Neutral Citation Number: [2010] IEHC 353

THE HIGH COURT

2008 2669 P

IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

BETWEEN

DEREK BYRNE, MARGARET MCNICHOLL

AND JUSTICE FOR THE FORGOTTEN LIMITED

PLAINTIFFS

AND

THE TAOISEACH, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 9th day of September, 2010.

1. The factual background

1.1 These proceedings arise out of the atrocities which have become known as the Dublin and Monaghan Bombings, which occurred on 17th May, 1974. The first plaintiff was seriously injured as a result of the car bomb explosion in Parnell Street in Dublin City on that day. The second plaintiff is a sister of Mary McKenna, who was killed as a result of the car bomb explosion in Talbot Street in the City of Dublin on the same day. The third named plaintiff is a body corporate which was established to provide support for, and advance the interests of, those bereaved and injured as a result of the Dublin and Monaghan bombings.

1.2 These proceedings are the result of dissatisfaction on the part of the plaintiffs with the police investigations and other investigations and inquiries which have been carried out by the State into the atrocities, in which 33 people lost their lives and almost 300 people were injured. The following outline of the relevant facts is almost exclusively a chronology of the investigations and inquiries carried out by organs of the State since 1974 and is based on a statement of facts filed on behalf of the plaintiffs on 15th October, 2009 and the appendix to the written submissions of the defendants filed on 14th October, 2009 on the chronology of the investigations and inquiries in relation to the bombings.

1.3 An investigation by An Garda Síochána began immediately following the bombings. That first phase of the investigation came to an end in August 1974. Between 1974 and 1979, further inquiries were carried out in response to further information. Between 1980 and 1987, no new information was added to Garda files.

1.4 What precipitated the next stage of the investigation was the broadcasting on 6th July, 1993 of a Yorkshire Television documentary entitled *"Hidden Hand – The Forgotten Massacre"*. That programme raised concerns as to the existence of collusion between Loyalist paramilitaries and members of the security forces in Northern Ireland in connection with the bombings. Following that broadcast, there were further investigations by the Gardaí through 1993 and 1994. Material was sent to the Director of Public Prosecutions in March 1994 but no prosecution ensued, because the Director was of the opinion that there was no evidence on which a prosecution could be initiated, nor was there any further line of inquiry which might alter the situation. Nonetheless, the inquiries continued through 1994. On the 21st anniversary of the bombings on 17th May, 1995, the Minister for Justice met representatives of the bereaved and injured and, in a statement issued following the meeting, she indicated that the crimes would remain an "open case" and, if any lead should emerge which might bring the culprits to justice, it would be pursued vigorously.

1.5 While this stage is not included in the defendants' chronology, as a result of the Good Friday Agreement, which was signed on 10th April, 1998 and ratified on 22nd May, 1998, which recognised the needs of victims of violence and contained commitments to acknowledge and address their suffering, John Wilson, former Tánaiste, was appointed Victims Commissioner on 25th June 1998. The report of the Victims Commission, which was published on 6th August, 1999 made recommendations in relation to an inquiry into the Dublin and Monaghan bombings.

1.6 Before that report was published, however, an event occurred which triggered further Garda investigations. In January 1999, John Weir, who was a former member of the Royal Ulster Constabulary (RUC) and who had served a prison sentence for his role for a murder in Northern Ireland, made a statement in which he alleged that there had been ongoing collusion between certain Loyalist paramilitaries and certain elements of the security forces in Northern Ireland, which he stated had resulted in a number of bombings and shootings in Northern Ireland and in the State during the mid-1970s. He also gave detailed information about the Dublin and Monaghan bombings. A copy of his statement was passed by the RUC to An Garda Síochána and this led to further investigations through 1999, during which Mr. Weir was interviewed by the Gardaí, and into 2000 and 2001, when persons in Northern Ireland were interviewed by the RUC at the request of the Gardaí. However, the information obtained did not advance the investigation.

1.7 Between February 2000 and December 2003 an inquiry was conducted into the Dublin and Monaghan bombings, initially by the former Chief Justice, Mr. Justice Liam Hamilton, and from October 2000 by a former Judge of the Supreme Court, Mr. Justice Henry Barron (the Inquiry). The terms of reference of the Inquiry were to undertake a thorough examination, involving fact-finding and assessment of all aspects of the Dublin and Monaghan bombings and their sequel, including –

- the facts, circumstances, causes and perpetrators of the bombings;
- the nature, adequacy and extent of the Garda investigation, including the co-operation with and from the relevant authorities in Northern Ireland and the handling of evidence, including the scientific analyses of forensic evidence;
- the reasons why no prosecution took place, including whether and, if so, by whom and to what extent the

investigations were impeded; and

- the issues raised by the *Hidden Hand* TV documentary broadcast in 1993.

In these proceedings, counsel for the defendants emphasised the broad scope of the terms of reference of the Inquiry. The Inquiry had no powers to compel the disclosure of evidence or the attendance of witnesses. Its work was conducted in private. The report of the Inquiry (the Barron Report) was published on 10th December, 2003 as an Interim Report of the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights. Counsel for the defendants have summarised the conclusions of the Inquiry as set out in the Barron Report as being critical of the Garda investigation and of the attitude of the Government of the day to the bombings. The Barron Report identified particular matters which it considered were shortcomings in the Garda investigation, such as lines of inquiry not being sufficiently pursued and insufficient liaison with the RUC in relation to the potential questioning of suspects.

1.8 The Barron Report was the subject of public hearings before the Joint Oireachtas Committee between January and March 2004. As a result, on 31st March, 2004 a final report of the Joint Oireachtas Committee was published, which identified the matters which required further investigation.

1.9 In May 2005, the Commission of Investigation into the Dublin and Monaghan Bombings of 1974 (the Commission) was established by Order of the Government made under s. 3 of the Commission of Investigation Act 2004 (the Act of 2004). Mr. Patrick McEntee, S.C. was appointed sole member of the Commission. The terms of reference of the Commission were to undertake a thorough investigation and make a report on specific matters outlined which were considered by the Government to be of significant public importance, namely:

> (1) Why the Garda investigation into the Dublin and Monaghan was wound down in 1974?
>
> (2) Why the Gardaí did not follow up on certain leads which were itemised, that at (ii) being relevant to the issues before the Court – "information relating to a man who stayed in the Four Courts Hotel between 15th and 17th May, 1974 and his contacts with the UVF"?
>
> (3) Certain questions in relation to missing documentation.

The Commission in its terms of reference was required to take account of investigative work already undertaken, including the Barron Report and the Final Report of the Joint Oireachtas Committee. In these proceedings counsel for the defendants have emphasised that the scope of the Commission's investigation was narrower than the scope of the Inquiry and, in particular, the Commission was not concerned to ascertain the perpetrators of the bombing. Its brief consisted of a review of the original investigation and the apparent deficiencies in that investigation identified by the Inquiry.

1.10 The Commission obtained information from various bodies within the State, including An Garda Síochána, the Defence Forces and a number of government departments. It also sought assistance of various agencies and entities of the British Government. By giving undertakings of confidentiality, it was able to access materials and conduct interviews beyond that undertaken by the Inquiry. Its proceedings were conducted entirely in private.

1.11 On 12th March, 2007 the Commission completed its work and submitted its final report to the Taoiseach. Thereupon, the Commission was dissolved by operation of s. 43(1) of the Act of 2004. The report was published on 4th April, 2007. Counsel for the defendants suggested that two broad themes emerged from the report. The first was that, as regards reaching conclusions on the issues raised by the terms of reference, major problems were caused by the lapse of time since the original Garda investigation. The second was that the Garda investigation was not inadequate and a number of leads were properly followed up. What is of relevance for present purposes is how the Commission dealt with the "man in the Four Courts Hotel" lead referred to at item 2(ii) of the terms of reference (Term 2(ii)). In chapter 11 of the report the Commission dealt with that issue as follows:

> "11.2 Despite having spent a lot of time and effort in investigating this aspect of the terms of reference and seeking to formulate conclusions which are lawful, fair and balanced, the commission regretfully states that, having regard to the provisions of the [Act of 2004], it cannot report under this heading of the terms of reference.
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> 11.3 The difficulties which have resulted in the commission being unable, as a matter of law, to report under this heading of its terms of reference have been made known by the commission to the Taoiseach."
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> 1.12 On 12th March, 2007, in addition to submitting its final report, prior to its dissolution, the Commission, acting pursuant to s. 43(2) of the Act of 2004, deposited its archive (which I understand to mean all evidence received by and all documents created by or for it) with the Taoiseach. The third plaintiff, on behalf of the victims of the atrocities, sought access to the archive in letters of the 27th May, 2007, 5th November, 2007 and 30th March, 2008 to the Department of the Taoiseach, but received no response.

2. The pleadings in the substantive proceedings

2.1 These proceedings were initiated by a plenary summons which issued on 3rd April, 2008. In their statement of claim the plaintiffs essentially make two complaints. The first is the failure of the Commission to report on the "man in the Four Courts Hotel" lead (Term 2(ii)) and the failure to report in public on the nature of the alleged difficulties in reporting thereon, which it is alleged constituted an infringement of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). That failure and alleged infringement is laid at the door of the State on the basis that it was obliged to ensure that the Commission complied with Article 2. The second complaint is the failure to allow the plaintiffs full or limited access to the archive of the Commission, which it is alleged is in breach of Article 2 and Article 13 of the Convention. Further, it is alleged that, insofar as it is contended by the defendants that s. 11(3) of the Act of 2004 prohibits the defendants from allowing the plaintiffs access to the Commission's archive, that provision is incompatible with the provisions of the Convention.

2.2 The reliefs which the plaintiffs claim are linked to the two complaints they make as follows:

> (a) In relation to the complaint based on Term 2(ii), they seek declarations that each of the following matters, that is to say –
>
> (i) the Commission's failure to report on Term 2(ii),

(ii) the Commission's failure to report in public on the difficulties it contended that as a matter of law rendered it unable to report on Term 2(ii), and

(iii) the failure of the Taoiseach to make public those difficulties as made known by the Commission to him,

constituted a failure to perform the functions in a manner compatible with the State's obligations under the Convention in breach of the plaintiffs' Convention rights and, in particular, rights pursuant to Articles 2, 6 and 13.

(b) In relation to the failure to allow access to the plaintiffs to the Commission archive, a declaration that the failure of the Taoiseach in that regard constitutes an ongoing failure by the Taoiseach to perform his functions in a manner compatible with the State's obligations under the Convention in breach of the plaintiffs' Convention rights and, in particular, rights pursuant to Articles 2, 6 and 13.

In broad terms, the plaintiffs also seek a declaration that s. 11(3) does not prohibit disclosure of the archive. As an alternative they seek a declaration pursuant to s. 5 of the European Convention on Human Rights Act 2003 (the Act of 2003) that s. 11(3) of the Act of 2004 is incompatible with the State's obligations under the Convention. Finally, they seek certain ancillary mandatory injunctive relief against the Taoiseach in relation to the archive.

2.3 The defendants in their defence delivered on 9th April, 2009, in addition to traversing the plaintiffs' allegations, plead certain matters by way of preliminary objection. Contemporaneously with the defence they brought a motion that issues arising out of those pleas be tried as preliminary issues in the proceedings. By order of the Court made on 17th July, 2009, the Court directed that those matters be tried as preliminary issues. By then, the plaintiffs had delivered their reply in which they join issue with the matters pleaded in the defence.

3. The issues

3.1 The issues which the Court directed to be tried as preliminary issues are the following:

(a) whether the provisions of Articles 2, 6 and 13 of the Convention are directly justificiable as a matter of domestic law in these proceedings in respect of the Commission in respect of deaths occurring twenty nine years prior to the coming into effect of the Act of 2003;

(b) whether the provisions of s. 11 of the Act of 2004 afford to the plaintiffs a legally enforceable right of access to the archive of a commission established pursuant to the Act of 2004 and, in the event that the said provision does not so provide, whether the same is for that reason, incompatible with the Convention; and

(c) whether the Act of 2003 enables the grant of relief in the form of the declarations as sought at paragraph B(1) – (5) inclusive of the general endorsement of claim on the plenary summons.

In line with my frequent experience when determining preliminary issues, I have come to the conclusion, which I will address later, that issue (a) and, to a lesser extent, the first limb of issue (b), as formulated do not precisely address the questions which the defendants require the Court to determine. In relation to issue (c), I note a difference between the reliefs sought in the prayer in the statement of claim and the reliefs sought in the plenary summons, in that paragraph B(5) of the general endorsement is not reiterated in the statement of claim. Therefore, as I understand it, the reliefs to which that issue relate are those paraphrased at (a) and (b) in para. 2.2 above.

3.2 The moving party on the trial of the preliminary issues was the defendants. Points of claim were delivered by the defendants and points of defence were delivered by the plaintiffs. The Court had the benefit of written submissions on the preliminary issues from counsel for the defendants and counsel for the plaintiffs, which were supplemented by oral submissions at the hearing of the issues.

3.3 As I understand it, at the hearing of the issues, counsel for the parties acknowledged that, if the issue at (a) was resolved in favour of the defendants by a negative answer, the second limb of issue (b) and issue (c) would not arise for determination.

4. Issue (a): Relevant treaty and statutory provisions

4.1 At the hearing, in relation to issue (a), the parties focused exclusively on Article 2 of the Convention, which provides as follows:

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

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

4.2 The provisions of sections 2, 3 and 4 of the Act of 2003 are relevant to the determination of issue (a). Those provisions impose positive obligations on the organs of the State in relation to the interpretation of laws, the performance of the State's obligations and the interpretation of the Convention provisions.

4.3 Sub-section (1) of s. 2 deals with interpretation of the laws of the State and provides:

"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."

The term "Convention provisions", as defined in s. 1, includes Articles 2, 6 and 13.

4.4 Section 3 deals with the performance of certain functions in a manner compatible with Convention provisions and provides in subs. (1):

> "Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

Section 3 goes on to provide for a remedy in damages for a person who has suffered injury, loss or damage as a result of a contravention of subs. (1).

4.5 Section 4 provides that judicial notice shall be taken of the Convention provisions and of, *inter alia*, any declaration, decision, advisory opinion or judgment of the European Court of Human Rights (ECtHR) established under the Convention on any question in respect of which that Court has jurisdiction, and further provides that a Court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

4.6 When enacted, section 9(2) of the Act of 2003 provided that it should come into operation on such day not later than six months after its passing as the Minister for Justice, Equality and Law Reform might appoint by order. In fact, it came into operation on 31st December, 2003. That it was not in force before 31st December, 2003 is the foundation of the defendants' contention that the answer to issue (a) should be negative.

4.7 The defendants contend that the obligations of organs of the State to comply with the Convention only arose and remedies in relation to alleged breaches of Convention rights only became available under domestic law from 31st December, 2003 by virtue of the Act of 2003 coming into force, so that obligations pursuant to Article 2 of the Convention do not arise and remedies under the Act for breach thereof are not available in respect of any deaths which occurred before 31st December, 2003. The response of the plaintiffs is that that submission is superficial and is wrong in law. The organs of the State, the plaintiffs contend, are answerable under domestic law for acts or defaults that infringe Convention rights, provided those acts and defaults occurred after the commencement of the Act of 2003, the date of the performance of the function being the relevant date for determining the existence of the statutory obligation. To put the matter another way, the defendants' case is that the Act of 2003 did not have retrospective effect, which is undoubtedly in line with authority. However, the plaintiffs' position is that they are not seeking to have the Act of 2003 applied retrospectively.

4.8 Counsel for the plaintiffs found support for the plaintiffs' position in recent case law of the ECtHR. While not ignoring the boundaries between the State's obligations under domestic law and its obligations under international law arising from the Convention, which counsel for the defendants cautioned the Court must not ignore, I think it is useful to consider the recent case law of the ECtHR relied on by counsel for the plaintiffs before considering the jurisprudence which has developed in this jurisdiction since the Act of 2003 came into operation and the jurisprudence which has developed in the United Kingdom as a result of the enactment of the Human Rights Act 1998 (the 1998 Act) in that jurisdiction.

5. Recent decisions of the ECtHR

5.1 The kernel of the argument advanced by counsel for the plaintiffs that, as a matter of domestic law, by virtue of s. 3 of the Act of 2003 the Commission was obliged to perform its functions in a manner compatible with Article 2 of the Convention was that, while it has long been established that Article 2 imposes both a substantive obligation and a procedural obligation on contracting States, under the recent case law of the Strasbourg Court the procedural obligation has evolved as a free standing autonomous obligation. The Commission, in the performance of its functions, which were performed after the Act of 2003 came into operation, was bound by the procedural obligation inherent in Article 2, even though the deaths to which its functions related had occurred long before the Act of 2003 came into operation.

5.2 The judgment of the ECtHR on which counsel for the plaintiffs laid most emphasis was the judgment of the Grand Chamber of in *Silih v. Slovenia* (Application No. 71463/01, 9th April, 2009). The factual basis of that case was that the applicants complained that their son had died as a result of medical negligence and that their rights under Articles 2, 3, 6, 13 and 14 of the Convention had been breached by the inefficiency of the Slovenian judicial system in establishing responsibility for his death. He died in 1993, a little more than a year before Slovenia ratified the Convention. In relation to the alleged violation of Article 2, the Government of Slovenia contested the jurisdiction of the ECtHR *ratione termporis* to deal with the applicants' complaint. In dealing with that issue the Court was concerned with its own jurisdiction. It set out the general principles which had been established in its jurisprudence in paras. 140 to 146, noting that, in applying the principle of non-retroactivity, the Court had been prepared in previous cases to have some regard to facts which occurred prior to the critical date, which was the date on which a contracting party to the Convention became bound by his provisions, because of their causal connection with subsequent facts which formed the sole basis of the complaint and of the Court's examination. An example given of that application was a case under Article 6 concerning the fairness of criminal proceedings, which started prior to the critical date and continued afterwards, in which the court looked at the proceedings as a whole in order to assess fairness. As was pointed out in para. 146, in *Blecic v. Croatia* (2005) 41 EHRR 13 the Court had endorsed "the time of interference principle as a crucial criterion for assessing the Court's temporal jurisdiction", having there found that –

> "[i]n order to establish the Court's temporal jurisdiction it is … essential to identify, in each specific case, the exact time of the alleged interference. In doing so the Court must take into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated".

The Court noted the "general character" of the test and the criteria established in the *Blecic* case, stating that the "special nature of certain rights", such as those laid down in Articles 2 and 3, require to be taken into consideration when applying those criteria, reiterating that Article 2 together with Article 3 "are amongst the most fundamental provisions in the Convention", citing *McCann v. United Kingdom* (1995) 21 EHRR 97.

5.3 The Court then went on to deal with its jurisdiction *ratione termporis* in respect of the procedural complaints under Article 2 of the Convention, referring to a number of cases where the facts concerning the substantive aspect of Article 2 fell outside the period under the Court's competence, while the facts concerning the related procedural aspect, that is the subsequent proceedings, fell at least partly within that period. Having noted varying approaches taken by different Chambers of the Court, the Grand Chamber set out to determine "whether the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date or alternatively whether they are so inextricably linked to the substantive obligation that an issue may only arise in respect of deaths which occur after that date".

5.4 In considering what it referred to as the "detachability of procedural obligations issue", the Court made a number of points. First, the Court has interpreted Articles 2 and 3, having regard to the fundamental character of those rights, as containing a procedural obligation to carry out effective investigation in alleged breaches of the substantive limb of those provisions, citing *McCann v. United*

Kingdom. Secondly, the Court outlined how the procedural obligation, had been applied in different contexts, for instance (at para. 157) it stated:

> "Moreover, while it is normally death in suspicious circumstances that triggers the procedural obligation under Article 2, this obligation binds the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it (see, *mutatis mutandis, Brecknell v. United Kingdom* No. 32457/04, 27th November, 2007 …).

Finally, the Court's determination on the "detachability of procedural obligations issue", which is the kernel of the plaintiffs' case on issue (a), was stated as follows (at para. 159):

> "Against this background the Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent 'interference' within the meaning of the *Blecic* judgment …. In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."

5.5 However, the Court went on to state that, 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. It emphasised two points. First, where the death occurred before the critical date, only procedural acts and/or omissions occurring after that date could fall within the Court's temporal jurisdiction. Secondly, 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. It is worth reiterating that throughout the foregoing, the Court was dealing with its own jurisdiction.

5.6 The application of the decision of the Grand Chamber in the *Silih* case was considered in the judgment of the Grand Chamber in the case of *Varnava and Ors. v. Turkey* (Application No. 16064/90 et al., 18th September, 2009). The complaints in that case arose out of the Turkish military operations in Northern Cyprus in July and August 1974 and involved the disappearance of four men. The critical date as regards jurisdiction was the date in 1987 when Turkey ratified the right of individual petition. In considering the nature of the procedural obligation to investigate disappearances, the Court emphasised that, as found in *Silih* concerning the procedural obligation under Article 2 to investigate unlawful or suspicious deaths, the procedural obligation under Article 2 arising from disappearances operates independently of the substantive obligation. However, it went on to distinguish between the procedural obligation to investigate a suspicious death and the procedural obligation to investigate a suspicious disappearance, stating that, in the face of a suspicious disappearance, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for. The ongoing failure to provide the requisite investigation will be regarded as a continuing violation, even where death may, eventually, be presumed. The Court went on to state (at para. 149):

> "It may be noted that the approach applied in *Silih* … concerning the requirement of proximity of the death and investigative steps to the date of entry into force of the Convention applies only in the context of killings or suspicious deaths, where the anchoring factual element, the loss of life of the victim, is known for a certainty, even if the exact cause or ultimate responsibility is not. The procedural obligation in that context is not of a continuing nature in the sense described above."

Once again, it is necessary to emphasise that what the Court was concerned with there was its own jurisdiction. While this Court is concerned with the jurisdiction conferred on it by an Act of the Oireachtas, the Act of 2003, not with the jurisdiction of the Strasbourg Court, it is apposite to comment that a submission made by counsel for the plaintiffs that the factual situation with which this Court is concerned is no different than a hypothetical situation in which the Gardaí in 2010 discover the body of a missing person which was buried twenty years ago is not in line with the jurisprudence of the ECtHR as regards its own jurisdiction *ratione termporis*, as set out in the above quotation.

5.7 The most recent decision of the ECtHR relied on by counsel for the plaintiffs is the judgment of the Fourth Section in *Dvoracek and Anor. v. Slovakia* (Application No. 30754/04, 28th July, 2009). In that case, the applicants alleged that the respondent state had failed to ensure appropriate medical treatment for their daughter, which led to heart and lung damage and finally to her death in 2004 in violation of Article 2. The alleged shortcomings had occurred shortly after her birth in 1981, which was prior to the date on which Slovakia became bound by the Convention, which occurred in 1992. In relation to the violation of Article 2 in its substantive limb, the Court found that it lacked jurisdiction to examine the alleged shortcomings in the applicants' daughter's medical treatment in the 1980s. On the procedural limb of Article 2, the Court recorded that it had recently found "that this procedural obligation has evolved into a separate autonomous duty", citing *Silih*. It recorded that in the case before it, one month after their daughter had died, the applicants had indicated to the District Court before which their claim for damages was pending that the question arose whether their daughter's death had been caused by shortcomings in her medical treatment and that they intended to claim damages in that respect. The Court stated, in a passage relied on by counsel for the plaintiffs (at para. 53):

> "It is true that more than twenty years separate the alleged shortcomings in the applicants' daughter's medical treatment and her death which, as the applicants alleged, was imputable to those shortcomings. Nevertheless, the Court considers that in the present case, and irrespective of the outcome of the proceedings which the applicants instituted, the procedural obligation under Article 2 to carry out an effective investigation came into being in the context of the proceedings complained of following [the daughter's] death in 2004 (see also *Silih* …)."

5.8 The judgment of the Fourth Section in *Brecknell v. United Kingdom* referred to in the passage from the judgment in *Silih* (at para. 157) quoted above (para. 5.4), was delivered on 27th February, 2007 and is based on facts which have certain features in common with the facts in this case. The applicant was the widow of Trevor Brecknell, who was one of three persons killed in a Loyalist gun attack at Donnelly's Bar, Silverbridge, County Armagh in December 1975. The applicant claimed that the United Kingdom Government had failed to provide an effective official investigation into the circumstances of her husband's death after allegations were made in 1999 by John Weir as to RUC involvement in violation of Article 2. The judgment, at para. 18 et seq., outlines Mr. Weir's statement which was given to a journalist in January 1999 and the subsequent actions of the police in Northern Ireland. It also sets out the information contained in relation to John Weir in the Barron Report. It was submitted on behalf of the United Kingdom Government that no procedural obligation arose under Article 2 to investigate Mr. Weir's allegations, as they were made in 1999, over twenty years after the event, and long after the period for fulfilment of the State's obligation of investigation had expired. It was further submitted that there had been a police investigation into the murders immediately after they occurred, with an inquest, and there had also been a second police investigation in 1978 and 1981 in the light of allegations made and information provided by certain individuals and that there was no continuing obligation to investigate after this initial period (para. 60).

5.9 The Court rejected those arguments. It pointed out that it had already had cause to examine cases in which new evidence came to light after the conclusion of the original proceedings concerning a death, citing *McKerr v. United Kingdom* (2001) 34 EHRR 553. While the Court commented that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly, in the context of war crimes and crimes against humanity, it went on to state (at para. 70):

> "It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. Both parties have suggested possible tests. The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely-differing situations which might arise. It is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to the Contracting Parties to provide further protection or guarantees. For example, contrary to the applicants' assertion, if Article 2 does not impose the obligation to pursue an investigation into the incident, the fact that the State chooses to pursue some form of inquiry does not thereby have the effect of imposing Article 2 standards on the proceedings. Lastly, bearing in mind the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources, positive obligations must be interpreted in a way which do not impose an impossible or disproportionate burden on the authorities …"

The penultimate sentence in that passage might be of significance if the Strasbourg Court was determining whether the procedural obligation under Article 2 was engaged under international law in relation to the performance by the Commission of its functions. However, that is not the issue which is before this Court. This Court is concerned with the position of the State acting through its organs under Irish law.

5.10 In the *Brecknell* case the Court found that, on one ground advanced by the applicant, there had been a violation of Article 2 of the Convention. That was on the ground that the investigative response to Mr. Weir's allegations lacked the requisite independence in its early stages because the initial inquiries were carried out by the RUC, which was itself implicated in Mr. Weir's allegations. Up to the time when the PSNI took over from the RUC in November 2001, the investigation could not be regarded as disclosing the requisite independence.

5.11 Unlike, for instance, the *Varnava* case, there was no issue of retroactivity in the *Brecknell* case. Nor could there be an issue of retroactivity if the plaintiffs made the complaint they are making in these proceedings to the ECtHR, because Ireland has been bound by the Convention since 1953. The principle as to the interpretation and application of the Convention which emerges from the *Silih* judgment and the two subsequent judgments is that the procedural obligation inherent in Article 2 to investigate a suspicious death is a separate and autonomous duty in respect of which the ECtHR may have jurisdiction in relation to a death, even if the substantive obligations thereunder in relation to that death are outside its temporal jurisdiction. If the plaintiffs were before the ECtHR pursuing a complaint of violation of Article 2 on the basis of the complaint which underlies issue (a), no issue could arise in relation to the temporal jurisdiction of that Court, as the Dublin and Monaghan bombings took place after Ireland became bound by the Convention. It is, of course, true that the totality of the jurisprudence of the ECtHR which has been referred to earlier was not solely concerned with the temporal jurisdiction issue, but also dealt with that Court's interpretation and application of the scope and content of Article 2. However, that is of no relevance to the solution of issue (a) if, as a matter of domestic law, the complaint which forms the basis of issue (a) cannot give rise to an obligation imposed by, or a remedy created by or derived from the Act of 2003, which is the only mechanism by virtue of which Convention provisions and the rights and the corresponding obligations of the State to which they gave rise are enforceable in Irish courts.

6. Retrospectivity: Irish/U.K. authorities

6.1 Accordingly, the question which is raised in issue (a) turns on whether the Act of 2003 has retrospective effect, which must be determined in accordance with Irish law. As counsel on both sides accepted, it is well settled at this juncture that it does not have retrospective effect.

6.2 While the Court has been referred to a number of decisions of this Court in which the Act of 2003 has been held to be non-retrospective (*Lelimo v. Minister for Justice* [2004] 2 I.R. 178; *Magee v. Farrell & Ors*. [2005] IEHC 389, in which the issue was considered in the context of Article 2; and *D. v. Residential Institutions Redress Review Committee* [2008] IEHC 350), the leading case on the issue, by which this Court is bound, is the decision of the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604, in which the Supreme Court held that the Act of 2003 could not be seen as having retrospective effect or as affecting past events. The past events in that case were the service of a notice to quit and the obtaining by the plaintiff landlord of a order for possession under s. 62 of the Housing Act 1966 against the defendant tenant in the District Court prior to 31st December, 2003. The issue arose on a case stated from the Circuit Court to the Supreme Court in the course of an appeal by the defendant against the order made in the District Court, which was lodged in the Circuit Court before the 31st December, 2003. Having found that the Act of 2003 does not have retrospective effect, Kearns J., with whom the other four Judges agreed, considered the position of the appeal to the Circuit Court stating (at p. 638):

> "… the proceedings were not merely pending but had proceeded to final determination in one court and a notice of appeal had been lodged in another court prior to the coming into operation of the new statute. The parties' legal rights and obligation were, in my view, fixed and determined once the wheel was set in motion by the service of a notice to quit, an act which triggered the provisions, requirements and consequences of s. 62 of the Housing Act 1966. That is the moment when the invocation of legal rights determined the applicable law and the position of the parties. The requirement to protect the respective position of the parties thereafter is all the greater in a situation where vested rights are involved and where the changes proposed by the Act of 2003 are agreed to be substantive rather than procedural."

6.3 In *Dublin City Council v. Fennell*, Kearns J. considered a number of authorities from the United Kingdom, including the decision of the House of Lords *In re McKerr* [2004] 1 WLR 807. That case arose out of the shooting dead of three men, including the applicant's father, by members of the RUC in Northern Ireland in November 1982. The three officers concerned were prosecuted in respect of the death of one of the men, but were acquitted by the direction of the judge. A police investigation was conducted, resulting in a lengthy report in 1986/1987. An inquest into the deaths opened in 1984, but following adjournments, a re-opened inquest was abandoned in 1994. Of significance is the fact that, arising out of those facts, in *McKerr v. United Kingdom* (2001) 34 EHHR 553, the ECtHR, in a judgment given by it in May 2001, had found that there had been a number of shortcomings in various investigatory proceedings. The Strasbourg Court had held that Article 2 of the Convention had been violated by failure to comply with the obligation implicit in Article 2 to hold an effective official investigation when a person has been killed by use of force. Subsequently, in June 2002, the applicant commenced proceedings against the Secretary of State for Northern Ireland seeking declarations that the

continuing failure of the Secretary of State to provide an Article 2-compliant investigation was unlawful and in breach of s. 6 of the 1998 Act, which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, which is defined as including an Article 2 right. Section 6 is the analogue of s. 3(1) of the Act of 2003.

6.4 Counsel for the defendants laid emphasis on the passage in the speech of Lord Nicholls of Birkenhead in which he outlined the distinction between (1) rights under the Convention and (2) rights created by the 1998 Act, stating (at para. 25):

> "These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2nd October, 2000. They are part of this country's law. The extent of these rights created as they were by the 1998 Act, depends upon the proper interpretation of that Act. It by no means follows that the continuing existence of a right under the Convention in respect of an act occurring before the 1998 Act came into force will be mirrored by a corresponding right created by the 1998 Act. Whether it finds reflection in this way in the 1998 Act depends upon the proper interpretation of the 1998 Act."

6.5 The importance of keeping in mind the distinction between international and domestic obligations was also emphasised by Lord Hoffman. At para. 66, he pointed out that before the coming into operation on 2nd October, 2000 of the 1998 Act there could not have been a breach of a human right provision in domestic law. There could have been "no continuing breach" in domestic law, because there could be no source for Convention rights under domestic law other than the 1998 Act. That Act "did not transmute international law obligations into domestic ones". It created new domestic human rights. The simple question was whether, as a matter of construction, those rights applied to deaths which occurred before the Act came into force. In *Dublin City Council v. Fennell,* Kearns J. quoted in part the next paragraph of Lord Hoffman's speech which is in the following terms:

> "67. Your Lordship's House has decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by Article 2 can have no application to a person who died before the Act came into force. His killing may have been a crime, a tort, a breach of international law but it could not have been a breach of s. 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one would have to go back into history and carry out investigations. … It would in principle be necessary to investigate the deaths by State action of the Princes in the Tower."

6.6 Counsel for the plaintiffs contended that the decision of the House of Lords in *McKerr* should not be regarded as a persuasive authority in this jurisdiction now because the jurisprudence of the ECtHR has moved on, as evidenced by its judgment in *Silih* and the subsequent judgments considered earlier. He referred to a passage in the speech of Lord Nicholls which he submitted was critical to the decision of the House of Lords. Having posed the question on which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death, Lord Nicholls answered it as follows (at paras. 21 and 22):

> "21. In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of s. 6, because it occurred before the Act came into force, it would be surprising if s. 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for s. 6 to apply, the death which is the subject of the investigation must itself be a death to which the section applies. The event giving rise to the Article 2 obligation to investigate must have occurred post-Act.
>
> 22. I think this is the preferable interpretation of s. 6 in the context of article 2. This interpretation has the effect, for the transitional purpose now under consideration, of treating all the obligations arising under article 2 as parts of a single whole. Parliament cannot be taken to have intended that the Act should apply differently to the primary obligation (to protect life) and a consequential obligation (to investigate a death). For this reason I consider these judicial review proceedings are misconceived in so far as they are thought to be founded on the enabling power in s. 7 of the 1998 Act."

It is important to emphasise that in those paragraphs Lord Nicholls was addressing the interpretation of the 1998 Act and his focus, as one would expect, was on what Parliament intended in enacting that statute, not what the ECtHR considered to be the obligations of the U.K. under the Convention in international law.

6.7 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 *McKerr* is based on an interpretation of Article 2 of the Convention which is at variance with the interpretation of the ECtHR in the *Silih* case 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 the *McKerr* case, or in *Hurst v. London Northern District Coroner* [2007] 2 WLR 726. Neither authority can be treated as a persuasive authority in the light of the recent jurisprudence of the Strasbourg Court, it was urged.

6.8 In the *Hurst* case, the claimant's son had died as the result of a stabbing attack in May 2000, some five months before the 1998 Act came into operation. An inquest into his death was adjourned pending criminal proceedings, which resulted in the attacker's conviction of manslaughter. The claimant requested the coroner to resume the inquest with a view to making findings under a statutory provision in force in the United Kingdom in respect of alleged failures by particular public authorities to protect the deceased from attack. The coroner refused the request. The claimant brought judicial review proceedings contending that the coroner had acted in breach of his obligation to investigate the death under Article 2. He was successful at first instance and the coroner was directed to resume the inquest. An appeal by the Commissioner of Police was dismissed by the Court of Appeal, which held that the relevant statutory provision was to be read, after the coming into operation of the 1998 Act by virtue of s. 3 thereof, which is the interpretative section (the analogue of which in this jurisdiction is s. 2 of the Act of 2003), compatibly with the United Kingdom's international obligations under the Convention.

6.9 On appeal, the House of Lords did not succumb to what Lord Rodger, in his speech, described as "the ingenious ways in which the Court of Appeal attempted to distinguish" the *McKerr* decision (para. 10). It held that the expression "Convention rights" bore the same meaning in s. 3 as in s. 6, and that, since the object of s. 3 was to avoid where possible action by a public authority which would otherwise be unlawful under s. 6 as incompatible with those Convention rights, the interpretive duty in s. 3 only arose where there would otherwise be a breach under domestic law. Further, since the Article 2 right in domestic law did not arise in respect of deaths prior to 2nd October, 2000, recourse to s. 3 was inapposite. The House of Lords applied the *McKerr* decision. The approach adopted by the House of Lords is exemplified in the following observations of Lord Mance (at para. 71):

> "… the Court of Appeal was wrong to conclude that, by virtue of section 3 of the Human Rights Act 1998, section 11(5)(b)(ii) of the Coroner's Act 1988 has had since 2 October 2000 to be interpreted to require an inquest complying with the United Kingdom's international obligations under Article 2 of the Convention …, no matter when the date of death. The Convention rights, in this case the right to life under article 2 in particular, can only apply domestically to deaths occurring on or after 2 October 2000. The Convention right to a proper investigation is an ancillary aspect of the right to life under article 2, and therefore also only applies in respect of deaths occurring on or after 2 October 2000. Under section 6, a public authority, failing to carry out such an investigation in respect of a death occurring prior to 2 October 2000, cannot be regarded as acting incompatibly with a Convention right, since the relevant Convention right only applies domestically in respect of deaths occurring on or after 2 October 2000."

The characterisation in that passage of the procedural obligation imposed by Article 2 as "an ancillary aspect of the right to life under article 2" does seem to be at variance with the decision of the ECtHR in *Silih*, which has held that the procedural obligation is "a separate and autonomous duty". However, the logic of the proposition that the interpretative provision (s. 3, which, as regards effect, if not scope, is substantially the same as s. 2 of the Act of 2003, providing as it does that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights") applies only where there would otherwise be a breach of a Convention right under domestic law (per Lord Brown at para. 44), in my view, is irrefutable.

7. The plaintiffs' case on issue (a)

7.1 In effect, the plaintiffs contend that the provisions of Article 2 are directly justiciable as a matter of domestic law in these proceedings in respect of the Commission's investigation in respect of deaths which occurred twenty nine years prior to the coming into operation of the Act of 2003. Therefore, they contend, the Commission was obliged as a matter of domestic law to conduct a Convention compliant investigation. The basis for that contention, as I understand it, is that the Commission was the final phase of an ongoing investigative process which flowed from events in 1999: the John Weir revelations; and the Good Friday Agreement coupled with the Victims' Commission recommendations. Those events triggered an obligation under the Convention to investigate, in consequence of which in 1999 the State had an international law obligation under Article 2 to engage in a Convention compliant investigation.

7.2 The State initiated an investigative process, the first stage of which was the non-statutory Inquiry. The final stage, following the deliberations of the Joint Oireachtas Committee, was the statutory Commission established under the Act of 2004 which was a continuation of the process which, it was contended, the State had been obliged by the Convention to initiate in 1999. From 2004 onwards, as a matter of domestic law, individual organs of the State, including the Commission after its establishment, as distinct from the State itself, were obliged to comply with the provisions of the Convention.

7.3 It was submitted on behalf of the plaintiffs that their case that the Commission was charged with complying with the provisions of the Convention in conducting its investigation under domestic law does not involve retrospectivity, in that it is not the case that such assertion has the effect of subjecting the Commission to a law that did not apply to it at the time it was performing its functions. There was a continuous process, it was submitted, which straddled the coming into operation of the Act of 2003 on 31st December, 2003. As an organ of the State, the Commission was obliged under the Act of 2003 to act in a manner compatible with the Convention. It was answerable under domestic law if it did not do so. It was exposed to the domestic law remedies provided for in s. 3 of the Act of 2003. It was submitted that as of 31st December, 2003 the citizens affected had the right to insist on a Convention compliant procedure relating to the investigative process which was ongoing. It would only have been in circumstances where the previous investigative process was spent that such right would have been exhausted. The essence of the Act of 2003 was that from the date on which it came into operation, if a Convention right was engaged, the relevant organ of the State was under duty to discharge its Convention duty and no issue of retrospectivity arose.

7.4 Counsel for the plaintiffs took issue with the contention made on behalf of the defendants that the establishment of the Commission was a policy decision which did not attract the statutory obligations created by the Act of 2003, on the basis that the State's legal obligations under Article 2 were already engaged under international law since 1999. That argument, in my view, justifies the characterisation by counsel for the defendants of the plaintiffs' position as being that the international Convention law applies directly to Ireland.

8. Conclusions on issue (a)

8.1 The approach this Court should take to the interpretation and application of the law in accordance with s. 2 of the Act of 2003, having regard to the interpretation of the Convention by the ECtHR and the provisions of s. 4 of the Act of 2003, was explained by Fennelly J. in his judgment in the Supreme Court in *J. McD v. P.L. and B.M.* [2010] 1 I.L.R.M. 528. He stated (at p. 99):

> "The Convention is an instrument of international law. It imposes obligations in international law on the contracting States. It does not require domestic incorporation of its terms into the law of the contracting States. Its judgments, as this Court has repeatedly stated, do not have direct effect in our law. The contracting States are under an obligation in international law to secure respect for the rights it declares within their domestic systems. The European Court has the primary task of interpreting the Convention. The national courts [do] not become Convention Courts."

8.2 Fennelly J. quoted the following passage from the speech of Lord Bingham in *R. (Ullah) v. Special Adjudicator* [2004] 2 A.C. 323 at 350 as correctly outlining the respective tasks of the European Court and the domestic courts:

> "In determining the present question, the House is required by s. 2(1) of the Human Rights Act, 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of special circumstances, follow any clear constant jurisprudence of the Strasbourg Court …. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg Court. From this it follows that a national Court subject to a duty such as that imposed by s. 2 should not without strong reason, dilute or weaken the effect of the Strasbourg case law … It is of course open to Member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national Courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national Courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

As Fennelly J. pointed out, Lord Bingham was speaking of the English legislation, the 1998 Act, which corresponds, though with some important differences, to the provisions of the Act of 2003.

8.3 The passage from the judgment of Fennelly J., in stressing that judgments of the ECtHR do not have direct effect on our law,

prompts an explanation of the earlier reference to the imprecision, or more correctly the imperfection, in the manner in which issue (a) is formulated. Issue (a) appears to pose the question whether Article 2 has direct effect in Irish law. The answer is that it does not. Its provisions are enforceable under domestic law in Irish courts only insofar as they are statutorily enforceable by virtue of the provisions of the Act of 2003. Since the decision of the Supreme Court in *In re ÓLaighléis* [1960] I.R. 93 it has been established law that the Convention is not part of the domestic law of the State and, under Article 29 of the Constitution, it could not be so. That position was re-stated by the Supreme Court in *Doyle v. Commissioner of An Garda Síochána* [1999] 1 I.R. 249, in which a relative of victims of the Dublin and Monaghan bombings sought discovery of documents and records relating to the Garda investigations into the atrocities (per Barrington J. at p. 368).

8.4 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 twenty nine 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.

8.5 On the authority of the *Brecknell* case, 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 ECtHR 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 ECtHR by virtue of s. 4 in the manner outlined by Fennelly J. in *J. McD v. P.L and B.M*.

8.6 On the basis of the reasoning of the House of Lords in the Hurst case, 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 the *McKerr* case, 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 31st December, 2003.

8.7 While the jurisprudence of the ECtHR has evolved since the decision of the House of Lords in the *McKerr* case, 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 the *Silih* case, is not consistent with the current jurisprudence of the ECtHR, the issue in this case, as was the case in the *McKerr* case, 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, *McKerr* 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.

8.8 Even though, on the authority of the *Brecknell* case, 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 31st December, 2003, nor was there a breach. Whether there could be a breach after 31st December, 2003 in respect of a death which occurred almost twenty nine 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* 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 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.

8.9 The rationale which underlies the decision in the *McKerr* case, 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* and which was followed by the Supreme Court in Dublin City Council v. Fennell, 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 *McKerr* 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 31st December, 2003, the concept of a continuing breach or a breach within a continuing process cannot arise.

8.10 The fallacy inherent in the continuing breach reasoning was underlined by the defendants' submissions. Counsel for the defendants submitted that the Act of 2003 imposes a statutory obligation on the State as regards killings prior to its coming into operation or it does not; their position was that it does not. In my view that is correct. It follows, as they submitted, that it would be entirely illogical that the State could incur liability under s. 3 if it took action, such as the executive action of establishing the Commission, whereas it would incur no liability if it took no action.

8.11 The Act of 2003 introduced a starting point at which the liability of an organ of the State for failure to perform its functions in a manner compatible with the provisions of the Convention arises under national law which is fixed in time, irrespective of the evolution of the jurisprudence of the ECtHR which may give rise to additional obligations on the part of the State at the level of international law. Accordingly, I find that the plaintiffs' complaints covered by issue (a) in relation to the manner in which the Commission performed its functions and the State's obligation arising therefrom are not justiciable under the Act of 2003.

9. Issues (b) and (c)

9.1 The first limb of issue (b), which requires a determination as to whether the provisions of s. 11 of the Act of 2004 afford to the plaintiffs a legally enforceable right to access to the archive of the Commission pursuant to the Act of 2004 is a matter of construction of that Act. Therefore, in my view, it is appropriate to consider it, notwithstanding the conclusion I have reach in

relation to issue (a).

9.2 However, the second limb of issue (b) which raises the issue of compatibility of s. 11 with the Convention in the context of the facts of this case, in the light of the conclusion I have reached in relation to issue (a), does not arise. Nor does issue (c), which raises the issue of the jurisdiction of the Court to grant a particular type of remedy, a declaration. It does not arise because the declarations sought are contingent on Convention rights being engaged, in the sense of the Act of 2003 conferring rights on the plaintiffs and imposing corresponding obligations on the Commission, prior to its dissolution, and thereafter on the Taoiseach, under Irish law in the context of the facts of this case, which I have held is not the case.

10. Issue (b) – the first limb: relevant statutory provisions and pleadings

10.1 Section 11 of the Act of 2004 is contained in Part 3, which deals with investigations and related matters, and deals with the giving of evidence to a commission, the general rule being that a commission shall conduct its investigation in private, although certain exceptions are outlined in paragraphs (a) and (b) of subs. (1), which did not apply in the case of the Commission. Sub-section (3) provides as follows:

> "A person (including a member of the commission) shall not disclose or publish any evidence given or the contents of any document produced by a witness while giving evidence in private, except –
>
> (a) as directed by a court,
>
> (b) to the extent necessary for the purposes of section 12,
>
> (c) to the extent otherwise necessary in the interests of fair procedures and then only with the written consent of the chairperson or, if the commission consists of only one member, the sole member, or
>
> (d) to a tribunal in accordance with section 45."

I will consider the exception in paragraph (a) later. As regards the exception provided for in paragraph (b), that relates to disclosure of the substance of any evidence in the possession of a commission of which a person who is to give evidence to the commission should be made aware and arises in the course of the work of a commission, as does the exception in paragraph (c). The exception in paragraph (d) does not arise in relation to the Commission, because a tribunal has not been established to inquire into matters which were the subject of the terms of reference of the Commission. Subsection (4) of s. 11 provides that subs. (3) does not prohibit the publication in a report under the Act of any facts established by a commission on the basis of evidence received in private. Subsection (5) provides that a person who contravenes subs. (3) is guilty of an offence. Read in the context of s. 11 in its entirety, the primary objective of subs. (3) is to maintain the confidentiality of evidence given in private to a commission during the course of the work of the commission. However, even in that limited context, it is reasonable to construe its scope as extending beyond the life of the commission.

10.2 Having said that, it is Part 5 of the Act of 2004 which deals with the reports and records of a commission and the regime after the commission ceases to exist. The requirement of confidentiality is to be seen clearly in various provisions of Part 5 dealing with the preparation of a commission's report. While the requirement that a commission, before its dissolution, shall deposit with the relevant Minister all evidence received by and all documents created by or for the commission is contained in s. 43(2), which is contained in Part 6 (Miscellaneous Matters), the provisions of ss. 39, 40 and 41, which are contained in Part 5, apply to records, *inter alia*, after they have been deposited with the relevant Minister. Section 39 provides that s. 4 of the Data Protection Act 1988 does not apply to personal data provided to a commission. Section 40 provides that the Freedom of Information Acts 1997 to 2003 do not apply to a record relating to an investigation by a commission, subject to certain exceptions. Section 41 deals with what is to happen to records in the long term. It provides in subs. (1) that records of a commission "that constitute Departmental records within the meaning of s. 2(2) of the National Archives Act 1986" (the Act of 1986), on the expiration of thirty years after the date of dissolution of the commission, come within the ambit of that Act in the manner prescribed in s. 41.

10.3 In essence, the effect of the application of the Act of 1986 in the manner prescribed in s. 41 to the records of the Commission is that, at the expiry of the thirty year period in just under twenty seven years time, a decision will require to be made in accordance with subs. (4) of s. 8 of the 1986 Act as to whether as regards the records, or of a particular class or classes of them, to make them available for inspection by the public –

> (a) would be contrary to the public interest, or
>
> (b) would or might constitute a breach of a statutory duty, or a breach of good faith on the ground that they contain information supplied in confidence, or
>
> (c) would or might cause distress or danger to living persons on the ground that they contain information about individuals, or would or might be likely to lead to an action for damages for defamation.

If a decision is made to issue a certificate under s. 8(4) not to make them public, that decision will be reviewed at least once in every subsequent period of five years.

10.4 I have outlined in general terms how the plaintiffs have pleaded their case in relation to their complaint based on the failure to allow them access to the archive of the Commission. It is necessary to look at the manner in which that complaint is pleaded in greater detail. Having pleaded that, on the Commission ceasing to exist as an entity, the State became answerable for the acts and defaults of the Commission, the plaintiffs plead, *inter alia*, that the Taoiseach, as custodian of the Commission archive, is obliged to allow the plaintiffs such full or limited access to the archive as they are entitled by law. The plaintiffs further plead that, pursuant to Article 2 of the Convention, they have an interest in and an entitlement to the evidence upon which the report of the Commission is based and they particularise that contention on the basis, *inter alia*, that the victims have a legitimate interest in securing access to all information gathered by the Commission in order to be able to consider and assess whether they have any rights of action under national, foreign or international law as against individuals and/or states and whether or not to take such action or actions. Further, they rely on the same factors as they contend rendered the failure by the Commission to report on Term 2(ii) a breach of Article 2. They also plead that their right under Article 13 to pursue an effective remedy is infringed.

10.5 As I have outlined earlier the plaintiffs seek various reliefs arising out of s. 11(3). The relief out of which the first limb of issue (b) arises is a claim for a declaration that s. 11(3) "having regard to" the provisions of s. 2 of the Act of 2003 "does not prohibit disclosure by the [Taoiseach] to the plaintiffs of evidence gathered by the Commission". Therefore, the first relief which the plaintiffs

seek arising out of s. 11(3) raises the question whether, when interpreted and applied in a manner compatible with the State's obligations under the Convention provisions, it prohibits disclosure by the Taoiseach of the evidence gathered by the Commission. The question posed by the first limb of issue (b) is different. It is whether the provisions of s. 11 afford the plaintiffs a legally enforceable right of access to the records. In this connection I note that in the defence in the substantive proceedings it is denied that the plaintiffs are entitled to access to the archive of the Commission. Further, in their points of claim on the preliminary issues, the defendants plead that s. 11 does not permit members of the public to have access to documents created and/or gathered by a commission. In their points of defence the plaintiffs plead that, as a matter of construction, the Taoiseach is not bound by s. 11(3). Further, they rely on their rights under the Convention as victims.

11. The plaintiffs' case on the first limb of issue (c)

11.1 The kernel of the plaintiffs' argument that a Convention compatible interpretation and application of s. 11 of the Act of 2004 requires that they be afforded access to the records of the Commission is that the case law of the ECtHR recognises that victims of unlawful killings have the right to participate in the investigation which the procedural obligations imposed by Article 2 mandate and that the requirements of accountability and transparency, which those investigations must meet, afford a right to victims to access the documents and information upon which the investigation relies. Counsel for the plaintiffs referred to three decisions of the ECtHR on this issue.

11.2 The case of *Shanaghan v. United Kingdom* (Application No. 37715/97, 4th May, 2001) was one of the four cases from Northern Ireland which were conducted simultaneously in Strasbourg, another being the *McKerr* case referred to earlier. In the *Shanaghan* case the applicant was the mother of Patrick Shanaghan who was shot dead by masked gunmen in August 1991. The applicant's case was that her son had been killed with the collusion of the security forces and that there had been no effective investigation into the circumstances of his death. She invoked Article 2. Among the complaints she made was that the coroner's inquest procedure was flawed on a number of grounds including a lack of access to documents and witness statements. In its judgment, the Third Section dealt with that complaint in para. 92 stating:

> "For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary for (sic) case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests …."

The reasons set out in the previous paragraph, which dealt with the need for a prompt response by the authorities in investigating use of lethal force, were identified as "maintaining public confidence in [the authorities'] maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts". On the facts of the case, the Court stated that it was not persuaded that the interests of the applicant as next of kin were fairly or adequately protected by the adoption of procedures which ensured the requisite protection of the interests of the family of the deceased (para. 117). In contrast to the position of the RUC, which had full access to information about the incident from its own files, the inability of the family to have access to witness statements before the appearance of the witness at the inquest placed them at a disadvantage in terms of preparation and ability to participate in questioning. The Court found that there had been a failure to comply with the procedural obligation imposed by Article 2 and a violation of that provision, on the basis of the finding of a considerable number of shortcomings in the whole investigative process, including the non-disclosure of statements prior to the inquest.

11.3 Counsel for the plaintiffs also relied on the decision of the ECtHR in *Finucane v. United Kingdom* (2003) 37 EHRR 656. The aspect of the decision of the Fourth Section to which the Court's attention was drawn is the manner in which the Court assessed the role of the Stevens Inquiries into the death of Patrick Finucane, in particular, in paras. 79 and 80. In para. 79 the Court stated:

> "The Court notes that the authorities responded to concerns arising out of allegations of collusion between the Loyalist organisations and the security forces by instituting special police inquiries, headed by a senior police officer from outside Northern Ireland. It is not apparent, however, that the first two inquiries, however useful they may have been in uncovering information, were in fact concerned with investigating the death of Patrick Finucane with a view to bringing prosecutions as appropriate. In any event, the reports were not made public and the applicant was never informed of their findings. The necessary elements of public scrutiny and accessibility of the family are therefore missing."

The Court held that the various investigations which had been carried out after the death of Mr. Finucane – the police investigation, the coroner's inquest, the Stevens Inquiries, and the involvement of the DPP – failed to provide a prompt and effective investigation into the allegations of collusion by security personnel and, consequently, there had been a failure to comply with the procedural obligation imposed by Article 2 and a violation of that provision. The point which counsel for the plaintiffs emphasised in relation to that decision was that the Court held that ad hoc tribunals established to deal with a specific incident are bound by Article 2.

11.4 The most recent decision of the ECtHR cited by counsel for the plaintiffs was *Khalitova v. Russia* (Application No. 39166/04), in which judgment was delivered on 5th March, 2009. That was a case involving the killing of the husband of the applicant, allegedly by State agents in the Chechen Republic. The passage from the judgment of the Court relied on by counsel for the plaintiffs is to be found in para. 62, where the Court stated:

> "It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in the maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests …."

The Court's decision in the *Shanaghan* case was cited as authority for that proposition.

12. Conclusions on first limb of issue (b)

12.1 While I have outlined the arguments made on behalf of the plaintiffs in reliance on the jurisprudence of the ECtHR in support of their claim for access to the records of the Commission, I have done so for completeness. The reality is that the plaintiffs' invocation of Article 2 rights as a ground of entitlement to access the records of the Commission, on the basis that for the Taoiseach to refuse access constitutes a breach of those rights justiciable under national law, can be no more productive than their invocation of those rights to establish an entitlement to remedies under national law for alleged breach by the Commission and the Taoiseach of the State's obligations in relation to the manner in which the Term 2(ii) remit was dealt with. That is because Article 2 rights cannot be invoked to ground relief under national law in respect of a death which occurred prior to 31st December, 2003, because the Act of

2003 is non-retrospective in effect.

12.2 The question whether the plaintiffs have a legally enforceable right of access to the archive of the Commission against the Taoiseach is a matter of construction of the Act of 2004 as a whole, not merely s. 11. In my view, the intention of the Oireachtas in enacting s. 11(3) in the context of the Act of 2004 as a whole is quite clear. Where, as in the case of the Commission, evidence was given in private, subject to the exceptions stipulated, there is a prohibition on disclosure or publication of the evidence or the contents of any documents produced by a witness while giving evidence in private. Sub-section (2) of s. 43 mandates a commission, prior to its dissolution, to deposit with the relevant Minister all evidence received by, and all documents created by or for the commission. That provision clearly encompasses evidence in respect of which there is an embargo on disclosure or publication by virtue of s. 11(3). Sub-section (3) of s. 43, which gives a specific meaning to "documents created by or for the commission", recognises that a commission may record evidence in various ways. The fact that furnishing evidence to a tribunal in accordance with s. 45 is an exception to s. 11(3) clearly indicates the intention of the Oireachtas that the relevant Minister, in this case the Taoiseach, is to be bound by s. 11(3) when he receives the evidence and documents referred to in s. 43(2), which he is empowered by s. 45(1) to make available to a tribunal after the commission has been dissolved.

12.3 Counsel for the plaintiffs submitted that during the thirty years following the dissolution of a commission the relevant Minister has a discretion in relation to affording access to "Departmental records" as defined in the Act of 1986, citing s. 10(6) of the Act of 1986 which provides as follows:

> "Nothing in this section shall prevent a member of the Government from granting a request for access to Departmental records or archives (being records held or archives formerly held by the Department of State of which that member is in charge) less than 30 years old."

The purpose of s. 10 is to regulate access by the public to archives in the custody of the National Archives, the main thrust of which is that such archives are to be available for public inspection except –

> (a) archives which were formerly Departmental records (other than court or testamentary documents) and are less than 30 years old, and
>
> (b) archives which were formerly Departmental records and in respect of which a certificate has been granted in accordance with s. 8(4).

The definition of "Departmental records" contained in s. 2(2) of the Act of 1986 defines that expression as covering every conceivable type of hard copy and electronic record (although the terminology used looks somewhat outdated almost a quarter of a century after the Act of 1986 was enacted) made or received, and held in the course of its business, by a Department of State or any body which is a committee, commission or tribunal of inquiry appointed from time to time by the Government, subject to certain predictable exceptions such as title deeds in relation to State property.

12.4 The legislative scheme discernible in the Act of 2004 in relation to evidence and documents to which s. 11(3) applies is that when the specified Minister, in this case the Taoiseach, receives records in accordance with s. 43(2), subject to the obligation to make available records to a tribunal of inquiry in accordance with s. 45, those records remain subject to the embargo in s. 11(3) for at least thirty years from the date of dissolution of the commission. At the end of thirty years, as I have already stated, they become subject to s. 8 of the Act of 1986 and at that stage a decision has to be made whether they should be certified under s. 8(4). If they are, then they become exceptions to s. 10(1).

12.5 Accordingly, as a matter of construction of the Act of 2004, insofar as is relevant by reference to the Act of 1986, I am satisfied that the Taoiseach is bound by the prohibition on disclosure on publication contained in s. 11(3) of the Act of 2004 until the expiration of thirty years from the date of the dissolution of the Commission and that thereafter the issue of access of the public to the records which are now subject to that prohibition will turn on whether a certificate is granted in accordance with s. 8(4) of the Act of 1986. Therefore, the answer to the first limb of issue (b) is that the Act of 2004 does not afford the plaintiffs a legally enforceable right to access the archive of the Commission.

12.6 The one aspect of s. 11(3) which I have not addressed is the exception to the prohibition on disclosure on publication of evidence and documentation given in private where so directed by a Court. Presumably, by providing for that exception, the Oireachtas had in mind orders for discovery and inspection of documents and such like in proceedings before a court made in accordance with the jurisprudence of the court in relation to such matters. Counsel for the defendants, in my view, were correct in submitting that it is very difficult to see how a positive entitlement to any form of information can be extrapolated from s. 11 as a whole and that comment is particularly relevant to the exception in question. In the circumstances of particular litigation, for example, an application for judicial review of a decision of a commission by a person who has *locus standi*, the Court might make an order for discovery in reliance on that exception. However, nothing in s. 11 or in the Act of 2004 as a whole gives rise to a positive entitlement on the part of the public or any category of the public, such as the victims of an event being investigated by a commission, to evidence taken by a commission in private.

12.7 That conclusion is consistent with the decision of this Court (Murphy J.) in *O'Neill v. An Taoiseach* [2009] IEHC 119. In that case, the plaintiffs, who were relatives of victims of the Dublin and Monaghan bombings, sought discovery in a plenary action of the Commission's archive. The application was refused on the ground, *inter alia*, that the archive is subject to statutory privilege by virtue of s. 11(3) of the Act of 2004.

13. Summary of conclusions and order

13.1 As I have indicated earlier, having regard to the long established jurisprudence of the Irish courts going back to the decision of the Supreme Court in the *ÓLaighléis* case in 1960, there is no basis on which any provision of the Convention is directly justiciable as a matter of domestic law. Therefore, as I have indicated earlier, my understanding as to what the parties require the Court to determine in issue (a) is whether the plaintiffs' complaints in the substantive action, which relate to deaths which occurred twenty nine years before the coming into operation of the Act of 2003, but which the plaintiffs contend relate to post 31st December, 2003 breaches of Articles 2, 6 and 13 of the Convention, are justiciable in Irish law under the Act of 2003. The answer is that they are not justiciable, for the reasons given earlier.

13.2 In relation to the first limb of issue (b), I have found that as a matter of construction of the Act of 2004, the provisions of that Act do not afford to the plaintiffs a legally enforceable right of access to the archive of a commission established pursuant to the Act of 2004. The second limb of issue (b), the compatibility of the Act of 2004 with the Convention, is not justiciable under the Act of 2003 for the reasons which have given rise to the finding that issue (a) is not justiciable.

13.3 In the light of the finding on issue (a), issue (c) does not arise.

13.4 I will hear further submissions from the parties as to the precise form of order which they require the Court to make.

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