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Summary

The Secretary of State for Northern Ireland proposes that there should be full police investigations of historic cases only if there is new compelling evidence and such cases should be closed in certain circumstances with no possibility of further investigations and prosecutions. These proposals appear to conflict with Article 2 of the European Convention on Human Rights (ECHR) which requires effective official investigations into the killings that took place during the Troubles. Owing to the obligations that flow from the ECHR and its position under the Good Friday Agreement the implementation of the proposals would have an array of negative consequences. It could lead to a lowering of standards in the search for truth and justice, which would most obviously be against the interests of families and others close to the victims and might also on occasion harm the peace process.

Introduction

The focus will be on the Government's proposed approach to the re-investigation of cases in the Written Statement of the Secretary of State for Northern Ireland on 18 March 2020.¹ The European Convention on Human Rights (ECHR) will be the basis for addressing issues that the Northern Ireland Affairs Committee has indicated that it is particularly interested in.

The Written Statement

The relevant paragraph is the third from the end. It implies that there should be a one-time final review of all cases and that if there is a realistic prospect of a prosecution as a result of new compelling evidence, there should be a full police investigation, but if there is no realistic prospect, or if the full police investigation does not result in a prosecution, the case would be closed and no further investigations or prosecutions would be possible. The Statement diverges from the Stormont House Agreement (SHA) in two respects. Under paragraph 34 of the SHA, there was no prescription as to the manner in which cases would be considered and no suggestion that a point might be reached at which no further investigations or prosecutions would be possible. The SHA also permitted families to apply to have other cases considered for criminal investigation if there was relevant new evidence, with no limit set to their power to do this.

The first paragraph of the Statement proposes to “[ensure] equal treatment of Northern Ireland veterans and those who served overseas”, but the rest of the Statement gives no indication of how this objective might be achieved. Presumably it is a reference to the

¹ Brandon Lewis, Addressing Northern Ireland Legacy Issues: Written statement – HCWS168 (2020), available at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-18/HCWS168/>.

Overseas Operations (Service Personnel and Veterans) Bill, which appeared on the same day.² However, there appears to be an inconsistency between the two documents. The Written Statement would preclude prosecution altogether if the one-time final review found that there were no realistic prospect of prosecution or if the same conclusion were reached following a full police investigation. On the other hand, pursuant to section 2 of the Bill, prosecution would be exceptional, but it would not be excluded as a possibility. Also, according to the Bill, restrictions on prosecution for acts on operations outside the British Islands would apply *only* to British service personnel and veterans and others supporting a British military mission. To transfer this to Northern Ireland would raise a whole raft of sensitive political issues which do not come to the fore in operations outside the UK. The proposed procedure for investigation in the Statement purports to apply to all cases without exception. Therefore the possibility of differential treatment of service personnel and veterans will not be discussed further here. In any event, if a similar Bill is envisaged for Northern Ireland, it is to be hoped that there would be public consultation on it as well.

Incompatibility with the ECHR

This is not the place for an excursus on the benefits of the protection of human rights in peace processes. Suffice it to say that an agreement to move on from violence such as existed during the Troubles requires ground-rules for future conduct on which there can be consensus and which will, if followed, address the abuses that have occurred and promote arrangements that will minimize the possibility of their recurrence. Human rights provisions will almost always form a crucial part of this framework. The UK has long been a party to the ECHR. Under the Good Friday Agreement, the British Government was obliged to complete incorporation into Northern Ireland law of the ECHR, with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency. The principles of the jurisprudence of the European Court of Human Rights (ECtHR) relevant to the proposals will now be outlined.

It has been long established that the obligation to protect the right to life under Article 2 of the ECHR read in conjunction with the State's general duty under Article 1 implies that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, amongst others, agents of the State.³

For an investigation to be effective, the following criteria should be met: the persons responsible for and carrying out the investigation should be independent from those implicated in the events;⁴ the investigation should be adequate in that it must be capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances and of identifying and – if appropriate – punishing those responsible;⁵ the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements;⁶ it should be prompt and reasonably expeditious;⁷ and there must be sufficient public scrutiny of the investigation and participation of the victim's next of kin to the extent necessary to safeguard his or her legitimate interests.⁸

² <https://publications.parliament.uk/pa/bills/cbill/58-01/0117/20117.pdf>.

³ *McCann and Others v UK* (1996) 21 EHRR 97, para 161.

⁴ *Armani da Silva v UK* (2016) 63 EHRR 12, para 232.

⁵ *ibid* para 233.

⁶ *ibid* para 234.

⁷ *ibid* para 237.

⁸ *Al Skeini v UK* (2011) 53 EHRR 18, para 167.

The procedural obligation in regard to an investigation binds the State throughout the period in which the authorities can reasonably be expected to take measures aimed at elucidating the circumstances of a death and establishing responsibility for it.⁹

Brecknell v UK presented the criteria for conducting further investigations. The Court held that whilst “[i]t cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention....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.*” [Italics added]¹⁰ It cautioned that “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 does not impose an impossible or disproportionate burden on the authorities.”¹¹ It went on to state 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* [Italics added], the authorities are under an obligation to take further investigative measures”.¹² At the same time the Court considered that the authorities are entitled to take into account the prospects of success of any prosecution and that the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals.¹³

It should be acknowledged at the outset that because the proposals in the Statement are not detailed and could be translated into legislation in innumerable ways caution should be exercised in making inferences as to their compatibility with the ECHR.

The criteria for a fresh investigative obligation derived from *Brecknell* seem more complex and less stringent than the threshold of “a realistic prospect of prosecution as a result of new compelling evidence” referred to in the Written Statement.¹⁴ “[I]nformation 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” may not only take the form of evidence “relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing”, as specified in the Written Statement, but also of information leading to the realisation that the investigation that has taken place has not been effective in that those who have conducted it have not been independent from those implicated or its conclusions have not been based on thorough, objective and impartial analysis of all relevant elements. 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” would appear to include evidence not reaching the threshold of “new compelling evidence” and it might be uncovered after the point at which according to the Written Statement the case would be closed and no further investigations or prosecutions would be possible.

⁹ *Šilih v. Slovenia* (2009) 49 EHRR 996, para 157.

¹⁰ *Brecknell v UK* (2008) 46 EHRR 42, para 70.

¹¹ *ibid* para 70.

¹² *ibid* para 71.

¹³ *ibid* para 71.

¹⁴ Strictly *Brecknell* and the Written Statement are referring to two separate concepts—“further investigative measures” and a “full police investigation”, respectively—but there is no reason why the former might not sometimes amount to the latter or directly lead to it.

In short, investigation would be permitted by the Statement in too restricted a range of circumstances at the stage of the one-time final review of all cases and it would be prohibited altogether after the closure of cases. In both respects it would seem that the Statement is inconsistent with the procedural obligation under Article 2.

The ECtHR doubted whether it was possible to formulate any detailed test for the fresh investigative obligation under Article 2 which could usefully apply to the myriad of widely-differing situations that might arise.¹⁵ The drafting of the relevant legislation would therefore present challenges and some discretion would need to be left to the decision-maker, but the proposals in the Statement are so far from the requirements that they would not be a suitable basis.

Effects of incompatibility with the ECHR

It has frequently been pointed out that there are serious impediments to the investigation and prosecution of alleged historic crimes committed during the Troubles owing to defects in the evidence.¹⁶ These impediments will inevitably increase with the passing of time. There may be very few cases in which further investigation or prosecution would be appropriate. However, if legislation were to be adopted on the basis of the Written Statement, it might well be challenged on the grounds of incompatibility with the ECHR. A case might reach the ECtHR and for the reasons given earlier it might find against the UK, indicating at the same time that the legislation based on the Written Statement was the reason for the violation, as it famously did in deciding on a challenge to the exclusion of the right to vote from convicted persons serving prison sentences.¹⁷ Public sympathy for those who have served their country in life-threatening conditions is far greater than for those who have been found to have committed crimes. Therefore if UK service personnel appeared to be implicated, there might be a far more serious confrontation between the Council of Europe and the UK.¹⁸ This possibility depends on a number of hypotheticals and it would only arise, if at all, long after adoption of the legislation. However, the enactment of legislation that would evidently be at variance with the ECHR would have more immediate harmful effects. It would be inconsistent with the GFA and SHA. It would also mark a further weakening of the British commitment to the Convention. Facilitating its breach in legislation undermines the authority of the UK as a major proponent of international law.

There was a time when a sound case for the inconsistency of a proposal with the ECHR was sufficient for it to be discarded in policy discussions. However, the long-running dispute over the right of prisoners to vote has revealed high levels of dissatisfaction with the Strasbourg organs. There has been discussion of reform of the status of human rights in UK law and even serious calls for withdrawal from the Council of Europe. In these circumstances additional arguments are now needed.

¹⁵ *Brecknell v UK* (2008) 46 EHRR 42, para 70.

¹⁶ eg Written Evidence submitted by Kieran McEvoy on 7 March 2017 to the House of Commons Defence Committee, available at <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Defence/Investigations%20into%20fatalities%20in%20Northern%20Ireland%20involving%20British%20military%20personnel%20%E2%80%8B/written/48436.html>.

¹⁷ cf *Hirst v UK (no. 2)* (2006) 42 EHRR 41, para 82.

¹⁸ Alexander Horne and Isobel White, *Prisoners' voting rights (2005 to May 2015)* (2015) House of Commons Library, Standard Note SN/PC/01764; Neil Johnston, *Prisoners' voting rights: developments since May 2015* (2020) House of Commons Library, Briefing Paper Number 07461.

At the risk of stating the obvious, there are strong emotionally charged disagreements about what happened during the Troubles and it is impossible to deal with them in a manner that will satisfy everyone. Nevertheless, moves away from polarised perceptions and towards a more objective understanding, even if slow and incomplete, should be beneficial on the whole. Minimum standards of human rights, however, though they may not fully be respected and they may on occasion have outcomes that some will dislike, provide at least a framework within which these developments can occur. Effective official investigations of killings established in accordance with the case law of Article 2 of the ECHR can lead to determinations as to what happened which will have a measure of authority and objectivity that would otherwise be very difficult to attain. As is well-known, there have been many instances in which official investigations in Northern Ireland have been found wanting, but an ECHR-based process has the best prospect of reaching the truth and achieving justice given its position in the legal framework.

An overt departure from the standards set by the ECHR, despite the possibility of reversal through a lengthy judicial process, would be inequitable and detrimental to the goal of meeting the needs of victims and the promotion of reconciliation. Under the Convention families have a right to an effective investigation into the death of their loved one. According to the proposals, some investigations could not be revived, even if grounds which previously would have been legally sufficient for revival were present. The paucity of cases in which this might occur does not remove the inequity or the validity of the grievances of those affected. In the context of Northern Ireland, the investigation of a single death arising from the Troubles matters acutely not only to friends and relatives of the victim but also often to members of a wider community. There have been *causes célèbres* in which ongoing unanswered questions have been a source of resentment among broad sections of society and have affected the political process. In other words, effective investigations can contribute to reconciliation.

Conclusions

The Written Statement is brief and the devil would be in the detail of any subsequent legislation, but the proposals for investigation and re-investigation on their face conflict starkly with the obligations of the UK under the ECHR and, as such, they would have profoundly damaging ramifications at a number of levels. Apart from the intrinsic harm that would result from the violation of the ECHR and the GFA there would be a change in the legal framework which would limit the scope for investigations into killings related to the Troubles thereby reducing opportunities for providing truth and justice to the families and even on occasion reducing opportunities for enhancing the peace process.

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