignificant procedural steps, have been carried out, but where it is alleged that an effective investigation ought to have taken place. Such an obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible…Should new material emerge in the post-entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law. However, if the triggering event lies outside the Court's jurisdiction ratione temporis, the*

discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the "genuine connection" test or the "Convention values" test, discussed below, has been met.

…

148. …[T]he Court finds that, for a "genuine connection" to be established, both criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, and a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force."

136. The approach adopted by the EctHR was followed by the UK Supreme Court in R (Keyu), upon which the applicant relies. It is urged that this Court should follow the approach adopted in *R (Keyu)* when considering the applicability of Article 2 to the present case.

137. In *R (Keyu),* the question for consideration was whether the UK Secretary of State was required to hold a public inquiry into the shooting in 1948 by a Scots Guard Patrol of 26 unarmed civilians in Selangor-a British protectorate in the Federation of Malaysia. Investigations carried out in 1948, 1949, 1970 and 1995 – 1997 were inconclusive. In 2011, the applicants, who were relatives of those killed, sought judicial review of the decision of the Secretary of State not to order an inquiry under the Inquiries Act 2005. One of the grounds advanced was that a public inquiry was required under Article 2 ECHR. The divisional court of the Queens Bench Division dismissed the claim. The UK Court of Appeal affirmed the divisional court's decision.

138. The relatives' appeal to the UK Supreme Court was dismissed. However, in the course of its judgment, the UK Supreme Court, applying *Silih* and *Janowiec*, held that the duty to protect life under Article 2 of the Convention gave rise to the autonomous and detachable duty to provide an investigation into a death occurring in suspicious circumstances and that, while the Convention did not generally have retrospective effect, the EctHR's jurisprudence obliged a State to investigate a death that occurred before the critical date, namely the date of entry into force of the Convention with respect to that State.

139. In *R (Keyu),* the UK Foreign Secretary's contention was that even if the EctHR would have held that the appellants would have had a valid claim for an inquiry under Article 2 ECHR, their claim under that head should be dismissed because a UK court would have no jurisdiction to entertain it on the basis that the UK Human Rights Act 1998, ("the 1998 Act") which took effect on 2nd October 2000, could not be invoked in order to give a UK court jurisdiction in respect of an event which occurred before that date. This was the approach which had been adopted by the UK House of Lords in *R(McKerr).*

140. In *R (Keyu)*, Lord Neuberger addressed this argument as follows:

"93. At least on the face of it, that seems a very powerful contention. It is clear from section 22(4) that the 1998 Act was not intended to have retrospective effect. And the contention is supported by opinions given by all five members the House of Lords in In re McKerr [2004] UKHL 12, [2004] 1 WLR 807, a case concerned with the duty to hold an inquiry or inquest into a suspicious death: see paras 20-23, 48, 67, 79-81 and 88-89 per Lord Nicholls, Lord Steyn, Lord Hoffmann, Lord Rodger and Lord Brown respectively. This, Lord Hoffmann explained that the House of Lords had "decided on a number of occasions that the [1998] Act was not retrospective", and that accordingly there was, at least domestically, no "ancillary right to an investigation of [a] death [of] a person who died before the Act came into force".

94. However, in the light of the Grand Chamber judgment in Šilih, some members of this court adopted a somewhat modified position in the subsequent case of In re McCaughey (Northern Ireland Human Rights Commission intervening) [2011] UKSC 20, [2012] 1 AC 725. In that case, by a majority of six to one, the Supreme Court held that, at least where there had been a decision to hold an inquest into a death which had occurred before 2 October 2000, the 1998 Act could be invoked to require the inquest to comply in all procedural aspects with the requirements of the Convention. (And I can see no reason why the same reasoning would not apply where the decision was to hold an inquiry into a death which had occurred before 2 October 2000.)

95. However, Lord Phillips went a little further in McCaughey at paras 61-63, where he indicated that, if in a particular case the Strasbourg court would hold that there was, after 1 October 2000 an article 2 obligation to investigate a suspicious death before that date, then, contrary to the conclusion in McKerr, he would have been inclined to hold that that obligation would also arise in domestic law under the 1998 Act. While he found the reasoning in Šilih difficult to understand (para 46), he seems to have formed the opinion that it would probably justify departing from McKerr, although he did not express a concluded view. Lord Kerr (who at paras 216-219 was also critical of the reasoning in Silih) and Lord Dyson both appear to have concluded that the effect of the Grand Chamber's reasoning in Šilih was that the conclusion reached in McKerr was no longer sound, and that, if the Strasbourg court would hold that the UK had an article 2 duty after 1 October 2000 to investigate a death before that date, then that duty would also arise domestically under the 1998 Act – see paras 110-114 and 132-137 respectively."

141. The UK Supreme Court did not decide whether *R (McKerr)* remained good law and it left open the question whether, if the EctHR would have held that the appellants were entitled to seek an investigation under Article 2, a UK court would have been bound to order an inquiry pursuant to the 1998 Act. (at paras. 97-98)

142. With regard to the applicant's contention that this Court's approach to the Article 2 challenge should mirror the jurisprudence of the EctHR, in like manner as the UK Supreme Court in *R (Keyu)*, the Court must first address the status of the Convention in Irish law. This issue was comprehensively considered in *J. McD. v. P.L.,* [2009] IESC 81, where Murray C.J. considered the extent to which the European Convention on Human Rights Act 2003 ("the 2003 Act") has given effect to the Convention in the domestic law of the State. He stated:

"[15] The relationship between international treaties to which Ireland is a party and national law is imbued with the notion of dualism, the effect of which finds expression in Article 29.6 of the Constitution. According to the concept of dualism, at national level national law always takes precedence over international law. At international level, as regards a state's obligations, international law takes precedence over its national or internal law, which is why a state cannot generally rely on their own constitutional provisions as an excuse for not fulfilling international obligations which they have undertaken. Coming back to the national level the dualist approach means that international treaties to which a state is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself, specifies.

…

[21] This is not to take away from the fact that recourse may and has been had by our courts to the case law of the European Court of Human Rights (ECHR) for comparative law purposes when a court is considering the import of a right under our law which is the same or similar to a right under the Convention (See for example In re Article 26 and the Health (Amendment) (No. 2) Bill 2004 [2005] IESC 7, [2005] 1 I.R. 105).

…

[30] It is important to underline that the obligations of Contracting Parties under the Convention are engaged at international level, as was pointed out in Re O Laighléis [1960] I.R. 93. The Convention does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention. The contracting states are answerable at international level before the ECHR, an international court, and then only where available national remedies for any alleged wrong have been exhausted. This follows one of the general principles of international law that international courts should not have jurisdiction unless an individual claimant against a state has first exhausted available domestic remedies.

…

[39] Section 2 of the Act provides as follows:-

"(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."

[40] This section obviously is not a basis for founding an autonomous claim based on a breach of a particular section of the Act. It is an interpretative provision and is limited to requiring that a court, so far as possible, when interpreting or applying any "statutory provision" or "rule of law" do so in a manner compatible with the State's obligations under the Convention. In exercising its jurisdiction pursuant to s. 2 a court must identify the statutory provisions or rule of law which it is interpreting or applying. Even then it is subject to any rule of law relating to interpretation and application.

[41] "Rule of law" is not defined except to say that it includes the common law.

[42] Section 3 permits a claimant, if no other remedy in damages is available, to recover damages for injury suffered where an "organ of the State" has failed to perform its functions in a manner compatible with the State's obligations under the Convention. An "organ of the State"is specially defined in s. 1 of the Act and excludes the President, the Oireachtas and the Courts.

[43] Section 5 permits a provision of the Convention to be relied upon where a court makes a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention. Such a declaration may only be made where a party to proceedings has no other adequate and available legal remedy. Other than the making of a declaration of compatibility any benefit to a claimant is discretionary and extra-judicial. The declaration does not affect the validity or enforcement of any statutory provision or rule of law. The party to the proceedings concerned may make an application to the Attorney General for compensation for loss and injury sustained as a result of the incompatibility concerned and the Government in their discretion may make an ex gratia payment of compensation."

143. The question whether any provision of the Convention was justiciable in Irish law fell to be considered in *Byrne v. An Taoiseach*. The plaintiffs were victims and relatives of victims of the Dublin/Monaghan bombings in 1974. They were dissatisfied with the investigations and enquiries of the Gardaí, and the Barron Inquiry into the bombings and the accompanying Oireachtas sub-committee Report, their contention being that these investigations had not been compliant with the State's domestic law obligations under, *inter alia*, Article 2 EHCR. Their claim was that there was a continuing process of investigation and that, as of the 31st December, 2003, they were entitled to insist on a Convention-compliant procedure. The plaintiffs further sought to invoke Article 2 rights as a ground of entitlement to access the records of the McEntee Commission on the basis that a refusal of access constituted a breach of those rights, which was justiciable under national law.

144. Laffoy J. found against the plaintiffs, finding that there was no basis on which any provision of the Convention was directly justiciable as a matter of domestic law. In reliance on *J. McD. v. P.L.*, the learned judge found that provisions of the Convention were enforceable under domestic law only insofar as they were statutorily enforceable under the provisions of 2003 Act.

145. In the course of her judgment, Laffoy J. also acknowledged the dichotomy between the decision of the UK House of Lords in *R (McKerr)* and the decision of the ECHR in *Silih*. She stated:

> *"At the core of the case put forward on behalf of the plaintiffs is the contention that the decision of the House of Lords in In re McKerr [2004] UKHL 12, [2004] 1 W.L.R. 807 is based on an interpretation of article 2 of the Convention which is at variance with the interpretation of the European Court of Human Rights in Silih v. Slovenia (App. No. 71463/01) (2009) 49 E.H.R.R. 996 and the subsequent cases outlined above and that it is not open to this court to adopt the approach adopted by the House of Lords in In re McKerr [2004] UKHL 12, [2004] 1 W.L.R. 807, or in Hurst v. London Northern District Coroner [2007] UKHL 13, [2007] 2 W.L.R. 726. Neither authority can be treated as a persuasive authority in the light of the recent jurisprudence of the Strasbourg Court, it was urged." (at para. 46)*

146. Laffoy J. also acknowledged that the categorisation by the UK House of Lords in *Hurst v. London Northern District Coroner* [2007] UKHL13 (which had applied *R (McKerr)* of the obligation to conduct a proper investigation as an ancillary aspect of the right to life under Article 2 "*does seem at variance with the decision of the European Court of Human Rights in Silih.*"

147. However, Laffoy J. did not accept the plaintiff's claim that the provisions of Article 2 were directly justiciable as a matter of domestic law from 31st December, 2003 onwards, or that as a matter of domestic law individual organs of the State, including the Barron Commission of Inquiry, as distinct from the State itself, were obliged to comply with the provisions of the Convention. Applying *J. McD.v. P.L.,* she held that Article 2 did not have direct effect in Irish Law. She also held that its provisions were enforceable under

domestic law in Irish Courts "*only insofar as they are statutorily enforceable by virtue of the provisions of the Act 2003.*"

148. She went on to state:

> *"[57] Accordingly, in my view, the question which the parties wish the court to answer would be more properly formulated as follows:-*
>
> > *"Whether an action by the plaintiffs against the defendants is justiciable in Irish law by virtue of the provisions of the Act of 2003 on the basis of an allegation that the commission breached its obligation under s. 3 of the Act of 2003 to perform its functions in respect of deaths which occurred 29 years prior to the coming into effect of the Act of 2003 in a manner compatible with the State's obligations under the Convention provisions and, in particular, the provisions of articles 2, 6 and 13 of the Convention?"*
>
> *That question falls to be determined in accordance with Irish law interpreted and applied, in so far as applicable, in accordance with s. 2 of the Act of 2003 and having proper regard to s. 4 of the Act of 2003.*
>
> *[58] On the authority of Brecknell v. United Kingdom (App. No. 32457/04) (2008) 46 E.H.R.R. 42, it may be that, if the concerns in relation to the investigations of the Dublin and Monaghan bombings which arose from the revelations of Mr. Weir and the consideration by the Victims' Commission and the response of the State to those matters had been before the European Court of Human Rights after 1999, that court would have found that the procedural obligation in article 2 was triggered in 1999 and that the State was obliged, as a matter of international law, to conduct an article 2 compliant investigation into those matters. However, these proceedings invoke domestic legislation, the Act of 2003, and seek remedies under national law and the issues to which they give rise fall to be determined in accordance with Irish law, albeit, as I have stated, that the court must comply with s. 2 of the Act of 2003 insofar as it is applicable to the facts and take judicial notice of the jurisprudence of the European Court of Human Rights by virtue of s. 4 in the manner outlined by Fennelly J. in J. McD. v. P.L. [2009] IESC 81, [2010] 2 I.R. 199.*
>
> *[59] On the basis of the reasoning of the House of Lords in Hurst v. London Northern District Coroner [2007] UKHL 13, [2007] 2 W.L.R. 726, in my view, this court's interpretative obligation under s. 2 of the Act of 2003 to interpret and apply the law in a manner compatible with the State's obligations under the Convention provisions is temporally coterminous with the obligation of every organ of the State to perform its functions in a manner compatible with the State's obligations under the Convention provisions as mandated in s. 3. Therefore, to adopt the terminology of Lord Hoffman in In re McKerr [2004] UKHL 12, [2004] 1 W.L.R. 807, the simple question which issue (a) raises is whether, as a matter of construction of the Act of 2003, the rights correlative to the obligations imposed by s. 3 of the Act of 2003 by reference to article 2 apply to deaths which occurred prior to the coming into force of the Act of 2003 on the 31st December, 2003.*
>
> *[60] While the jurisprudence of the European Court of Human Rights has evolved since the decision of the House of Lords in In re McKerr [2004] UKHL 12, [2004] 1 W.L.R. 807 and while the interpretation by the House of Lords of the procedural obligation inherent in article 2 as being an ancillary obligation, rather than a separate and autonomous obligation, as was held in Silih v. Slovenia (App. No. 71463/01) (2009) 49 E.H.R.R. 996, is not consistent with the current jurisprudence of the European Court of Human Rights, the issue in this case, as was the case in In re McKerr [2004] UKHL 12, is one of national law and of the interpretation and application of the relevant statutory provision, in this case, s. 3 of the Act of 2003. I am satisfied that, notwithstanding the evolution of the Strasbourg jurisprudence, In re McKerr [2004] UKHL 12 remains a persuasive authority in determining whether the plaintiffs have a justiciable cause of action under the Act of 2003 in relation to their complaint as to the manner in which the Commission carried out its functions in relation to the deaths in 1974."*

149. In these proceedings, the applicant's argument is essentially that the circumstances of the case meet the threshold set by the jurisprudence of the EctHR in *Silih* and *Janowiec*, which accordingly gives rise to an obligation of the State, under the Convention, to investigate a death prior to the 31st December, 2003.

150. What the applicant wants is the establishment of two commissions of investigation, one to examine substantive failures which attached to the investigation into the death of Seamus Ludlow and the other to investigate what documents might have been created by the State authorities in respect of the murder. The respondents argue that the Convention does not admit of such a right. I am constrained to agree with the respondent's submission. As demonstrated by the jurisprudence of the EctHR, the Article 2 obligation is concerned with ensuring that there has been an effective investigation into a homicide or suspicious death with a view to establishing the identification and eventual prosecution of the perpetrators. It is not concerned with the ascertaining of historical truths which is, effectively, what is sought by the Ludlow family in seeking that the commissions of investigation recommended by the Oireachtas Joint Committee be established.

151. Furthermore, even if I am in error in this finding and the commissions of investigation sought by the applicant could be said to be sufficiently connected to an investigation to establish the identification and eventual prosecution of the perpetrators of an unlawful killing, and even if the Court were to find that a major part of the investigation into Seamus Ludlow's death was carried out post 31st December 2003, which the Court is prepared to find, I find myself in agreement with the respondent's submission that it may be difficult for the applicant to succeed before the EctHR on Article 2 grounds in view of the expanse of time (some twenty seven years) that has elapsed between "the trigger date" (2nd May, 1976) and "the critical date" (31st December, 2003). Thus, there is a question mark as to whether the circumstances of the case would satisfy the "*genuine connection*" test, as set out by the EctHR in *Silih* and *Janowiec*. I note that the expanse of time was the factor upon which the UK Supreme Court denied relief in *R (Keyu)*.

152. I find also the applicant's reliance on the decision of the EctHR in *Brecknell* is misconceived. In my view, the applicant does not, at this juncture at least, meet the test set out in Brecknell for a revival of any international obligation the State may have to take further investigative steps. In Brecknell, the EctHR set out the basis upon which such an obligation would arise:

> *"71. …the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts… the authorities*

are entitled to take into account the prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings…"

153. The applicant does not make the case that such evidence or information exists at the present time such as would warrant the re-opening of the criminal investigation into the killing of Mr. Ludlow. In these proceedings, the respondents acknowledge, effectively, that if there was such information the Garda authorities would be bound to act pursuant to a continuing duty on the State to vindicate the right to life of a person within the State, and where that life has been terminated by violent and unlawful means, to investigate the circumstances of that death in an effective way.

As has been acknowledged by the respondents, an effective Garda investigation most definitely did not occur in 1979, by reason of the failure of the Garda authorities to follow up on information provided by the RUC.

154. However, as the history of the case shows, when new information came into the public domain in 1995/1996, the Garda investigation of Mr. Ludlow's death was re-ignited, in conjunction with RUC officers in Northern Ireland. This was following the revelation that the Gardaí had been given information by the RUC in 1979 that had not been followed up. Contact was made by the Gardaí with the RUC and four suspects were arrested by the RUC but, ultimately, a decision was taken in 1999 by the DPP for Northern Ireland that no prosecutions should be taken.

155. Following the Oireachtas Sub-Committee hearings and the Oireachtas Joint Report, a further review of the death was undertaken by the Gardaí between 2006 and 2009, again involving their travelling to Northern Ireland to interview two of the suspects in Mr. Ludlow's murder. Ultimately, however, this did not lead to anyone being charged with Mr. Ludlow's murder. It remains unsolved, albeit the file remains open. I do not understand the position to be that the Ludlow family are taking issue with how the 2006-2009 investigation was handled. As they have stated on more than one occasion, they are satisfied that they know the identity of the perpetrators of Mr. Ludlow's murder. They say they are resigned to the prospect that those responsible for the killing will not be prosecuted for their crimes. As I have already stated, the Garda file remains open.

156. It remains the case however that the information which was brought to light in 1995/96, and which in fact had been made available to the Gardaí in 1979, was not followed up for reasons explained by Judge Barron in his Report, as referred to earlier in this judgment. While it is accepted by all concerned that the failures and omissions of the State authorities in 1979 is entirely indefensible, as I have said, it is not the applicant's case, in these proceedings, that new information or evidence has come to light such as to revive the investigation into Mr. Ludlow's death. Rather, what the Ludlow family want to achieve, in their call for the establishment of the commissions of investigation recommended by the Oireachtas Joint Committee, is that answers would be given for the State's failure to follow up on concrete information which was provided to the Gardaí in 1979 and which might have at that time led to the identification and perhaps the prosecution of the perpetrators of Mr. Ludlow's murder.

157. To return now to the applicant's argument that Article 2 of the Convention is engaged by virtue of the first respondent's decision not to propose the commissions of investigation recommended by the Oireachtas Joint Committee. This Court has expressed a view on the likelihood of the nature of the inquiries being sought by applicant coming within the parameters of Article 2. It has also expressed a view as to the likelihood of the applicant being able to meet the "genuine connection" test, or meeting the Brecknell criteria for a revival of an investigation. Even if the Court is in error in these regards, and that it can be shown that the State has an international law obligation to carry out further inquiries into Mr. Ludlow's murder, the crux of the matter is that, given that the death of Mr. Ludlow occurred prior to the coming into force of the 2003 Act, on the authority of *J.McD v. P.L.* and *Byrne v. An Taoiseach*, the applicant cannot establish a corresponding Article 2 obligation under national law.

158. In *Byrne v. An Taoiseach*, Laffoy J. addressed this issue in the following terms:

> *"[61] Even though, on the authority of Brecknell v. United Kingdom (App. No. 32457/04) (2008) 46 E.H.R.R. 42, the State's procedural obligation under article 2 to carry out further investigation into the Dublin and Monaghan bombings may have existed as an international law obligation in 1999, the State had no corresponding obligation under national law prior to the enactment and the coming into operation of the Act of 2003. There could not have been a breach of national law in that regard before the 31st December, 2003, nor was there a breach. Whether there could be a breach after the 31st December, 2003, in respect of a death which occurred almost 29 years before that date, falls to be determined in accordance with Irish law. The Supreme Court has held, applying Irish law, in Dublin City Council v. Fennell [2005] IESC 33, [2005] 1 I.R. 604 that the Act of 2003 cannot be seen as having retrospective effect or as affecting past events. That means, in my view, that it cannot give rise to a cause of action for failure of an organ of State to perform its function compatible with article 2 in respect of a death which occurred before the 31st December, 2003. The Oireachtas in enacting the Act of 2003 intended it to have effect and to give rise to causes of action and remedies prospectively only.*
>
> *[62] The rationale which underlies the decision in In re McKerr [2004] UKHL 12, [2004] 1 W.L.R. 807, and in particular, the reasoning in para. 66 of the speech of Lord Hoffman, which was adopted by the High Court in Lelimo v. Minister for Justice [2004] IEHC 165, [2004] 2 I.R. 178 and which was followed by the Supreme Court in Dublin City Council v. Fennell [2005] IESC 33, [2005] 1 I.R. 604, in my view, still applies, notwithstanding the evolution of the Strasbourg jurisprudence. The argument made on behalf of the plaintiffs that the commission investigation was the final stage of an ongoing or continuous process is as fallacious since the evolution of the Strasbourg jurisprudence as it was when In re McKerr [2004] UKHL 12 was decided. As there could not have been any breach of article 2 which would give rise to a cause of action in Irish law before the 31st December, 2003, the concept of a continuing breach or a breach within a continuing process cannot arise."*

159. This Court is satisfied to accept the dictum of the learned Laffoy J. as a correct statement of the law in this jurisdiction, particularly having regard to the learned Judge's reliance on *J. McD. V. P.L.* and *Dublin City Council v. Fennell* [2005] IESC 33. Accordingly, in all the circumstances, and for all of the reasons set out herein, the Court finds that the Article 2 ground has not been made out.

Failure to take relevant considerations into account and unfairness and irrationality in the decision making

The applicant's submissions

160. It is alleged that by failing to take into consideration the applicant's legitimate expectation that the investigative process would be concluded only when the investigators determined that there was nothing else to investigate, the first respondent acted procedurally unfairly in making the decision not to propose the commissions of investigation which were recommended by the Oireachtas Joint Committee. Counsel for the applicant submits that the respondents failed to take into account properly or at all the

Oireachtas Joint Committee's recommendations, and the applicant's legitimate expectation. No adequate justification for the frustration of the applicant's legitimate expectation has been provided by the respondents. The only explanation proffered by the first respondent is that the commissions of the investigation are not warranted because "no new information has come to light". Counsel submits that new evidence or information cannot come to light without an effective investigation. Accordingly the first respondent's reasons are inadequate and irrelevant. Evidence does not self present, it must be discovered by a process of investigation.

161. It is further submitted that given the gravity of the issues under human rights law, the Constitution and the common law, and the wider and recognised public interest, the fact that the Oireachtas Joint Committee has found that two further commissions of investigation are essential and required in the interest of justice all speak to the irrationality of the first respondent's decision. Counsel points to the time and money that has been effectively wasted by not finishing what was started by the Barron Report and Oireachtas Joint Committee. He also emphasises the legitimate suspicions and concerns which, it is submitted, have generated by the incomplete investigation and refusal to complete it, together with the substantive benefits that would flow from the findings of commissions of investigation (including the possibility of providing a gateway to further investigation). All of these factors, counsel submits, underpin the irrationality of the first named applicant's decision. Furthermore, the first respondent erred in failing to take account of the State's international obligations, pursuant to Article 2 ECHR, to provide an effective inquiry.

162. Counsel contends that it is entirely irrational for the first respondent to conclude that the establishment of commissions of investigation would be futile in advance of the outcome of any findings by such commissions of investigation.

163. It is contended that the first respondent's reliance on the view expressed by Judge Barron, in his report, and before the Oireachtas Sub-Committee, that he had received the full co-operation of An Garda Síochána is entirely misconceived and irrational in circumstances where the first respondent does not address the Sub-Committee's view, as expressed at para. 24 of the Oireachtas Joint Committee's report, namely that that comment "*must be viewed in the light of the fact that Mr. Justice Barron had no powers either to compel persons to attend or to compel documents to be produced*". The absence of a power of compellability is of obvious significance in the light of Judge Barron's view that he was not given "*the full picture by one or more people*".

164. Principally, the applicant contends that it is irrational for the respondents to have commenced a process and then not complete that process in circumstances where there is a strong imperative from the Oireachtas Joint Committee that two commissions of investigation were necessary and essential to get the truth of the State's failure to effectively investigate the murder of Mr. Ludlow. These are weighty matters which require investigation. It is submitted that in the circumstances of this case, there requires to be compelling and cogent reasons for the first named respondent not to propose the setting up of the recommended commissions of investigation. It is contended that none of the first respondent's reasons stand up to scrutiny. There was abundant evidence before the first named respondent which dictated that the rule of law required the investigative process that commenced in 1999 should be brought to a conclusion.

165. It is also the applicant's contention that given fundamental rights issues in this case, the first respondent's reasons were required to be far more substantial than those advanced and that an exacting review by the Court is required, as opposed to the leeway which might be given to the other types of administrative decisions.

166. Given the factors outlined, the first respondent has failed to strike a fair balance in terms of the proportionality of the decision. Accordingly, for the reasons set out, in particular the failure to give adequate reasons to justify the refusal to establish the commissions of investigation, it is submitted that the respondents have traversed the reasonableness and proportionality standard of review, as set out in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. Additionally, or in the alternative, it is submitted that the respondents were obliged to act in accordance with their hitherto policy, to wit, the unambiguous publically stated policy to "get to the bottom once and for all" of the circumstances of Seamus Ludlow's murder. The applicant contends that this sudden departure from the stated policy objective requires very compelling reasons to justify the decision not to establish the commissions of investigation, which have not been forthcoming.

The respondents' submissions

167. At the outset, counsel for the respondents submits that insofar as the applicant pleads that the first named respondent's decision is vitiated for want of fair procedures or constitutional justice, or by reason of unreasonableness or irrationality, such pleas are vague and, moreover, not particularised.

168. It is submitted that the allegation of unreasonableness and irrationality is manifestly unsustainable and does not meet the test set in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. There are demonstrably ample and more than stateable reasons for the refusal to propose the establishment of a commission of investigation, even if the applicant (or the Court) would disagree with them.

169. There are clear factual reasons set out in the letter as to why the two commissions of investigation were not being proposed, and the rationale for the reasons is clear. The applicant has not put in evidence anything to challenge the first named respondent's view that nothing in the information which the applicant provided to the first named respondent "represents new or substantial information which would in the public interest warrant an inquiry of the kind sought".

170. Moreover, the clear pertinent reason, as given by the first named respondent, is that she cannot conclude that there is a significant public interest at issue – which the test as set out in the 2004 Act. That is the legal criterion on which the first named respondent has based her decision and that is what the applicant must challenge in the within proceedings. It is not irrational for the first respondent to state that the Ludlow case is not of significant public concern.

171. Thus, in the absence of a clear legitimate expectation (which is not made out) or in the absence of the applicant establishing that the first respondent failed to have regard to a relevant consideration (which the respondents submit is also not made out), the applicant has not established a basis to say that the decision is irrational.

172. Moreover, the applicant has not put before the Court evidence of who could give evidence over and above those witnesses who appeared before the Oireachtas Sub Committee, given that Commissioner Wren is deceased. Nor has the applicant suggested what documents might be obtained in any commission of investigation. Insofar as applicant relies on paragraph 34 of the Oireachtas Joint Committee's Report, the Report does not say that any more documentation could have been procured if Judge Barron had had powers of compellability. Nor did Judge Barron believe that the absence of compellability was a serious shortcoming to his inquiry, albeit that it is accepted by the respondents that two individuals declined to attend the Oireachtas Sub Committee hearings.

173. The respondents dispute the contention that the requirement on the Court (as per *Meadows*) to engage upon a proportionality assessment has been triggered in this case, in the absence of any constitutional right of the applicant to an inquiry of the kind sought, and in the absence of any breach of other constitutional rights, or of the Convention.

Discussion
174. Section 3 of the 2004 Act provides that the establishment of a commission of investigation is contingent on the matter to be investigated being "of significant public concern". It bears repeating that the establishment of a commission of investigation is for the Houses of the Oireachtas and not for the respondents named in the within proceedings, and most definitely not a matter for the courts. As already stated, for the issue of the establishment of a commission of investigation to be laid before the Houses of the Oireachtas by the Government for resolution in this case, the initiating step requires the first respondent to bring a proposal to Government with the approval of the Minister for Finance. The tenor of the first respondent's decision of 25th February, 2015, is, effectively, that no proposal with regard to the commissions of investigation recommended by the Oireachtas Joint Committee will be brought to Government, pursuant to s.3 of the 2004 Act. Accordingly, the first respondent has made a decision not to bring a proposal to Government. The first respondent's statutory discretion pursuant to the 2004 Act is of course reviewable by the courts.

175. The applicant contends that the first respondent has acted unfairly, unreasonably and irrationally, given the gravity of the issues under human rights law, the Constitution and the common law. In particular, the applicant asserts that the first respondent's conclusion that the commissions of investigation are not warranted because "no new information has come to light" is irrational, since new evidence cannot come to light without an investigation.

176. Firstly, insofar as the complaint is that the first named respondent's decision is procedurally unfair, I do not find that this complaint is made out. It is not asserted that the first respondent did not consider the document which was presented to her at the meeting with the Ludlow family in June, 2014, during which the family put their case for the establishment of the two commissions recommended by the Oireacthtas Joint Committee, or that she did not consider other documents furnished by the family following the meeting. The first respondent states in the letter of 25th February, 2015 that she had a review of those papers carried out by her Department, together with other information already on file in her Department, Judge Barron's report and the report of the Oireachtas Joint Committee. The letter also advised that the first respondent's review involved consultation with the Garda authorities. The applicant has not pointed to any document furnished by the family to which the first respondent did not have regard.

177. The case is also made that in making the decision the first respondent failed to take into account the family's legitimate expectation, from the inception of the Barron Inquiry, that if the requisite answers were not forthcoming from the fruits of that Inquiry the investigative process would be followed through. The Court has earlier found that no clear or unequivocal promise was made by the respondents such as could give rise to a substantive legitimate expectation on the part of the applicant. Insofar as the applicant relies on the fact that the Oireachtas Joint unequivocally recommended that further investigations should be carried out, I am satisfied, albeit I have found that the Oireachtas Joint Committee's recommendations cannot bind the first respondent, that the Committee's recommendations were acknowledged in the 25th February, 2015 letter. The first respondent specifically alluded to the fact that the Committee had recommended two commissions of investigation and that the Committee's recommendations had to be given "due weight". Accordingly, I find no basis for the complaint that the first respondent failed to take account of the Oireachtas Joint Committee's recommendations.

Is the first respondent's decision irrational?
178. Before addressing the claim that the decision is irrational, it must first be determined whether, as contended for by the applicant, the Court, when assessing the reasonableness or rationality of the decision, is obliged to engage upon a proportionality assessment.

179. In *Meadows v. Minister for Justice, Equality and Law Reform*, Murray C.J. considered when an assessment as to proportionality will be a necessary tool of judicial review. He also addressed the circumstances in which a court will intervene to quash an administrative decision on grounds of irrationality and unreasonableness. In this regard, the learned Judge referred to the judgment of Finlay C.J. in *O'Keeffe v. An Bord Plenala* [1993] I.R. 39:

> *"[39] In giving his judgment in that case Finlay C.J., with whom the other members of the court agreed, applying the decision in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642, stated at p. 70:-*
>
> > *"In dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., in that judgment set out a number of such circumstances in different terms.*
> >
> > *They are -*
> >
> > > *'1. It is fundamentally at variance with reason and common sense.*
> > >
> > > *2. It is indefensible for being in the teeth of plain reason and common sense.*
> > >
> > > *3. Because the court is satisfied that the decision maker has breached his obligation whereby "he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision".'*
>
> *I am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent with one another, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."*

180. He went on to state:

> *"[55] In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken.*
>
> *[56] In doing so the court may examine whether the decision can be truly "said to flow from the premises" as Henchy J., put it in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 If not it may be considered as being "fundamentally at variance with reason and common sense"."*

181. Murray C.J. addressed the basis upon which a court will embark on a proportionality assessment in the following terms. He stated:

> *"[62] It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and*

in particular the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it. The respondents acknowledge this in their written submissions where it was stated:- "Where fundamental rights are at stake, the courts may and will subject administrative decisions to particularly careful and thorough review, but within the parameters of O'Keeffe v. An Bord Pleanála [1993] 1 I.R. 39 reasonableness review". In the same submissions the respondents stated, "as to the test of reasonableness, the respondents have already made it clear that they have no difficulty whatever with the proposition that, in applying O'Keeffe v. An Bord Pleanála, regard must be had to the subject matter and consequences of the decision at issue and that the consequences of that decision may demand a particularly careful and thorough review of the materials before the decision maker with a view to determining whether the decision was unreasonable in the O'Keeffe v. An Bord Pleanála sense.""

182. The parameters of the proportionality assessment advocated by *Meadows*, where fundamental rights are in issue, are succinctly set out by Cooke J. in *ISOF v. Minister for Justice, Equality and Law Reform* [2010] IEHC 457:

> *"9. To a large degree the issue raised here is directed at an apparent distinction between the review of the validity of a decision by reference to the decision making process and a substantive or "merits-based" reassessment of it. On the one hand, traditional concept of judicial review does not permit the court to re-examine the merits and substitute its own evaluation; on the other hand it is required pace Meadows to decide whether the conclusion is proportionate and therefore whether the respective merits underlying the proportionality of the decision have been correctly assessed and balanced. There is, therefore, at the very least a semantic ambivalence as to the distinction between a merits-based/substantive re-examination of a decision and a purely processed-based review of its legality. In the view of the Court the answer to this conundrum is to be found in para. 71 of the judgment of Fennelly J. in Meadows where he said the following:-*
>
> > *"I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, 'substantive', to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence."*
>
> *10. This court respectfully considers that this quotation underpins the approach adopted by it in the impugned paragraph 12 of its judgment in respect of which the certificate is now sought. For the avoidance of doubt, the Court would reiterate its understanding of the current state of the law as follows. Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the Keegan/O'Keeffe test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made… If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection."*

183. In these proceedings, the applicant does not advance the case that he has a constitutional right to the establishment of a historical truth, or to an investigation into the manner in which the murder investigation was conducted by the Garda authorities in 1979. In the absence of such a right, it cannot be said that the applicant's constitutional rights are engaged by the first respondent's refusal to propose the recommended commissions of inquiry.

184. While it undoubtedly the case that Article 2 of the Convention provides for a right to an effective investigation of a death occurring in suspicious circumstances as "*a separate and autonomous*" duty on a State to the duty to protect the right to life, for reasons already set out in this judgment, the Court has found that Article 2 of the Convention is not engaged in this case.

185. Accordingly, notwithstanding that the late Seamus Ludlow's right to life was engaged by his unlawful killing in 1976, the claim before the Court is that of his relatives, who want an investigation into why the criminal investigation of Mr. Ludlow's death was not pursued in 1979, following upon the information received from the RUC. Important and all as the concerns of the Ludlow family are, in the absence of a finding that fundamental rights under the Constitution or the Convention are engaged in this case, I am not persuaded that the first respondent's decision should be assessed within the parameters of a proportionality type assessment, in the sense outlined in Meadows.

186. While the Court does not find that the proportionality assessment envisaged by *Meadows* is engaged, it must nevertheless assess whether the first named respondent's decision not to propose to the Government that the two commissions of inquiry recommended by the Oireachtas Joint Committee be set up, is vitiated by unreasonableness or irrationality, applying the test set out in *O'Keeffe v. An Bord Pleanala*. I am satisfied that in applying *O'Keeffe v. An Bord Pleanala*, I must have regard to both the subject matter and the consequences of the decision. I have no hesitation in agreeing that given the nature of the issue before the Court, the first respondent's decision must be subject to a careful scrutiny.

187. Given the circumstances of this particular case, it seems to me that the proper starting point for a rational decision-maker would be to take cognisance of the human tragedy for the Ludlow family that was caused by the callous murder of their family member, and the later untold hurt and injustice which has been caused to them by the by now well-documented failure of the Garda authorities to follow up on the information provided by the RUC in 1979. I am satisfied the first respondent was cognisant of this as she refers to the findings of Judge Barron and the Oireachtas Joint Committee in this regard, and the public acknowledgment by two former Garda Commissioners of the failings of the Gardaí. Moreover, the first respondent reiterates the previous apology of her predecessor for the handling of the Garda investigation.

188. The first respondent set out a number of factors (quoted in full earlier in this judgment) which ultimately prevailed with her in finding that "the question of why the 1979 information was not more rigorously followed-up" would not be any more conclusively answered by a commission of investigation than it was when Judge Barron and the Oireachtas Sub-Committee inquired into the matter.

189. In the first instance, the first respondent found it of note that the matters recommended by the Oireachtas Joint Committee were in fact central to the Barron Inquiry's terms of reference. The first respondent also noted that while Judge Barron could not be conclusive on the matter, he found that the most credible explanation for the Gardaí not following up the information received from the RUC in 1979 was that a direction to that effect had been given by a senior Garda. She relied on Judge Barron's evidence to the Oireachtas Sub-Committee that he did not think that the absence of powers of compellability of witnesses and documents prevented the Barron Inquiry from getting the "full picture", albeit they "were not given the full picture by one or more people". She also noted that the Oireachtas Sub-Committee, despite its detailed examination, could not advance any further the question of why the 1979 information was not followed up.

190. With regard the aforesaid factors, the applicant's principal criticism is that the first respondent failed to take cognisance of the Oireachtas Sub-Committee's view that it was unable to resolve the question of why the Gardaí did not follow up the information they had in 1979, or whether there was a policy in existence at the time which prevented such follow up, precisely because it did not have powers of compellability, when a commission of investigation would have such powers. Counsel for the applicant contended that the very essence of a commission of investigation is that it is, *inter alia*, empowered to compel the attendance of witnesses and the production of documents. It is also submitted the first respondent's decision did not address the fact that two "crucial" witnesses declined to attend the Oireachtas Sub-Committee hearings, including Detective Sergeant Damien Doyle, who was found, both by the Barron Inquiry and the Sub- Committee, to be a crucial link in relation to the divergence of views which had emerged between Detective Inspector Courtney and former Commissioner Wren on the issue of why the information which came from the RUC in 1979 was not acted upon. I note however that the two witnesses who did not attend the Sub-Committee hearing did in fact appear before the Barron Inquiry.

191. I am satisfied that the first respondent was cognisant of the powers of compellability which a commission of investigation would have in relation to witnesses and documents. She states as much in the decision. She acknowledged that a commission of investigation "could require or reveal more information than has been made available to date". The first respondent relied however on Judge Barron's view, as set out in his report, that he had received the full co-operation of An Garda Síochána notwithstanding that he lacked powers of compellability and that he was not "given the full picture by one or more people". The first respondent found it of relevance that "although it was not possible for Judge Barron to be conclusive on the matter, he found that the most credible explanation for the lack of follow up of the information received from the RUC was that a direction was given which led the investigating Garda not to pursue this line and that such direction was given by a former senior Garda". To my mind, the decision-maker's reliance on this cannot be said to be irrational.

192. The first respondent went on to address the issue of missing Garda and departmental documentation by reference to the fact that the McEntee Commission had looked into similar issues relating to the Dublin and Monaghan bombings of 1974. She took cognisance of the fact that while critical of Garda file management systems, the McEntee Commission did not identify any deliberate suppression or withholding of material in the context of the Barron Inquiry into the Monaghan and Dublin bombings. She concluded that there was no reason to suggest that a different approach had been adopted with regard to Judge Barron's Inquiry into Mr. Ludlow's death.

193. It was acknowledged in the decision that "due weight" must be afforded to the recommendations of the Oireachtas Joint Committee. It was undoubtedly correct that the first respondent would adopt this approach given the commitment made on 26th March, 2002 that Judge Barron's report would be examined in public session by the Oireachtas Joint Committee "in order for it to advise…the Oireachtas as to what further action, if any, would be necessary…"

194. However, the basis for the Committee's recommendation that two commissions of investigation be established, namely that "a further inquiry is essential in order to ensure justice is both done and seen to be done" and that it was necessary "to address the potential damage to the rule of law that would occur if the investigation into the murder of any citizen of the State is not treated in a professional manner as is the right of every citizen" did not prevail with the first respondent for the reasons stated in the decision, including the factors to which I have already alluded. As I have stated previously, there can be no suggestion that in exercising her statutory function that the first respondent was bound to act on the Oireachtas Joint Committee's recommendations. The question which arises is whether due weight was afforded to the Oireachtas Joint Committee's recommendations. I am satisfied that it was.

195. Notwithstanding the applicant's submissions, I am not persuaded that the first respondent's reliance on the findings of Judge Barron, in support of her conclusion that there was no requirement for a further inquiry, can be said to be irrational in circumstances where the source of the reliance was an independent judicial inquiry the terms of reference of which were germane to the issue under consideration by the first respondent. Furthermore, when considering the efficacy of a further inquiry, the first respondent, also had regard to Judge Barron's findings that he was hampered to some degree by a lack of contemporaneous documents, by the decease of potential witnesses and by the impact of the passage of time on the recollection of others. It seems to me, from a rationality point of view, that the decease of witnesses and the impact of the passage of time (in relation to events in 1979) were factors rationally considered by the first respondent in 2015, just as they were by Judge Barron in 2005.

196. I accept however that the issue of documents is more problematic. The thrust of the applicant's argument in the within proceedings is that it is only an inquiry with compellability that will establish whether or not documents exist which might throw light on why the information available to the Gardaí in 1979 was not pursued. In the decision, the first respondent addressed this issue by relying on Judge Barron's conclusion that the absence of compellability did not hamper him in the conclusions arrived at in his report, and on the findings of the McEntee Commission. I cannot find the reliance on either irrational. As I have already said, Judge Barron was in a position to conclude, as a likelihood, that a direction had been given by senior Garda management whereby recourse to the pursuit of suspects in Northern Ireland would not be pursued by investigating Gardaí. He also believed it likely that the Deputy Garda Commissioner who made the decision would have discussed it with other senior Gardaí and senior officials in the Department of Justice. These findings were made by Judge Barron notwithstanding that he did not have powers of compellability. Given that Judge Baron's findings speak to a considerable extent to the matters which the Ludlow family want to be investigated by way of a commission of investigation, it cannot be considered irrational that in considering the efficacy of proposing such a commission, that the first respondent would look to what had already been achieved. With regard to the first respondent's reliance of the findings of the McEntee Commission, I find that the findings of that Commission were sufficiently proximate in time to the conduct of Judge Barron's Inquiry to allow the first respondent to rationally rely on the McEntee Commission's findings.

197. The other factors relied on by the first respondent as a basis for her belief that no greater answers as to why the 1979

information was not followed up would be forthcoming from a commission of investigation than when the matter was inquired into by Judge Barron and the Oireachtas Sub-Committee were that a Garda review of the original investigation and the original evidence had been conducted, and that the DPP had directed that no prosecution be brought. The applicant submits that these matters are of no comfort to the Ludlow family given the established shortcomings of the Gardaí. It is also argued that the first respondent's reliance on the fact that the DPP has decided that no prosecution should be brought is not a rational basis for the decision not to propose the commissions of investigation recommended by the Oireachtas Joint Committee. The argument canvassed by the applicant is that, at this juncture, the issue is not the circumstances of the murder of Seamus Ludlow, but rather why there was a failure on the part of the State to investigate the information which was received in 1979 from the RUC. While there is merit in what the applicant says in this regard, I do not find that the first respondent's reliance on these factors is sufficient, of itself, to vitiate the decision particularly where there are other factors relied on which the Court has not impugned.

198. It is further contended by the applicant that the fact that a public apology had been made to the Ludlow family is not a rational basis upon which to refuse to set up the recommended commissions of investigation. While the applicant may disagree that this was a factor that should have been relied on, *inter alia*, to ground the decision not to propose the recommended commissions of investigation, I am satisfied that it was not irrational for the first respondent to do so given that the apology directly addressed the abject failings of the Gardaí in 1979. It was thus within the bounds of rationality for the first respondent to factor into the decision the acknowledgement of those failings, in 2006, from both the sitting and a former Garda Commissioner, and the then Minister for Justice, as part, essentially, of the vindication of the Ludlow family's quest for answers to what had transpired in 1979. This is particularly so given that in his evidence to the Inquiry, former Garda Commissioner Byrne thought it likely that there would have been some discussion between senior Gardaí and officials of the Department of Justice concerning the decision not to pursue the information which investigating Gardaí had received from the RUC in 1979.

199. It is also argued on behalf of the applicant that it is entirely irrational for the first respondent to conclude that the matters the Ludlow family wished to have investigated further were not matters of significant public concern.

200. The argument advanced by the respondents in response to this submission is that the applicant has not said why the first named respondent's conclusion is irrational. It is submitted that it is not sufficient for the applicant simply to disagree with the conclusion.

201. It is clear from the provisions of the 2004 Act that whether a matter is of significant public concern is for consideration by the Executive. The first respondent, as part of the Executive and in exercising her statutory discretion as to whether to bring a proposal to Government to establish a commission of investigation into the Garda handling of Mr. Ludlow's murder, concluded that there was "no significant public concern at issue" sufficient to merit the establishment of a commission of investigation in 2015. The conclusion was arrived notwithstanding the first respondent's acceptance of the gravity of the circumstances of Mr. Ludlow's murder and the abject failure of the Garda authorities, in 1979, to pursue a proper investigation of his killing. The rationale for the first respondent's conclusion that there was not "a significant public concern at issue sufficient to merit the establishment of [a commission of investigation" appears to be that these grave matters were, in substantial part, addressed by the Barron Report and Oireachtas Joint Committee, by the public apologies made to the family at the Oireachtas Sub-Committee hearings and by the renewed Garda investigation which commenced in 2006.

202. It is the applicant's contention that it is difficult to conceive that the established failure of the Garda authorities in 1979 to pursue the investigation of the murder of Seamus Ludlow is otherwise than a matter of public concern. In particular, the applicant points to the Barron Report which suggested that a policy was in place within the State not to interview suspects in Northern Ireland because of some perceived national interest. It is contended that the issue of a perceived national interest outweighing the right of the Ludlow family to have a proper investigation into the murder of their family member cannot be otherwise than a matter of significant public interest.

203. Without doubt, the public interest benefit in enquiring into why the Gardaí did not, in 1979, pursue information which might have assisted in the prosecution of those responsible for Mr. Ludlow's murder was considered to be significant in 1999 when a decision was made to make it part of Judge Barron's independent judicial enquiry, which was then followed on by the consideration of the Barron Report at public hearings before the Oireachtas Joint Committee in 2006. However, in considering the matter in 2015, the first respondent concluded that there was nothing in the documents which had been received from the Ludlow family which represented new or substantial information "which would in the public interest warrant an inquiry of the kind that is sought."

204. In light of the first respondent's reliance on the established findings of Judge Barron which, the first respondent concluded, addressed the issues of concern which gave rise to the Barron Inquiry in the first instance, and the fact that no new information was before the first respondent in 2015 such as would warrant the new inquiry sought by the Ludlow family, the Court finds that the decision made by the first respondent was one that was open to the decision-maker to make. The Court has every sympathy with the Ludlow family's concerns as have been expressed in these proceedings and over the course of a long number of years. Their wish to discover the truth of why important information was not pursued by the Garda authorities in 1979, over and above what has been established by the Barron Inquiry and the Oireachtas Joint Committee hearings, is entirely understandable and commendable given the callous murder of their loved one and the established failings of the Garda investigation in 1979.

205. However, for the reasons set out herein, I cannot find that the first respondent's decision not to propose the commissions of investigation recommended by the Oireachtas Joint Committee is "*fundamentally at variance with reason or common sense*" or that the first respondent flagrantly disregarded fundamental reason and common sense, which is the test this Court must apply. The test does not require the decision-maker to convince the Court to the point of conviction that the decision was the right decision in any absolute sense. Applying the requisite test, this Court, having regard to all the circumstances, has found no basis to impugn the decision of the first respondent as irrational.

206. As has been said on many occasions, it is not the function of the Court to stand in the shoes of the decision-maker even if the Court were to hold a contrary view to that of the decision-maker. As Cooke J. states in *ISOF v. Minister for Justice*, the Court "does not have before it an appeal against the decision, much less a merits based appeal by way of re-adjudication of the original issue."

Summary

207. For the reasons set out in this Judgment, the relief sought in the notice of motion is denied.