

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 28/7/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EDWARD BARNARD FOR
JUDICIAL REVIEW OF THE DECISION BY CHIEF CONSTABLE OF THE
POLICE SERVICE OF NORTHERN IRELAND

TREACY J

INDEX

	Para Nos.	Page No.
Introduction	[1]	2
Factual Background	[2] - [4]	2 - 3
The Investigation	[5] - [9]	3 - 4
The Set Up, Development and Eventual Disbandment of the HET	[10] - [15]	4 - 6
What was the HET?	[16] - [18]	6 - 12
Oversight of the Work of the HET	[19]	12
National Oversight Measures	[20] - [25]	12 - 22
Oversight by the Committee of Ministers ("CM")	[26] - [28]	22 - 23
The Relationship of the HET with the Article 2 Procedural Duty	[29] - [32]	23 - 25
Structure & Strategy	[33] - [36]	26 - 29
The White Team	[37] - [40]	29 - 34
Future	[41] - [45]	34 - 38
Representations re the Overarching Thematic Report	[46] - [65]	38 - 52
The Decision not to Complete the Overarching Thematic Report	[66] - [69]	52 - 53
Relief Sought	[70]	53 - 54
Grounds for Relief	[71]	54 - 56
Arguments		
• Applicant's Arguments	[72] - [98]	56 - 62
○ Separate/Autonomous Obligation		
○ Links/Credible Case of "State"/ "Administrative" Practice		
○ Enforcement of law, public ventilation and		

<ul style="list-style-type: none"> ○ accountability ○ Conclusion on Article 2 ○ Common Law ○ Legitimate Expectation ○ Unjustified Departure ○ Failure to take into account, fettering of discretion, irrationality and improper purpose 		
<ul style="list-style-type: none"> • Respondent’s Arguments ○ Article 2 ○ Legitimate Expectation 	[99] - [113]	62 - 68
<ul style="list-style-type: none"> • Other Arguments 	[114] - [123]	68 - 69
Applicant’s Note on Keyu	[124] - [128]	69 - 71
<ul style="list-style-type: none"> • Article 2 		
Respondent - Keyu	[129]	72
Discussion	[130] - [208]	72 - 93
<ul style="list-style-type: none"> • What structures were developed in order to deliver Article 2 compliant investigations into historic cases? • Cases where there are Allegations of Collusion • Operational Independence from the Chief Constable of NI • What Changed in 2010? • The system which currently exists does not contain many of the required elements • The decision not to complete an overarching report • What was the function of the HET? • Legitimate Expectation/Article 2 		
Conclusion	[209] - [210]	93
Glossary		94

Introduction

[1] The Applicant is the older brother of Patrick Barnard, murdered aged 13 by a bomb placed outside the Hillcrest Bar in Dungannon on 17 March 1976. The Applicant was 19 at that time. The Historical Enquiries Team (“the HET”) considered that this bombing was part of the ‘Glenanne series’ of cases. The Applicant seeks relief arising from a failure/refusal on the part of the HET to conduct a lawful, effective and independent investigation into the murder of his brother, particularly by the failure/refusal of the HET to complete and publish an overarching thematic report regarding the linked Glennane Gang cases.

Factual Background

[2] Patrick James Barnard was a 13 year old schoolboy (born 7/12/63) who lived with his mother Mary and his four siblings at 9 Fairmount Park Dungannon.

[3] At approximately 8.20pm on 17 March 1976, a “no warning” bomb, planted by the UVF, exploded outside the Hillcrest Bar, Donaghmore Road, Dungannon. Patrick Barnard was playing in the street outside the bar. He was taken to Craigavon Hospital for treatment but died the next day at 12.45pm. A post-mortem examination was performed on him on 18 March 1976. The cause of death was given as multiple injuries due to a bomb explosion. James Francis McCaughey, Andrew Joseph Small and Joseph Kelly were also killed in the attack.

[4] Examination of the scene by Scenes of Crime Officers and members of the Northern Ireland Forensic Science Service determined that a bomb had been planted in a vehicle parked outside the Hillcrest Bar. The bomb was believed to have contained 60-80lbs of homemade explosives. The vehicle, a green Austin 1100, had been reported stolen on 9 March 1976. Forensic exhibits recovered from the scene were destroyed in a fire at the forensic centre on 18 September 1976 before a report could be prepared.

The Investigation

[5] On 8 December 1980, Garnet James Busby was arrested for the bombing. During interview he admitted to his involvement in the Hillcrest Bar bombing and to his membership of the UVF. He admitted having met [A],[B] and [C]and that the bomb was loaded into an 1100 car and that he was told to drive it to the Hillcrest Bar. He said that [C] scouted the road in front of him. Busby admitted parking the bomb laden car outside the Hillcrest bar and getting into the car driven by [C] and leaving the scene.

[6] An inquest into the death of Patrick Barnard (and the other victims of the Hillcrest bombing) was held on 20th December 1976. An open verdict was returned.

[7] On 23 October 1981 Busby was convicted at Belfast City Commission to a total of 14 offences including the Hillcrest Bar bombing. He was sentenced to life imprisonment for the murders and concurrent sentences for the other offences. He was released on life licence in February 1997.

[8] [A], [B], [C] and two other named individuals were also arrested and interviewed in relation to the bombing. While never charged in relation to the Hillcrest attack, they were later charged with other offences.

[9] During his interviews in custody on 10 and 11 December 1980, Busby also admitted his involvement in the following incidents:

- (a) The murders of Peter and Jane McKearney at Moy in October 1975;
- (b) The placing of a car bomb outside O'Neill's bar, Dungannon on 16 August 1973;

- (c) The placing of a car bomb at Quinn's public house, Dungannon, on 12 November 1973.

The Set Up, Development and Eventual Disbandment of the HET

[10] Following the McKerr series of judgments the UK Government set in train a package of measures to remedy the identified breaches of the Article 2 procedural obligation to effectively investigate suspicious deaths. The 2013 report of Her Majesty's Inspectorate of Constabulary ("HMIC") described the genesis of the HET as follows:

"Between 2000 and 2003, the European Court of Human Rights (ECtHR) applied the criteria for Article 2 ECHR to a number of complaints concerning deaths in Northern Ireland during 'the Troubles' in which there had been State involvement. These cases came to be known as the McKerr cases. In each case, it concluded that the Article 2 rights of the deceased had been violated by a failure of the State to put in place an adequate and effective investigation to protect the right to life.

Following the ECtHR's findings of a breach of Article 2 in McKerr cases, the UK Government presented the CM with a 'package of measures' designed to address the Court's findings, and to prevent such failings from happening again."

[11] The package of measures was overseen by the Committee of Ministers ("CM"), the body responsible for the implementation of judgments.

[12] The PSNI Serious Crimes Review Team ("SCRT") was established in 2003 as one of the measures designed to address the defects in previous police investigations. Its remit was '*to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed.*' The CM made the following comments about the SCRT in its 2005 Interim Resolution:

"The PSNI has adopted a three-stage approach to 'historical'. First, a preliminary case assessment is carried out to ascertain if any potential evidential opportunities exist to move the investigation forward. Second, where these are identified then a full deferred case review will be commissioned by the Assistant Chief Constable. Subsequently, as the third stage of the process, the case may be referred to a murder

investigation team for further investigation subject to the accepted recommendations of the review.

The work of the SCRT is painstaking and places significant demands on police resources. As a consequence the Government have been discussing with the PSNI how this work might be expanded to process greater numbers of unresolved deaths and to do so in a way that commands the confidence of the wider community.”

[13] The HET was established in 2005 as a further part of the package of measures. It began its work in 2006. The HMIC report notes the following about the set up and operation of the HET:

“The HET was established, in September 2005, as a specialist unit of the SCRT, dedicated to examine all deaths attributable to the security situation that occurred in Northern Ireland between 1968 and the Belfast Agreement in 1998. There were 3,260 deaths attributable to ‘the Troubles’ within this period, arising from 2,555 separate incidents. Deaths after 1998 are investigated by the PSNI Crime Operations department murder investigation teams of the PSNI, with the exception of a few historical cases which had been referred by the Chief Constable to the HET.”

[14] The HMIC report describes the package of measures and the scrutiny of that package by the CM as follows:

“[The package of measures] included individual measures, designed to address the breaches that had been found in the McKerr cases themselves, and general measures (A-K), which were designed to address systemic failings in the approach to investigating deaths arising out of ‘the Troubles’ and to prevent such failings from happening again.”

[15] The Joint Committee on Human Rights Seventh Report of Session 2014-15 said the following about the establishment of the HET:

“3.2 The McKerr group of cases concern the adequacy of investigations into deaths in the 1980s and 1990s in Northern Ireland, either in security force operations, or in circumstances giving rise to suspicions of collusion with the security forces. The

Court in these cases found a number of violations of the procedural obligation under Article 2 ECHR... to conduct an effective investigation into such deaths, including lack of independence of investigating police officers; lack of public scrutiny and information to victims' families on reasons for decisions not to prosecute; defects in the police investigations; limitations on the role and scope of the inquest procedure; absence of legal aid for the representation of the victims' families; and delays in inquest proceedings.

3.3 The Government has adopted a number of general measures to give effect to these judgments, including reforms to the inquest procedure in Northern Ireland and the establishment of bodies to carry out investigations, including the Police Ombudsman of Northern Ireland and the Historical Enquiries Team ('HET'). The Committee of Ministers closed its supervision of a number of implementation issues as a result of these measures, but a number of outstanding issues remain...

3.4 The effective investigation of cases which are the legacy of 'the Troubles' in Northern Ireland has proved a particularly intractable problem in practice because it is so intimately bound up with the much larger question of dealing with the past in a post-conflict society. The processes established to provide the effective investigations which Article 2 ECHR requires, through the institutions of the Police Ombudsman and the HET, have been beset with difficulties and have also been the subject of critical independent reviews which have called into question their compliance with the requirements of Article 2..."

What was the HET?

[16] From its outset, the HET adopted three main objectives:

"1. To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to 'the Troubles' between 1968 and the signing of the Belfast Agreement in April 1998;

2. To re-examine all deaths attributable to 'the Troubles' and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;
3. To do so in a way that commands the confidence of the wider community."

[17] The 2007 Interim Report summarises the information provided by the UK authorities in relation to *'the work carried out by the [HET] including its objectives, processes and the rationale behind its establishment'* as follows:

"i. Rationale and objectives

21. The HET is an independent unit of the Police Service of Northern Ireland (PSNI) which reports directly to the Chief Constable. It was established in September 2005 and began its work in January 2006. The establishment of the HET evolved from the Chief Constable's policy on the review of unresolved deaths. The United Kingdom Government recognised the needs of the families of victims to have more information on the deaths of family members and, as a result of joint discussion between the Government and the PSNI, the Secretary of State (Northern Ireland) made additional resources available to the Chief Constable to establish the HET to deal solely with the unresolved deaths during the 1968 and 1998 period.

22. The HET has three objectives:

- to assist in 'bringing a measure of resolution' to those families affected by deaths attributable to the security situation in Northern Ireland between the years 1968 to 1998;
- to re-examine all deaths in this respect and to ensure that all investigative and evidential opportunities are subject to a thorough, professional examination in a manner that satisfies the PSNI's

obligation of an 'effective investigation', in conformity with Article 2 of the PSNI Code of Ethics, as far as possible; and

- to do so in a way that commands the confidence of the wider community.

23. The HET pledges to deal with families with honesty, trust and confidentiality. Providing such a 'family centred' approach is at the heart of the HET project. The team seeks to identify and address issues and questions that are unresolved from the families' perspective. Its primary aim is to address, as far as possible, all the unresolved concerns that families raise.

24. The HET is part of a process (which includes the Public Prosecution Service) aiming to achieve as Article 2 compliant an investigation as possible, whilst recognising there are certain inevitable limitations, namely the HET's focus on the review of historical cases which means they cannot satisfy the promptness requirement of Article 2.

...

iii. The prioritisation of cases

27. The HET looks into the cases on a chronological basis, beginning with incidents which took place in 1968 and working through those which occurred before April 1998 and the Good Friday Agreement. There are exceptions to this chronological approach, which include:

- Previously opened investigations: prior to the establishment of the HET in 2005, the PSNI's Serious Crime Review Team (SCRT) had the task of reviewing past cases. The HET subsumed these cases when it took over the responsibility for historical cases and, in the interests of fairness to the families involved; prioritised their reviews;

- Humanitarian considerations; for example, if the relatives of victims are very ill or elderly;
- Involving issues of serious public interest: for example, the cases that are currently being examined by the Committee of Ministers;
- Linked series of cases: the HET will pursue the evidential opportunities presented by each case. If cases appear to be linked, then they will be considered together.

iv. HET processes

28. A HET review of a case is a five-step process involving the following stages: collection, assessment, review, focussed re-investigation and resolution.

29. The Review process is designed to be exhaustive and includes a re-examination of all documentation, exhibits and intelligence material associated with a case. The intention is to take advantage of any developments in forensic science to identify any evidential opportunities arising from witnesses and to exploit any potential opportunities from intelligence on the case that may have arisen since the original investigation or which were not used at the time.

30. If evidential opportunities are identified during the Review process which can be realistically pursued, the investigation of the death will proceed and where there is credible evidence available, files will be forwarded to the Public Prosecution Service for consideration. The evidential standard applied is identical to that used by the police. However, it has to be noted that a considerable amount of time has passed since many of these offences were committed. There are therefore likely to be very few cases in which there is sufficient evidence to prosecute. It is not possible to recreate the investigative circumstances of 20 years ago (e.g. physical evidence

could be lost or witnesses could now be unavailable etc).

31. This whole process is underpinned by a developing analytical database which contains details relevant to each case and which can be used to identify both links between cases (intelligence or forensic/ballistic), gaps in intelligence or any other trends/evidential opportunities.

v. Family liaison and resolution of cases

32. Families are under no obligation to engage with the HET should they not wish to do so. However, reviews of cases will take place regardless of whether or not there is family involvement in order to ensure that families do not come under pressure by any individual or group to prevent a HET review.

33. A bespoke Family Liaison Strategy has been put in place comprising a help desk and liaison officers dealing directly with families. From the outset of the Review process families have the opportunity to raise any questions or concerns that they may have about their particular case which the HET will then endeavour to answer as far as possible.

34. Once a case review is completed, a HET 'Resolution Panel' will closely scrutinise all aspects of the review. The Deputy Director of the HET sits on the Panel. The findings of the review are contrasted with the requests made by the family to ensure that all their queries have been addressed as far as possible. A Review Summary Report is then produced. The Summary Report will set out: the HET's findings with respect to the case, any new information that has been uncovered and the answers to the family's questions as far as possible. In essence the Report is an attempt to tell the story of the case for families, often for the first time.

35. Once the Summary Report has been finalised, members of the HET will meet with the families, inform them of their findings and provide a copy of

the report. The HET does not disclose the report to any third party other than the family. Families are always able to seek further clarifications of any issue or make representations. The HET is committed to reviewing its work should a family have further questions. If necessary, families also have the option of meeting with the senior managers of the HET to resolve any issues of concern.

vi. Cases where there are allegations of collusion

36. Cases in which there are allegations of State collusion are handled by the HET's White Team and Complex Inquiry Team, both of which are staffed by police officers from outside Northern Ireland. The teams will look for evidence of offences which might be characterised as 'collusion', such as murder, conspiracy to murder, causing/conspiracy to cause explosions, perverting the course of justice or misfeasance in public office (there is no specific criminal offence of 'collusion' in Northern Ireland law). The teams will also examine any links which can be identified between cases. These types of cases are also referred to the Police Ombudsman, who will conduct a parallel investigation. The HET will focus on investigating the incident itself while the Ombudsman looks at the conduct of police officers. Where there is sufficient evidence of offences, as with any HET case, this will be submitted to the Public Prosecution Service for consideration and a decision on prosecution."

[18] The practices of the HET underwent a fundamental change in 2010. The HMIC report noted this as follows:

"Prior to 2010, it was general practice that the HET would review cases and, if any evidential opportunities existed, investigate them. This is consistent with the CM's observation in 2007 that investigations would be conducted 'in-house'. In 2010, there was a change in this regard. A catalyst for this change was the recommendation by PONI that the PSNI should re-investigate a series of murders, attempted murders and other serious crime which the PONI had code-named Operation Ballast. The then Chief Constable of the PSNI referred the cases to the

HET, which set up a Complex Enquiry Team to deal with them.

It is to the HET's credit that it was able to make progress on the cases, which it renamed Operation Stafford. It was a complex investigation and, as it developed, it used a significant amount of the HET's resources. Eventually, according to the LSIO in charge of the operation, the HET was not able properly to resource the cases alongside its other work and a decision was made by the Chief Constable to transfer the operation to the PSNI. By that stage, a substantial number of suspects had already been charged and the scale of the operation was such that it took three months to transfer it to the PSNI.

In addition, the Chief Constable decided that all cases with potential evidential opportunities would be transferred to the PSNI for further investigation instead of being investigated 'in-house' by the HET. We found that there was a range of different views in the HET about what this meant in practice which, as will be seen later in this report, resulted in some ambiguity about what cases should be transferred, when and how."

Oversight of the Work of the HET

[19] There were two sources of scrutiny of the work of the HET: national oversight measures, and oversight by the CM.

National Oversight Measures

[20] The Northern Ireland Policing Board Historical Enquiries Team (HET) Working Group Position Paper helpfully sets out the timeline of this scrutiny as follows:

"The Policing Board has followed the work of the HET closely, initially facilitating background briefings concerning a 2008 report by the Northern Ireland Affairs Committee which recommended alternative ways for HET to prioritise their caseload in order to manage funding more effectively. Thereafter, independent research conducted by Professor Patricia

Lundy of the University of Ulster provided a focus for much of the Board's scrutiny of the HET.

Can the Past be Policed?

In October 2008 the Board's Human Rights and Professional Standards Committee (HR&PS) considered a report by Professor Patricia Lundy on the operational and investigative practices of HET. Can the Past be Policed? identified institutional flaws in the organisational and operational procedures in the HET process. It also raised serious concerns about governance and leadership, accountability, procedures, storage of evidence and an inconsistency of approach between cases with state involvement and cases without.

On 12 November 2008 Members of the HR&PS Committee met with the Chief Constable Sir Hugh Orde and senior colleagues to discuss Professor Lundy's report. It was agreed at that meeting that the Chief Constable would provide the Committee with a written response to the report. Despite further meetings and numerous requests from the Committee a substantive response was not received.

In March 2009 the HR&PS Committee was provided with a 'current situation paper'. The paper expressed the view that the majority of issues raised in Professor Lundy's report had either been addressed, or had moved on significantly since its initial publication. The report noted that other factors, such as the employment of former RUC/PSNI staff, 'would still be contentious' and had not yet been fully addressed. The paper stated that the leadership of HET had met with Professor Lundy again and was exploring how to assess the current position against that described in the Can the Past be Policed? Report by means of a follow-up review.

Follow up Review of the Historical Enquiries Team

In her follow-up review Professor Lundy noted that initially the PSNI and HET leadership welcomed the opportunity to respond to the concerns raised in her research. However, Professor Lundy informed the

Committee that subsequently she had experienced a lack of cooperation from HET senior management, especially in regards to the level of access to HET staff, which she believed was 'not conducive to a meaningful assessment'. She believed this raised serious questions about accountability and transparency. Therefore Professor Lundy stated that she would no longer devote any time to a follow up review, suggesting the HET management should submit a detailed response based on the findings of her initial report to the HR&PS Committee.

Thereafter the HR&PS Committee met with the leadership of HET and continued to press for a substantive response to both Professor Lundy's Can the Past be Policed? Report and her follow-up review. On 15 September 2010 the Committee issued a letter to the Chief Constable Matt Baggott seeking his response to a number of urgent matters of concern, once again reiterating their desire for a comprehensive PSNI response to Professor Lundy's original report and her follow up review. No response was received from PSNI to the Committee's request.

Engagement through correspondence continued and, further to issues raised by the Committee, ACC Harris responded by letter dated 7 October 2011. Under the heading 'Dr Lundy's report' ACC Harris stated:

'HET is now in its 7th year of operations and has evolved a methodology that will allow it to complete its task within a relatively short period of time. The HET does not intend commissioning any further research and will focus on finishing its task...'

At a meeting with the HR&PS Committee on 13 October 2011 the Committee was informed that there had been a relationship breakdown between the HET and Professor Lundy and that a follow-up report would no longer be compiled. Furthermore Members were unaware of any specific steps undertaken to address the issues highlighted in Professor Lundy's reports.

On 24 February 2012 the HR&PS Committee again wrote to the Chief Constable to advise that the Committee was anxious that a formal response on progress made with respect to Professor Lundy's original report had not yet been provided. The letter requested that a response to the issues raised by Professor Lundy be submitted to the Committee at the earliest possible opportunity.

Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases

On 8 March 2012 Professor Lundy presented another research paper entitled Assessment of HET Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases to the Human Rights and Professional Standards Committee. This research specifically considered HET's review processes and procedures in Royal Military Police investigation cases involving the fatal shooting of over 150 civilians by the British army between 1970 and September 1973. Professor Lundy's research stated that, by November 2011, HET had completed 36 RMP case reports. Her paper detailed her findings based on an analysis of twenty-four HET reports, relating to seventeen individual RMP cases. Professor Lundy reported that there were apparent anomalies and inconsistencies in the HET investigation process where the military was involved, compared to historic cases where non-State or paramilitary suspects were involved. She questioned whether such anomalies and inconsistencies impacted on the ability, and/or perception, of the HET to undertake impartial, effective reviews in cases involving State agencies. Professor Lundy also found that some HET interviews in RMP cases appeared to lack robustness and inconsistencies were frequently not adequately challenged.

The Committee forwarded Professor Lundy's report to the Chief Constable on 12 March 2012 to seek his views on her findings. The Chief Constable responded to this letter in correspondence dated 14 March 2012, noting that Professor Lundy's report:

'has neither status nor legal bearing in shaping the responsibilities or conduct of HET which are much broader than reflected in this paper'.

Questions were subsequently put to the Chief Constable by Members at the 5 April 2012 Board meeting in respect of Professor Lundy's RMP report and it was agreed by the Board that a review of investigative practices within the HET by Her Majesty's Inspectorate of Constabulary (HMIC) provided an appropriate way forward.

The HMIC Review of HET

Between 4 May 2012 and 31 October 2012 the Chief Constable and the Board corresponded regarding the Terms of Reference for the HMIC review, with the final agreed terms confirmed by way of correspondence from HMIC to the Chief Constable dated 25 October 2012.

The HMIC Review of RMP cases (1970 - 1973) undertaken by HET was conducted between November 2012 and May 2013, with Inspectors interviewing over 180 people and examining material relating to 31 cases, previously reviewed by HET. While reporting that it had been told the HET had a positive impact on the lives of many families who had engaged with the process, HMIC determined that there were a wide range of areas in which HET did not conform to current policing standards and practices

...

Board response to HMIC Review and the work of the HET Working Group

Members of the Board received the report and agreed at a meeting on 4 July 2013 that a dedicated working group should be established to consider a number of recommendations relevant to the Board and to oversee implementation of the remainder which were focused on the PSNI. The Board also issued a press release which stated it had no confidence in the

leadership of the HET and asked the Chief Constable to review the management arrangements with immediate effect. The Board further stated that all reviews of military cases should be suspended and that no other reviews should be finalised until the recommendations highlighted by HMIC had been implemented.

At the first meeting on 11 July 2013, Members established the Terms of Reference for on-going work of the Working Group. It was agreed that the Terms of Reference should remain a 'living document', so that, if required, they could be amended to take account of future findings. The Terms of Reference agreed to by Members state that the Working Group should:

- Review PSNI failures to respond promptly to issues raised in relation to the work of the HET;
- Lead on addressing the challenges identified in the HMIC report;
- Agree the oversight mechanism for the review of HET and the on-going operation of HET;
- Seek to ensure that the management, leadership and governance arrangements of HET and PSNI leadership are addressed as a matter of urgency;
- Publish a plan and programme for consultation; and,
- Seek to ensure the implementation of the HMIC recommendations.

The HET Working Group met on 18 occasions between July 2013 and April 2014 and engaged directly with a range of stakeholders, through direct meetings with their representatives or consideration of written submissions which relayed experiences of dealing with HET and opinions on the reforms required. ... The Working Group also held bi-monthly

meetings with the Chief Constable, the most recent of which was on 14 April 2014 and regularly corresponded with PSNI in order to establish the work being undertaken to implement the HMIC recommendations.

In addition, the Chair of the HET Working Group was invited to meet with Acting Detective Chief Superintendent Tina Barnett and Detective Superintendent Jason Murphy, the new Director and Deputy Director respectively of HET, at a 'critical process day' which provided an update of the progress made within the HET since the publication of the HMIC's report. The critical process day included a seminar at HET Headquarters, attended by 'critical friends' from Great Britain which provided an opportunity for officials from other agencies to critically assess and challenge the work undertaken by the interim leadership of the HET.

During the Working Group meeting of 17 October 2013 Members first considered a paper on the procedural obligation under Article 2 of the European Convention on Human Rights. This paper was adopted by the Working Group and subsequently shared with the Chief Constable. ...

The Chair of the HET Working Group reported on the activities of the Working Group at each of the Board's monthly meetings between September 2013 and February 2014.

As of April 2014 the HET had completed reviews in 1,752 cases, involving 2,214 deaths. A further 810 cases linked to 1,054 deaths are yet to be completed.

..."

[21] The Working Group then set out a number of recommendations, including that the HET, going forward *'should comply with Article 2 of the European Convention on Human Rights'*.

[22] In the *'Postscript to concluding observations and recommendations of the HET Working Group'*, the Working Group noted as follows:

“With regard to the publication of the Working Group’s Position Paper, there was no consensus in the Performance Committee or the Board on this issue. Members agreed that it was imperative that the Justice Minister commission HMIC to undertake a follow-up review of the HET in order to reassure the Board and the public that PSNI had fully implemented all the recommendations contained in the original inspection. The Board wrote to the Minister on 28 April 2014 to ask him to commission HMIC to carry out a follow-up inspection of HET as soon as practically possible and the Minister agreed to do so in a letter dated 1 July 2014. The inspection began in September 2014.

...

The Chief Constable met with the Performance Committee on 18 September 2014 and informed Members that PSNI had implemented all the HMIC recommendations within their operational remit. He outlined that due to severe budgetary pressures, PSNI was considering drawing together its legacy operations under a single command, provisionally referred to as the ‘Legacy Branch’. This Branch would be fully integrated into the Crime Operations Department, accountable to the Chief Constable through the Assistant Chief Constable. The Chief Constable outlined his belief that it would prove impossible to re-engineer public confidence in the HET and that a new approach was necessary. He emphasised that the work of the Legacy Branch would be underpinned by the full implementation of HMIC’s recommendations and that he believed the independence of the Legacy Branch should be scrutinised by an oversight panel appointed by the Board.”

[23] The paper on the Article 2 procedural obligation referred to above and adopted by the Working Group set out the history of HET, the legal framework, the details of each of the minimum requirements, the relationship between investigative duties and criminal prosecution and the findings of the HMIC report. It concluded:

“... the HMIC report recorded flaws in the HET which were sufficiently serious to mean that the HET was not compliant with Article 2 ECHR but perhaps

more importantly that the flaws identified within the HET were capable of undermining the entire package of measures for the investigation of suspicious deaths. The PSNI must discharge its legal obligations and may not defer or delay the discharge of those obligations. It is important to stress that any process that is established which is confined to reviewing unsolved deaths without more will not in itself comply with Article 2 ECHR. However, what is abundantly clear is that any process must not operate so as to violate Article 2 and undermine the package of measures. The Policing Board's role is relatively limited: it may not direct the PSNI on the model to be adopted or on the employment of staff within the HET. It can, however, form a view on the proposed arrangements and comment upon them but ultimately it is a matter for the PSNI and the State to resolve any Article 2 issues. ..."

[24] The HMIC's follow-up report made the following observations about the changes made within the HET since the publication of its initial report in 2013. It is important to note that while the HMIC was compiling its work it was informed that the HET's work was to be transferred to the Legacy Investigation Branch ("LIB"). The HMIC decided to complete its work in order that the report might shape the work of any future legacy work of a similar nature. In commenting on the HET's response to its original report, the HMIC report stated:

"2.3 Our report was published on 3 July 2013. On 30 September 2013, a new senior command team for the Historical Enquiries Team was appointed. Those occupying the two most senior positions in the Historical Enquiries Team, who originally were not serving police officers, were replaced by police officers from the Police Service of Northern Ireland, with a mandate to effect the necessary changes.

2.4 The appointment of serving police officers to the most senior posts quashed any remaining perception that the Historical Enquiries Team was independent of the Police Service of Northern Ireland, and further structural changes also made clear that the Historical Enquiries Team was to be fully integrated into the Service's crime operations department."

[25] In relation to the HMIC's first recommendation from the 2013 report: *'The Historical Enquiries Team's role and purpose need to be clarified and specific terms of*

reference should be published. These must be explicit about what the public and interested parties can expect from the Historical Enquiries Team'. The follow up review noted the following:

“In May 2014, the Police Service of Northern Ireland’s service executive team ratified new terms of reference for the Historical Enquiries Team, setting out its purpose, vision, values and role, as well as providing specific guidance as to what it could not do.

2.13 We set out its terms of reference in full below.

...

Our Role

...

- To refer to [the Office of the Police Ombudsman for Northern Ireland] any matter arising from our work which raises a concern of possible police criminality or serious misconduct

...

What we cannot do

...

- We cannot undertake wide ranging reviews into the broader context of ‘The Troubles’ in Northern Ireland.’

2.14 The Historical Enquiries Team also accepted that, although it had actually been clearly defined as a review body since 2010, on occasion, it had undertaken some investigative work.

2.15 By way of example, in some cases, the Historical Enquiries Team staff had interviewed soldiers under caution when they had not been authorised to do so by the Chief Constable. This was in contravention of a memorandum of understanding introduced by the Chief Constable in 2010.

2.16 In order to make it absolutely clear to staff that the Historical Enquiries Team’s function was one of review, following our 2013 inspection, job titles

within the team were changed so that: 'lead senior investigating officers' became 'review managers'; 'senior investigating officers' became 'review supervisors'; and "investigating officers" became 'reviewers'."

Oversight by the Committee of Ministers ("CM")

[26] The CM examined the progress of the HET (along with the other measures) from its inception until 2009. Having been satisfied by the information provided to it that progress in relation to a particular measure was satisfactory, it closed its examination into the issue of the investigation of historical cases on 19 March 2009 *'as the HET has the structure and capacities to finalise its work'*.

[27] The CM in its final memorandum before the closure of its examination was published on 19 November 2008. In relation to the findings of the (then draft) report of Professor Lundy, the UK Government provided the following comments (as summarised in the Secretariat's memorandum):

"[t]he work of the HET has been analysed, at its request, by an external academic, whose initial research has identified strengths and weaknesses in the HET approach, a useful diagnostic. A number of problems were identified in the working of the HET. These include that approximately 24% of the HET staff previously worked for the RUC, Special Branch or the Ministry of Defence. The continuing churn of investigators who originate in Scotland, Wales and England has impeded the effective operation of the HET, contributing to the delay in closing files. Problems are being experienced recruiting qualified investigators to replace those who leave. Policing Board members, from both communities, have questioned the allocation of funding to the HET, noting that in fact it has come from the PSNI budget rather than the additional funding already indicated. Certain of the reports delivered to families have been poorly prepared: it is also noteworthy that it was the work of an NGO which prompted the recall of reviews of killings by soldiers in the period up to 1973. (In response to these comments, the United Kingdom authorities have noted that the report compiled by the external academic, Patricia Lundy, remains in draft form and has not yet been finalised. The work carried out by Professor Lundy was limited to the setting up of the HET and many of the issues

identified in the report have been addressed. There are some areas where the HET accept that the report makes some useful points, and it is considering how these might be incorporated into its work. However, the small scope and narrow focus of the report mean that the UK authorities do not accept that the report on its own is an appropriate means by which to judge the work of the HET.””

[28] On the basis of this information the Committee of Ministers was satisfied with the HET and with the investigation of historical cases and closed its investigation.

The Relationship of the HET with the Article 2 Procedural Duty

[29] The Secretariat’s memorandum of June 2006 made the following comments about the HET:

“... the establishment of the Historical Enquiries Team, especially designed for re-examining deaths attributable to the security situation in Northern Ireland during ‘the Troubles’ and containing a unit solely staffed with officers from outside the PSNI, seems encouraging. It is clear, however, that it will not provide a full effective investigation in conformity with Article 2 in ‘historical cases’ but only identify if further ‘evidentiary opportunities’ exist. ... The HET work in identifying evidential opportunities appears to be thorough and involves modern techniques. It would appear to be a valuable complement to the police investigations in the cases under its remit. The HET work thus appears to the Secretariat a positive development in remedying the defects in the police investigations identified by the court in this [sic] kind of cases.”

[30] The Interim Report of 2007 records the following information given by the UK government in relation to the HET:

“The PSNI... has established a new unit of the SCRT, that is dedicated to re-examining all deaths attributable to the security situation in Northern Ireland between 1968 and the Good Friday Agreement in 1998 (‘the Troubles’). This Historical Enquiries Team (HET) has been designed to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any

evidential opportunities that exist. The HET is operationally independent and reports directly from its Head of Branch to the Chief Constable.

The review process is designed to be exhaustive, and includes a re-examination of all documentation, any exhibits associated with the case and any intelligence on the case (both internal, partner agencies and open source). The intention is to take advantage of any developments in forensic science (e.g. fingerprint technology, DNA possibilities) to identify any evidential opportunities arising from witnesses (either people never seen or where the passage of time allows for changed loyalties etc), and to exploit any potential opportunities from intelligence that may have arisen since or which were not used at the time.

If evidential opportunities are identified during the review process by the HET, the investigation of the death will proceed and where there is credible evidence available reports will be forwarded to the Public Prosecution Service with a view to prosecution. The investigation process will be undertaken 'in-house' by the HET, and will be focused on the evidential opportunities that the review process identifies.

The first and primary objective of the HET is to provide a 'family centred' approach, seeking to identify and address issues that are unresolved from the families' perspectives. The HET's intention is to address, as far as possible, all the unresolved concerns that families raise. A bespoke Family Liaison Strategy has been designed, comprising a help desk, individual liaison officers for families and access for families to the two senior commanders in any case that is required. The principle that the HET adopts in dealing with families, underwritten personally by the Chief Constable, is maximum permissible disclosure, in line with legal and ethical considerations.

As regards the possible interplay between the HET and the Police Ombudsman with regard to historical cases, the HET have a very good working relationship with the Office of the Police Ombudsman (OPONI).

Since the inception of the unit, discussions have taken place on how issues that affect each agency, within individual or linked cases, can be progressed. A programme of minuted meetings has been instituted, at strategic (monthly), tactical (weekly) and operational (as required) levels. The HET have provided office space and IT support for an OPONI presence at the HET site. To preserve the independence of each party, discussions are continuing on how a parallel investigation process can best be managed in relevant cases. At present, the HET's view is that those cases that allegedly involve the actions of police officers exclusively will be reviewed by the Ombudsman alone, however the HET is committed to supporting them in any way possible that legislation allows. In those cases of parallel investigation (e.g. some police and some external collusion alleged) the meetings structure is designed to facilitate prompt exchange of relevant information and co-ordinated investigative response."

[31] The 2008 Interim Resolution provides as follows:

"[t]he Secretariat recalls that the HET does not carry out Article 2 compliant investigations in historical cases. The HET will not only view existing evidence but will also examine the potential of gathering new evidence either from lines of enquiry, missed opportunities or from turning information/intelligence into evidence. If sufficient evidence is found and can realistically be pursued, the HET will forward files to the Public Prosecution Service.

...

... the Secretariat is of the opinion that the HET can be considered as a useful model for bringing a 'measure of resolution' to those affected in long-lasting conflicts. Such institutions could be viewed as playing an important role in satisfying the State's continuing obligation to conduct effective investigations in violations of Article 2 of the Convention."

[32] Alongside the CM overview process there was other scrutiny of the HET.

Structure & Strategy

[33] The HET was an independent body which reported directly to the Chief Constable of the Police Service of Northern Ireland. The HMIC report describes the structure of the HET as follows:

“The HET is accountable to the Chief Constable of the PSNI who reports on the effectiveness, efficiency and impartiality of the PSNI to the NIPB. The HET has a senior command team that is led by its Director. The Director and his senior team set the strategic direction. The senior team members individually lead the review teams and manage cases allocated to them. The Chief Constable has delegated responsibility for HET’s resourcing and finance to the Assistant Chief Constable (ACC) – Crime Operations, who also has overall responsibility for any case that the HET refers to the PSNI for investigation.

The HET has nine operational review teams supported by an intelligence unit and a support structure to manage family contact, file management and administration. Finance and human resources support are supplied by the PSNI with staff delegated to work at the HET.

The case review section which examines the deaths that occurred during ‘the Troubles’ has 88 posts. All these posts are staffed by former police officers who have experience in criminal investigations.

The case review section is sub-divided into three units (red, purple and white¹), each led by a lead senior investigating officer (LSIO) who is responsible for ensuring that cases are dealt with appropriately. These three units are further divided into nine operational review teams (four red, four purple, and one white). The red and white teams are referred to as ‘independent’ because they are staffed by individuals who have not previously worked for the RUC or the PSNI, whereas the remaining four purple teams are known as ‘local’ because they include individuals who have.”

¹ The White Team was not an original feature of the HET. It came into being between 2006 and 2007 and its genesis, function and development are discussed below.

[34] The HMIC describes 'How the Historical Enquiries Team Works' as follows:

"At the time of this inspection, the HET had re-opened 2068 cases which related to the deaths of 3,682 people. They had completed 1,713 cases which related to the deaths of 2,209 people. In order to establish the HET, the Northern Ireland Office made £34m available to fund the project. This was ring-fenced funding that was separate from the main police grant and which was initially apportioned over a six-year period until 2010/2011. Funding was later provided by the DoJ (NI).

The HET considers its cases in five stages, known as the CARIR process:

1. Collection
2. Assessment
3. Review
4. Investigation
5. Resolution

The first task of the HET was the collection of all relevant material from across the force area. In addition, in many of the earlier cases, material was recovered from 'open sources' or other agencies, such as the Public Records Office for Northern Ireland (PRONI) and the Public Prosecution Service (PPS). This took a dedicated team over three years to complete, although work on cases started in the meantime.

The collection phase was a success as the HET claims that in 98% of all cases concerning deaths related to 'the Troubles', the HET found some material which was catalogued and sealed in boxes. This is a major achievement and one that is of central importance to the HET's on-going work.

When a case is scheduled for review, it is allocated to the most appropriate team at a Review and Allocation Panel meeting. A letter is sent to the identified next-of-kin of the deceased advising them of the HET review. The family is provided with a HET contact number and given the opportunity to engage in the process.

If the family wishes to engage (as is the position in approximately 70 percent of cases), the lead senior investigating officer (LSIO) or another member of the team meets the family members to explain the process. Families are asked whether there are any particular questions that they would like the HET report to address. Some families choose to be represented by a solicitor or NGO who, generally, are far more intrusive, probing the findings of the HET reports. NGOs say that the families they represent are treated differently than those who are unrepresented.

In cases where the family of the deceased does not engage with the process, the case is referred to the Non-engagement Assessment Team (NEAT) for review. In every case, a senior investigating officer (SIO) review report is produced. However, generally, in cases where the family of the deceased engages with the HET, a far more detailed RSR is also produced. Both are quality assured and checked for factual accuracy.

At the time of our inspection, the HET endeavoured to complete 40 cases per month.”

[35] Mr Cox described the structure of the HET to the Sub-Committee on the Barron Report as follows:

“Operationally, we are an independent unit. I report directly to the Chief Constable and not to any other line of command in the PSNI. That is exactly the same process when I was working on an external inquiry, the Stevens inquiry, before I came to the Historical Enquiries Team. As the Chief Constable is the statutory authority for the investigation of crime in Northern Ireland, all external investigations must report to him in any event. We are no different in that way. That does not mean the Chief Constable has time on his hands to make operational decisions. It means I report to him in terms of accountability.

Through the Chief Constable I report to the Northern Ireland Policing Board. ... I am also accountable to the Northern Ireland Office. It wants to know what I am doing with its money... There is the inspectorate function of Her Majesty’s Inspectorate of

Constabulary which can inspect any area of policing and publish reports.”

[36] In the SIO Review Report into the murders of James Francis McCaughey, Andrew Joseph Small, Joseph Kelly and Patrick James Barnard, the HET describes the ‘*Aim and Terms of Reference of [that] Review*’ as follows:

“

- To undertake a ‘desk top’ review into the death/s of victims.
- To ensure that all case papers, exhibits and other material appertaining to the investigation have been gathered from all the identified sources.
- To identify further investigative leads and opportunities developed through:-
 - i. Forensic Review
 - ii. Fingerprint Review
 - iii. Intelligence Review
 - iv. Review original case papers
 - v. Analysis of linked incidents
 - vi. Contact with original SIO
 - vii. Contact with family
 - viii. Open Source review
- Identify areas of collusion where they exist.
- Make recommendations for focused investigation or resolution.
- To identify the needs and wishes of the families.
- To build a ‘storyboard’ of the incident and subsequent investigations that allows for maximum permissible disclosure to families of victims.”

The White Team

[37] Originally, the HET was to have two teams. The Secretariat’s memorandum of October 2005 recorded:

“This Historical Enquiries Team has been conceived to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist. The Team [sic] will contain two investigative units, one of which will be entitled the Special Cases Section and will be staffed by officers seconded from police forces outside Northern Ireland. This section will deal exclusively with cases in which independence from PSNI is seen as a pre-requisite. The second unit, the General Enquiry Section, will be staffed by a mix of police officers and civilian staff recruited from both within the PSNI and externally. The team will be commanded by two senior staff from outside PSNI, but with experience of Northern Ireland issues gained from working on the Stevens Enquiries. Decision-making will be independent and supported by access to independent legal advice from outside Northern Ireland.”

[38] The structure and purpose of the White Team was discussed at the Joint Committee on Justice, Equality, Defence and Women’s Rights Sub-Committee on the Barron Report at its meeting on 14 November 2006. Relevant extracts are reproduced below:

“Chairman: Sticking to the intelligence issue, the whole question of a linked series of murders, referred to by Mr. Cox, the patterns of violence and the possible connections between those individual cases, seems to us important from the point of view of the potential possibility, or probability at this point, of collusion in the early 1970s in particular. What is being done in that regard by HET?

...

Mr Cox: ... As the Chief Constable said, collusion is one part of the linked series but we accept it is an important part. We have experience of dealing with such cases in the Stevens inquiry. The HET is an evolutionary concept and we are looking at how we can take these cases forward. They do not fit the structure I outlined very well because its assessment and review phases are pitched at looking at whether there are individual evidential opportunities rather than whether this is a case of State involvement and,

if so, at what level. A different type of investigation is, therefore, needed.

We are working on establishing a third team which would probably be based in London. It would be largely analytically driven and examine the collusion issues.

...

Senator Cummins: ... We are dealing with the Barron report which dealt with collusion. Mr. Cox has mentioned that various crimes will be linked in the HET's investigations. We have discussed the Glenanne incident during which there was obvious collusion between the RUC, the UDR and the British army and the murder gang in the area. When the HET makes its report, will it link the activities of this gang and others where similar crimes are involved? How does Mr. Cox intend to address in his report the links between various crimes?

...

Mr Cox: I will not comment on specific investigations, but the investigative process is different in cases of collusion. This is the reason we are determining whether to set up another team. Our initial contract is with families and revolves around reporting back to them on what we have found and the answers to their questions. It has been our commitment to them not to go to the press or the public with what we find unless they want us to do so. If they wanted to take the report to the press and make an issue of its contents, it would be a matter for them. We could either support them or, if they were wrong in their statements, correct them.

This does not mean that if we are examining an issue such as collusion, we will not make a public report. I would report on my findings on such a matter to the Chief Constable, who would be obliged to report to the Secretary of State. It is as simple as that. There are different types of investigations. The majority of cases involve the team working for families on a private, almost contractual basis, but where we examine

wider issues that touch on the involvement of other agencies of the state, I would report to the Chief Constable. There would be a report as opposed to an individual case finding.

...

Mr Cox: ... The concept behind the new third team, known as the white team, was to address issues that did not fit into the process as I set it out. We were not set up to examine the issue of collusion but to try to help families. The collusion cases are very worrying and involve a number of deaths under investigation but there was no collusion in the case of the vast majority of victims. There are thousands of unrepresented families who have suffered from a lack of information and the team was set up to put this right. However, we have come across such cases, as we expected we would and perhaps sooner than we expected, and tried to evolve a structure that will enable us to carry out investigations into that aspect of a case, as well as help the families for whom we are trying to work.

Deputy Hctor: ... I have questions relating to the farm at Glenanne. Is information available to Sir Hugh Orde which he can share with us on the number of acts of terrorism perpetrated using that farm between 1976... and 1978...?

Mr Cox: ... we work with many interested parties in this field, including families' representative groups which have undertaken some very detailed investigations of their own and made information available to us which has been of great assistance to us as we set up our team....

Deputy Hctor: Our questions are quite specific... With regard to the alert about the bomb that exploded at Kay's Tavern, the warning issued by the RUC to the Garda Síochána and the letter that followed subsequently, are such documents and details available yet to be examined?...

Mr Cox: ... That type of material is exactly what the team would focus on. We would be looking for that

and trying to get the details. It would form the core of our work and underpin the process of establishing collusion. Those are the type of things we would be looking for. Whether all that is available to us, I am not in a position to say at present.

Chairman: Is it that you have not arrived at that position or that you will never be in a position to say it?

Mr Cox: I should be in a position to say whether it is there but we are not at that stage yet. That case is part of a wider series that we will undertake with the white team but that white team is not yet in being.

Chairman: The white team is dealing with collusion?

Mr Cox: The third collusion team we are setting up in London.

...

Mr Cox: ... We were not set up to deal with Glenanne but to meet the families. Glenanne has come into the process and we are devising a structure by which we hope to be able to deal with it.

...

Mr Cox: ... Those cases, as I have mentioned before, will be the subject of investigation and review by the HET. They are cases which we will look at with our new structure. They do not fit particularly well within the structure that we set up – therefore, we have had to evolve. We are ultimately a victim-centred operation – we work closely with the families. It is about trying to answer their questions. obviously, if collusion is the big question, then we will front it up and try to find the answers for them.”

[39] The operation of the White Team was envisaged as follows in the materials provided to the CM prior to the publication of its 2007 Interim Report:

“vi. Cases where there are allegations of collusion

36. Cases in which there are allegations of State collusion are handled by the HET’s White Team and

Complex Inquiry Team, both of which are staffed by police officers from outside Northern Ireland. The teams will look for evidence of offences which might be characterised as 'collusion', such as murder, conspiracy to murder, causing/conspiracy to cause explosions, perverting the course of justice or misfeasance in public office (there is no specific criminal offence of 'collusion' in Northern Ireland law). The teams will also examine any links which can be identified between cases. These types of cases are also referred to the Police Ombudsman, who will conduct a parallel investigation. The HET will focus on investigating the incident itself while the Ombudsman looks at the conduct of police officers. Where there is sufficient evidence of offences, as with any HET case, this will be submitted to the Public Prosecution Service for consideration and a decision on prosecution."

[40] In an undated PowerPoint presentation on the Historical Enquiries Team, delivered by Sir Hugh Orde OBE, Chief Constable, and Mr David Cox QPM, Director of HET, the slide entitled 'White Team' provided as follows:

- "- Evolutionary concept, takes exceptional cases that fall outside Red/Purple capabilities
- Responsibility for those series of cases where significant allegations of collusion by Security Forces are present
- Close liaison with OPONI - potential for development
- Based in SE England (Independence issue)
- Wider recruiting profile
- Analytically driven utilising the HEAD."

Future

[41] Since the HET was disbanded its operations have been temporarily transferred to the Legacy Investigation Branch ("the LIB"). The ability of the LIB to continue the work of the HET is undermined by the fact that it has less resources and is not independent in the manner envisioned by Article 2.

[42] The Stormont Agreement of 2014 promises a new body, the Historical Investigations Unit (“the HIU”) which will take over the work of the HET. This body has not come into being yet. Progress appears to have stalled. The Stormont Agreement provides as follows:

“Historical Investigations Unit

30. Legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths; the Historical Investigations Unit (HIU). The body will take forward outstanding cases from the HET process, and the legacy work of the Police Ombudsman for Northern Ireland (PONI). A report will be produced in each case.

...

HET, which is relevant to the identification and eventual prosecution of the perpetrator.”

[43] The Joint Committee on Human Rights made the following comments about the Stormont House Agreement:

“The Stormont House Agreement, concluded in December 2014, contains a number of provisions about dealing with the past in Northern Ireland which are of potential relevance to the resolution of these outstanding judgments. There is agreement that any approach to dealing with the past must comply with certain principles, including upholding the rule of law, facilitating the pursuit of justice and information recovery and human rights compliance. Most significantly, there is agreement on a single comprehensive mechanism, the “Historical Investigations Unit”, to take forward outstanding cases from the HET process and the legacy work of the Police Ombudsman. There is also agreement that “the Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.” The UK Government also makes clear in the Agreement that “it will make full disclosure to the HIU”, and the HIU is to aim to complete its work within five years.

3.6 We welcome the relevant provisions in the Stormont House Agreement as a potentially

significant breakthrough in relation to these long-delayed cases of non-implementation. However, the issues are complex and their resolution will depend on the detailed implementation of the very general indications contained in the Stormont House Agreement. The Agreement does not specify a timeframe within which the new Historical Investigations Unit is to be established. The Chief Constable of Northern Ireland has said that he expects it to be two years before the new Unit is ready to start work.

3.7 We are particularly concerned by the prospect that it may be two years before the new Historical Investigations Unit starts its work, especially as in the meantime the work of the Historical Enquiries Team is going to be carried on by the smaller Legacy Investigations Branch of the PSNI. As well as having fewer resources at its disposal than its predecessor, the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service. We recommend that the legislation establishing the Historical Investigations Unit be treated as an urgent priority by the new Government and every effort made to ensure that the new Unit is up and running well before the two years anticipated by the Chief Constable. We also recommend that the arbitrary limit of 5 years of the life of the HIU is not necessarily consistent with Art 2 ECHR as investigation of the hundreds of outstanding cases may well take longer than that 5 years allocated.

3.8 We also recommend that the parties to the Agreement publish a more detailed plan for implementation of the relevant provisions of the Agreement, with clear target dates for the different elements, more specifics about how the delays in legacy inquests will be overcome, and more detail about precisely how the additional £150million over five years will be allocated, including whether any additional resources will be made available to coroners in Northern Ireland, and what proportion of those monies will be allocated to the HIU.”

[44] The HMIC’s follow up report noted the following about the LIB:

“The Head of the Historical Enquiries Team at the time of our follow-up inspection, who was transferred to the Legacy Investigation Branch, told us that, in the future, far from becoming more open, the branch would be less engaged with families than had been the case under the former Historical Enquiries Team. This is a worrying assertion and one which suggests that the direction of travel for the Legacy Investigation Branch is backwards towards introversion rather than forwards into an open and accountable body. Coupled with the absorption of the work into the Police Service of Northern Ireland, this is retrogressive.”

[45] Later in the report it continues:

“4.22 As we have said, if an investigation is to comply with Article 2 of the European Convention on Human Rights, those who are responsible for both overseeing and carrying it out, must be independent of those implicated in the events. This means that there must be not only an absence of hierarchical or institutional connection, but also practical independence.

4.23 In our 2013 report, we observed that, although the Historical Enquiries Team was formally part of the Police Service of Northern Ireland, the only institutional connection was through the reporting line to the Chief Constable. The Legacy Investigation Branch cannot claim the same degree of institutional independence.

4.24 With regard to practical independence, the Historical Enquiries Team tried to assign cases involving Royal Ulster Constabulary officers to teams which were not staffed by former officers of that force. The Legacy Investigation Branch needs to succeed in adopting the same approach if its independence is not to be compromised.

4.25 In accordance with the recommendations in our 2013 report, establishing clearer lines of accountability for the Legacy investigation Branch would help to ensure the rigour and quality of its reviews. However, even then, it may be difficult to secure and maintain

public confidence in the process, given the sensitivity of these cases, and the lack of independence, both in terms of reality and perception, which the Legacy Investigation Branch has from the Police Service of Northern Ireland.”

Representations re the Overarching Thematic Report

[46] The SIO Report into the deaths of James Francis McCaughey (which appears to be dated 30 August 2007), Andrew Joseph Small, Joseph Kelly and Patrick James Barnard provides that:

“11. Review Officers conclusions and observations:

This case is linked to the Glenanne Series and clearly of interest to the Pat Finucane Centre. There is no forensic evidence available. Analytical review by the White Team could give evidential opportunities to progress this case further.

...

12.6 Outcome of Analytical Review

... It is likely that the White Team will provide an analytical product when this and potentially grouped cases are assessed by them.

12.7 Outcome of Family Interaction

... The remaining families have not engaged with the HET. A/I Peter SMITH contacted the Pat Finucane Centre on 14th August 2007 when he requested further contact with the outstanding families to ascertain whether they were to engage. The BARNARD family do not wish to engage and the KELLY family have not responded to the PFC.”

[47] That report details certain questions asked by Norbert McCaughey at a meeting on 2 April 2007 in Benburb with HET Family Contact Officers:

“Was there collusion involving the security forces regarding this murder?

There is no evidence or information that there was collusion involving the security forces. However this

incident will be reviewed analytically in order to ascertain whether the issue of collusion is apparent. The White Team will under take this [sic].

...

Will the report be thorough and will it report on collusion, which I believe occurred in this case?

The review case papers are examined thoroughly, every item examined for any further information and fresh evidence. Detailed reports are then prepared. I have been unable to find any evidence or information that there was any collusion. However a team of Detectives based in England will be conducting analytical reviews to identify any suspected issues concerning collusion."

[48] The Supplementary SIO Review Report of 16/10/2008 addresses further questions raised by the McCaughey family:

"Why was there no mention of Trevor Barnard, despite the open acknowledgment, at a meeting in Benburb, of his involvement?

There is no intelligence or any information within the material researched that indicates any involvement of Trevor Barnard with the bombing at the Hillcrest Bar. However, he along with others will be looked at in the wider picture for the murders, which have been grouped together as the Glenanne Series.

Why have you not interviewed Wilson and Bogus, officers who investigated the case at the time? ...

We will continue to assess this case as part of investigations into the Glenanne Series.

...

Since, as your report states, there is evidence of collusion in this area... why have no members of the security forces been charged?

HET will continue to assess this and other cases as part of its ongoing investigations into the 'Glenanne series', in order that further detailed analysis can be undertaken, as mentioned in the RSR report in your

possession. Should any further evidence or information come to light then a report would be submitted to the Police Ombudsman's office for Northern Ireland (PONI)."

[49] Another supplementary SIO report review of 26/6/08 makes similar references as follows:

"HET will continue to assess this case as part of its investigations into the 'Glenanne Series'.

'HET will continue to assess this and other cases as part of its ongoing investigations into the 'Glenanne Series', in order that further detailed analysis can be undertaken, as mentioned in the RSR report in your possession."

[50] The McCaughey interim HET review report (which appears to be undated) into the death of James Francis McCaughey provides:

"HET will continue to assess this case as part of its investigations into the 'Glenanne series', in order that further detailed analysis can be undertaken."

[51] In the section entitled '*Questions raised by the family*' that interim report records the following questions and answers:

"17. Was there collusion involving the security forces regarding this murder?

The HET has found no evidence to suggest there was any collusion between the security forces and Busby...

The HET will continue to review a number of cases, collectively referred to as the Glenanne series, to further examine allegations of collusion. This case is regarded as part of the overall series because of links to suspects such as Busby. Any further developments in this regard will be notified to the family.

...

20. Will the review be thorough and will it report on collusion, which I believe occurred in this case?

A thorough review has been conducted by the HET and this interim Review Summary Report is based on the evidence and information that is contained in the available material.

The HET have not found any evidence or information that would indicate any form of collusion between the security forces and loyalist paramilitary organisations in this murder.

The HET will continue to review a number of cases, collectively referred to as the Glenanne series, to further examine allegations of collusion. This case is regarded as part of the overall series because of links to suspects such as Busby. Any further developments in this regard will be notified to the family.

...

26. Who were the Senior RUC, Army and UDR officers in this area as they just allowed these offences to carry on around 1975 and 1976?

The HET will continue to review a number of cases, collectively referred to as the Glenanne series, to further examine allegations of collusion. This case is regarded as part of the overall series because of links to suspects such as Busby. Any further developments in this regard will be notified to the family."

[52] In the 'What happens now?' section of the interim review report, the following is recorded:

"There are no further potential lines of enquiry at this time in this individual case. However, as discussed in the report, the HET will continue to examine a series of murders and terrorist offences commonly called the 'Glenanne series'. The murder of James will be considered as part of that series and the HET is examining the role of certain individuals and organisations in these events. You will be updated of any developments."

[53] The Andrew Joseph Small RSR (again apparently undated) contains similar information to the McCaughey interim RSR with certain additional information. Specifically it includes the following:

“The ‘Glenanne’ Enquiry

The HET ‘Glenanne’ Enquiry is an examination of 89 incidents that occurred between July 1972 and June 1978; in the area around the towns of Armagh, Portadown and Dungannon and their immediate surrounding areas. The incidents include:

46 murder cases involving a total of 80 deaths

22 non-fatal bombings

13 attempted murders

7 non-injury (intimidation) shootings

1 abduction and false imprisonment – ‘kidnapping’

HET Comment: The murder of Andrew was included as one of the cases that made up the HET ‘Glenanne’ enquiry.”

[54] The Small RSR provides some detail about the three people named by Busby as also having been involved in the Hillcrest bombing. It notes that suspect 2 *‘was a Private in the British (Territorial) Army at the time of ‘Hillcrest Bar’*. In the ‘Conclusions’ section, that RSR provides:

“Garnet James Busby was ... convicted ... of Andrew’s murder and was sentenced to life imprisonment.

This murder was carried out by the so called Moygashel unit of the UVF. There were links and associations between members of the Moygashel UVF and the ‘Glenanne Gang’.

One of the suspects, Suspect No. 2 ... was a British (Territorial) Army Private. His alleged involvement is purely based on a single item of intelligence: he was later sentenced to life imprisonment for other offences.

HET Comment: The HET is conducting on-going analysis into the ‘Murder Triangle’ and ‘Glenanne Gang’ related incidents. The HET findings and conclusions regarding the ‘Glenanne series’ will be reported in an overall report to be published later.”

[55] In the 'Questions raised by the family' section of the Small RSR, the following questions and answers are recorded:

"Q4. The indications to our family are that Dad's murder was not an isolated incident. Is there any intelligence to confirm this?

A. This case was not an isolated incident and there are links to other cases within the 'Glenanne series'. The analysis by HET is not yet completed and the extents of any links are yet to be fully established. You will be informed of the result and conclusions of the analysis when it has been fully completed.

...

Q17. In terms of forensic evidence regarding the person who made the bomb was there any forensic evidence or intelligence regarding this case linking it with the Miami Show Band incident. Will these cases be looked at together?

A... 'all the Glenanne series, including the Miami Showband, will be looked at in conjunction with one another and any links will be reported. A separate investigative team (White Team) are responsible for review and analysis of all the 'Glenanne' series cases."

[56] In the 'What happens now?' section of the Small RSR, the following is recorded:

"There are no further potential lines of enquiry at this time in this individual case. However, as discussed in the report, the HET will continue to examine a series of murders and terrorist offences commonly called the 'Glenanne series'. The murder of Andrew will be considered as part of that series and the HET is examining the role of certain individuals and organisations in these events. You will be updated of any developments."

[57] The RSR provided in respect of Joseph Kelly contains similar information to that contained in the McCaughey and Small RSRs. It includes the following:

"The HET has a dedicated team within its structure, (The HET White Team), which deals specifically with

cases that involve allegations of the involvement or collusion by members of the security forces with terrorist organisations. This team is examining 89 incidents, although not all involve obvious collusion, perpetrated by loyalist terrorists, which occurred between July 1972 and June 1978, around the towns of Armagh, Portadown, Newry and Dungannon and their immediate surrounding areas. The incidents include:

46 murder cases involving a total of 80 deaths

22 non-fatal bombings

13 attempted murders

7 non-injury (intimidation) shootings

1 abduction and false imprisonment - 'kidnapping'

HET intends to produce an over-arching report on a number of these linked cases in the near future."

[58] In the 'What Happens Now?' section of the Kelly RSR, the following is repeated:

"There are no further potential lines of enquiry at this time in this individual case. However, as discussed in the report, the HET will continue to examine a series of murders and terrorist offences commonly called the 'Glenanne series'. The murder of Joseph will be considered as part of that series and the HET is examining the role of certain individuals and organisations in these events. You will be updated of any developments."

[59] The revised RSR provided to the McCaughey family contains much of the additional information contained in the Kelly and Small RSRs. In particular it includes the following:

"The HET has a dedicated team within its structure, (The HET White Team), which deals specifically with cases that involve allegations of involvement or collusion by members of the security forces with paramilitary organisations.

The team is examining 89 incidents perpetrated by loyalist paramilitaries, which occurred between July 1972 and June 1978 in the area around the towns of

Armagh, Portadown and Dungannon and their immediate surrounding areas.

...

HET intends to produce an over-arching report on a number of these linked cases in the near future.

The murder of James was included as one of the cases that made up the HET 'Glenanne' enquiry."

[60] In the 'Conclusions' section the McCaughey revised RSR provides:

"This murder was carried out by the so called Moygashel unit of the UVF. There were links and associations between members of the Moygashel UVF and the 'Glenanne Gang'

...

HET Comment: The HET is conducting on-going analysis into the 'Murder Triangle' and 'Glenanne Gang' related incidents. The HET findings and conclusions regarding the 'Glenanne series' will be reported in an overall report to be published later."

[61] In the course of these proceedings the PSNI have provided a draft report entitled '*South Border Security Situation*'. That report provides as follows:

"Introduction

This document is the Historical Enquiries Team (HET) over-arching report into its reviews of a number of terrorist related deaths in the south border area of Northern Ireland during 1972 to 1978.

The HET has completed the reviews into all the individual cases. The families have been provided with case specific review summary reports which explain the circumstances of the death, evaluate the standard of investigation and the HET's conclusions.

Associated with many of the deaths are allegations of collusion, in that they were caused by loyalist terrorists, who included amongst their numbers serving police officers and soldiers of the British army.

A number of security force personnel were convicted of involvement of some of the deaths; and that there was collusion in those cases is indisputable.

...

Historical Enquiries Team review of Glenanne cases

The Historical Enquiries Team (HET) reviews all deaths attributed to The Troubles between 1968 to pre-Belfast/Good Friday agreement 1998.

The HET Principle aims are to ensure that all investigative and evidential opportunities are subjected to thorough and exhaustive examination in a manner that satisfies the PSNI's obligation of an 'Effective Investigation' Article 2, Code of Ethics for PSNI, and to assist in bringing resolution to the families of victims of The Troubles.

Within the HET is a dedicated team (The White Team), which deals specifically with cases of alleged involvement of, or collusion by, security forces members with paramilitary organisations.

Collusion, within the context of the Troubles in Northern Ireland, has previously been defined by former Metropolitan Police Commissioner The Lord Stevens and Supreme Court of Canada Judge Peter Cory. As neither definition was appropriate for the remit of the White Team cases, a more suitable definition was created.

The White Team definition of collusion is 'where a member of the security forces commits with any person an offence that amounts to either:

1. Murder.
2. Serious offence (includes attempted murder, causing an explosion, intimidation shooting and kidnap).
3. Malfeasance in public office.

4. Conspiracy to commit acts of terrorism.

The White Team reviewed 89 incidents perpetrated by loyalist terrorists between July 1972 and June 1978, in the area around the towns of Armagh, Portadown and Dungannon, and the surrounding area. Included amongst those are the incidents referred by the PFC and CCHR.

The 89 incidents comprise of:

- 46 murder cases involving a total of 80 deaths.
- 22 non-fatal bombings.
- 13 attempted murders.
- 7 non-injury (intimidation) shootings
- 1 abduction and false imprisonment - 'kidnapping'."

[62] That document then goes on to describe in detail certain of the incidents. Significant amounts of the detail is copied and pasted from individual RSRs. The detail in the report includes: what happened, who was involved or suspected of involvement (including details of any interviews or statements, charges, and convictions), weapons and weapon linkages, details of the investigations carried out, available intelligence, and details of the course of prosecutions.

[63] At the end of the document there are three pages which appear to contain the titles of remaining chapters and the sub-headings to be covered in each of those chapters. This proposed structure strongly resembles the structure discussed with the Pat Finucane Centre (discussed below). This included the following:

“The ‘Murder Triangle’ - Origins and chronology of the Murder Triangle 1972-1978:

Brief summary of all 101 incidents included (lift of the HET timeline). Will include victim’s name, gender, age and religious denomination, date and time of incident and location. Brief nature of attack. Whether or not detected. Who arrested. Security force membership, confirmed paramilitary membership.”

[64] Other RSRs which refer to a specific ‘Glenanne’ Inquiry include:

“a. The murders of James Desmond Devlin and Gertrude Devlin (‘The murders of James and

Gertrude were included as one of the cases that was reviewed as part of the HET 'Glenanne' enquiry'.)

b. The death of Frederick George McLoughlin ('The HET White Team is conducting a continuing review of the linked issues between Frederick's murder and other cases in the local area and in South Armagh. The family will be kept updated on developments.)

c. The murders of Peter Joseph McKearney and Jane McKearney ('The HET has a dedicated team within its structure... which deals specifically with cases that involve allegations of the involvement or collusion by members of the security forces with terrorist organisations... HET intends to produce an over-arching report on a number of these linked cases in the near future.')

d. The deaths of John Martin, Brian and Anthony Gerard Reavey ('The White Team is an analytical and investigation unit within HET's Review and Investigation Directorate. It is tasked to examine those cases requiring longer-term investigation that extend beyond the remit of other HET Review Teams. This includes cases such as this where significant allegations of collusion involving security force personnel are presented. Because these murders are intrinsically linked to a number of other murders and offences committed in the area, commonly known as the Glenanne series, this case has been submitted to the HET 'White Team' for its continued examination and analysis')

e. The death of Dorothy Trainor ('The HET is continuing an overall investigation into the 'Glenanne series'; Dorothy's murder will form a part of this work, and the family will be kept informed of any developments')

f. The deaths of Colin McCartney and Sean Patrick Farmer ('The White Team is an analytical and investigation unit within the HET Review and investigation Directorate. It is tasked to examine those cases requiring longer-term investigation that extend beyond the remit of other HET Review Teams. This

includes cases such as this, where significant allegations of collusion involving security force personnel are presented. Because these murders are intrinsically linked to a number of other murders and offences committed in the area, commonly known as the Glenanne series, this case has been submitted to the HET 'White Team' for its continued examination. The families will be kept informed of developments.'

g. Michael Joseph McGrath ('The HET 'White Team' is conducting an overview of cases known as the 'Glenanne Series'; it may be that this analysis will provide further insight into all of these issues.')

[65] In addition, meeting between PFC and HET record the following discussions:

"a. Meeting of 22/1/2009: (Dave Cox and Phil James)

'Reports - not in context - reports concentrate on the incident but not the context.

- Glenanne Report - look at each case individually then do a larger report which will put things in context.

b. Meeting of 6/10/2009: (Present: Robin Hancock, Trevor Bursh, Steve Morris, Paul, Anne, Alan

'D.C. (David Cox) feels Glenanne Report can be started - enough is now known to start - suggesting doing rolling report.

...

What are the questions which need answered in 'Generic Report' into Glenanne - PFC to get our suggestions together.

c. Meeting of 20/10/2009: (Present: Robin Hancock, Pete Smith, Steve Morris, Paul, Maggie, Anne, Alan)

Generic Report

1. Intro: Case to answer - ECHR judgments - panel document:
 - What allegations were made
 - o Operation Nantucket
 - o Wei's [sic] allegations
 - o 1978 arrests
 - o Barron reports/cross-border discussion
2. The Allegations
 - The Group
 - The individuals
 - The State
3. The Murder - Chronological 1972-78
4. Cross-border attacks
5. Collusion
 - Definition - how wide, how narrow?
 - Stevens/Cory
 - HET definition
 - What was the policy about those who were charged from the security forces, when did they resign and why?
 - What did SDLP, Catholic Church, etc. say at the time; what did the B.G. say?
 - December '75+ January '76 - was it going towards civil war? - What was the B.G. response? - ie SAS into area - is this a means to an end? - SAS in to attack/take-on the IRA
 - Screening policy - a discussion
6. HET history
7. White Team history
8. Those seen
9. Analytical process
10. John Weir - his allegations/service/interview/evaluation

11. Policing - context - geographic environment/limited access and community (did this suit police), ...*rest cut off paper*
 - Workload of CID/schedule of officers involved in Glenanne cases/interviewing of suspects/local practices
 12. Intelligence - the system/grading/use of sources or agents/ownership of intel/special branch/sharing of intel/where did it come from?
 13. Weapons links - Were (why this is not evidential)/ why is this linkage important
 14. UDR -history/composition/how did the UDR actually work
 15. Significant incidents - possibly individual cases - done chronologically
- d. Meeting of 10/11/2009 (Present: Pete Smith, Robin Hancock, Steve Morris, Anne, Maggie, Paul, Alan, Tricia Lundy and Falls Family. Dave Cox present for discussion of generic report)

Generic Report

- At the end of this - 8 some cases may need to be given to OPONI for further investigation eg Rock Bar and Step Inn
- e. Meeting of 15/6/2011 (Present: Paul, Maggie, Anne, Alan, Steve, Dave, Paul Johnstone, Chris Symones; +1)
 - Can the 'generic report' be delivered in the autumn?
 - Dealing with very complex issues and cases at the minute
 - Statistical work is very nearly complete
 - Appendix to Kingsmill will link the guns that were used and who was subsequently convicted in relation to those guns
 - Seven jobs to be done before Steve can look at the generic report; he feels that he could look at

- it then and get it done; however still have Fermanagh and other families who have older relatives to look at
- Steve will have the above 7 jobs done by the end of July and he will then be free to look at this
 - The Ombudsman – don't feel that it needs to go there first before it goes to the family."

The Decision not to complete the Overarching Thematic Report

[66] On the 11 March 2014, the Applicant's representatives wrote to both the Chief Constable of the PSNI and to the HET. The letter to the PSNI included the following:

"It was our client's understanding that an overarching thematic report was due to be prepared by the HET and that such report would have been under the auspices of the PSNI. The report was never produced and in place of that each of the families of the deceased received their own HET RSR outwith any referencing to the overall thematic report.

Our client would like to know who took the decision not to produce an overarching thematic report into all of the Glenanne Gang linked cases. When was that decision taken? Was it taken by the HET on a standalone basis or was the decision made pursuant to engagement with PSNI and/or any other agencies."

[67] That letter also noted that *'The HET RSR into the killing of Mr Barnard did not include any reference to a series of linked cases/killings carried out by the Glenanne Gang'*.

[68] The letter to the HET provided:

"We refer to the above matter and previous correspondence herein touching upon the need to have a thematically linked investigation with other cases/murders.

Can you please confirm that this investigation has been linked to all other relevant incidents/cases/murders in a manner consistent with the approach taken in the case of Sean Dillon deceased (killed 27/12/1997).

In particular we would like to have access to the investigative end product undertaken pursuant to HEAD.

If no such thematically linked investigation has been undertaken or there has been but you are not in a position to release the end product... then please let us know."

[69] J A Harris, Assistant Chief Constable - Crime Operations, replied on 12 June 2014 in the following terms:

"The Historical Enquiry Team (HET) are committed to the preparation of bespoke family reports outlining the particular circumstances relating to individual cases. Whilst each case is reviewed for potential evidential opportunities in its own right, part of this review process includes the identification of links to other cases and any potential evidential or investigative opportunities that this may present. Although such linkages may be made for example through suspects, vehicles, locations, weapons; the absence of evidence to connect an individual to the preparation of commission of a said offence may limit the ability to progress an investigation.

The preparation of an overarching report would not provide any evidential opportunities not currently being considered during the Review process. The HET does not intend to prepare an overarching thematic report into those cases referred to as the 'Glenanne Gang linked cases'. To prepare such a report would divert HET resources from their central role of conducting a review and preparing a report for families specific to the death of their loved ones."

Relief Sought

[70] The Applicant seeks the following relief:

- a. An order of *Certiorari* to quash the impugned decision;
- b. An order of *Mandamus* to compel the Respondent (or any alternative mechanism) to conduct a lawful investigation and to complete and

publish the required overarching thematic report in accordance with any judgment, order or direction of this Honourable court.

- c. A declaration that the impugned decision was unlawful, *ultra vires* and of no force or effect.
- d. A declaration that the impugned decision was unlawful and in breach of Article 2 ECHR and thereby section 6 of the Human Rights Act 1998.
- e. Damages and/or just satisfaction.
- f. Such further or other relief as this Honourable Court shall deem necessary.
- g. All necessary and consequential directions.
- h. Costs.”

Grounds for Relief

[71] The Applicant seeks the said relief on the following grounds:

“(a) The impugned undertaking is unlawful as it was in breach of Article 2 ECHR and thereby contrary to section 6 of the Human Rights Act 1998 in so far as:

- i. The failure/refusal to produce an overarching thematic report amounts to a failure/refusal to consider and investigate the extent to which the murders and activities of the Glenanne Gang could be considered to be part of a “*State practice*”.
- ii. The HET, as a significant part of the State mechanism for compliance with the requirements of Article 2, has failed to conduct an effective, independent investigation into the murder of Patrick Barnard which requires a wider examination [including completion and publication of the said overarching thematic report] in all the circumstances.

iii. The failure/refusal is compounded by the lack of opportunity to investigate the said “*State practice*” under the present system of investigating “*legacy cases*” (and in the absence of an alternative investigative framework).

(b) The impugned decision was unlawful as in breach of the common law requirements [including anxious scrutiny, transparency and restorative justice] in respect of the investigation of Patrick Barnard’s death.

(c) The impugned decision was unlawful as it was in breach of the Applicant’s legitimate expectation that an overarching thematic report would be completed and published by the HET.

(a) The impugned decision was unlawful as an unjustified departure from a prior policy of the HET which had been to complete and publish an overarching thematic report. No adequate reasons have been provided to justify this dramatic departure [a *de facto* reversal] from prior policy.

(b) The impugned decision was irrational as it failed to take into account, adequately or at all, a number of relevant factors including *inter alia* that the official tasked with producing this overarching thematic report within the HET, Mr Steve Morris, had completed approximately 80% of the said report by in or around May 2010 and also failed to take into account, adequately or at all, the availability of the Historical Enquiries Analytical Database (“HEAD”) program to the HET which provided them with a unique ability under the present system of investigating “*legacy cases*” (and in the absence of an alternative investigative framework) to conduct the wider examination required by establishing the links between the numerous and interrelated Glennane Gang cases.

(c) The impugned decision amounts to an unlawful fettering of their discretion by the HET.

(d) Given the context concerning fundamental considerations of the right to life and human dignity, the impugned decision was irrational and unreasonable [i.e. lacking in sufficient anxious scrutiny and requiring objective justification] in all the circumstances.”

Arguments

Applicant's Arguments

[72] The Applicant submits that the impugned decision is in breach of Article 2 ECHR in respect of the procedural investigative duty. It is submitted that the constituent elements of the duty are well established and governed by domestic human rights precedent. The scope of the duty to investigate concerns individual killings, but also any systemic issues that concern the surrounding context of the killings, whatever those may be, and whether horizontal or vertical. The purpose of the investigatory obligation combines the enforcement of criminal and civil law, but also includes a function of ensuring public ventilation and accountability that equally enables utilitarian lesson-learning and dignitarian involvement for the next of kin.

[73] It is argued that the instant case, along with the rest of the Glenanne series of cases, represents a paradigm example in this jurisdiction of 1) a separate/autonomous obligation to investigate that has been revived in the HRA era as a result of the work of the HET between 2008 to date; 2) the links now established indicate a credible case of ‘State’ or ‘administrative’ practice combining direct involvement in killing, failing to prevent it and a want of due diligence in investigation; and 3) the present status quo demands public and independent ventilation of the evidence and issues in order to enable the enforcement of law, but also the achievement of truth and accountability.

Separate/Autonomous Obligation

[74] The Applicant submits that the ECHR duty to investigate historic killings is a separate and autonomous duty that is not inextricably linked to the substantive prohibition on killing. This enables the investigative duty in Article 2 to be relied upon even though the deaths in question preceded the direct effect enforcement of the ECHR by the HRA. The Applicant notes that the Strasbourg case law has indicated that there are two ways in which the investigative duty can arise that are not caught by objections based upon temporality. The way which is relevant in relation to the instant case is where either fresh evidence arises; or a fresh analysis of the materials is carried out that ‘cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may arise for further investigations to be pursued’ (Hackett v UK, App. No. 34698/04, 10 May 2005).

[75] The facts of these legacy cases indicate that what is required of the State may differ depending on the nature of the fresh evidence and the circumstances in which it comes to review its impact on previous official accounts. The Applicant argues that the present situation is closely analogous to the result of the inquiries of the Hillsborough Independent Panel to declare that the Article 2 investigatory obligation had been revived. The closely analogous situation here arises from the Glenanne individual RSRs and the consequential HET commitment to producing the overarching report. On these facts, it is submitted, the Article 2 obligation was revived as a result of the review process. It was the HET itself that determined what was reasonable in terms of its duties.

Links/Credible Case of "State"/"Administrative" Practice

[76] The Applicant submits that in the case of Glenanne the surrounding circumstances indicate a credible case of a "State" or "administrative" practice combining direct involvement in killing, a failure to prevent killing and a want of due diligence in its investigation. It was these matters that in substance cause the HET to regard it as crucial to conduct a thematic analysis that could be properly disclosed into the public domain thereby enabling 'an honest disclosure of all relevant matters and considerations.'

[77] The phenomenon of State practice and the special need for its proper public and independent ventilation has been recognised by the English Divisional Court in R (Ali Zaki Mousa) v Secretary of State for Defence (No 2) [2013] EWHC 1412 (Admin). It arises where there is "an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but a pattern or system". In circumstances where there is an arguable case of 'State' or 'administrative' practice there is no need to show that the higher echelons of government necessarily knew about it.

[78] The Applicant argues that, having established that there are numerous and in depth links between State agents that were involved in the killings and having repeatedly admitted the compelling need to look at these links both horizontally and vertically, it is not open to the Respondent who is the primary holder of the relevant material to stop at this juncture.

Enforcement of law, public ventilation and accountability

[79] The ultimate reason given for shelving the commitment to produce the thematic report is one predicated upon the Respondent's pessimistic assessment of its prospects in assisting further criminal investigations in the case of Patrick Barnard. The Applicant submits that, if that is the actual reason, then it is patently wrong in terms of the Respondent's human rights obligations, because it reduces the purposes of the investigatory duty to crime and punishment alone. In fact there is a long line of Strasbourg case law that makes it plain that identification and punishment are important features, as are private law damages, of the broader

function of the Article 2 duty to ensure public ventilation and accountability. It is the broader function that arises where State agents have arguably breached the negative prohibition against killing; or otherwise failed to prevent it.

[80] The Applicant submits that this broader function is manifestly contained in the binding domestic precedent of Amin. It is further reflected in recent Strasbourg authority on the 'right to the truth' and the need to acknowledge the high 'political and societal stakes' that must lead to avoiding 'any appearance of collusion in or tolerance of unlawful acts' of this nature (El Masri v Macedonia (2013) 57 EHRR 25, Al Nashiri v Poland (2015) 60 EHRR 16). It is submitted that these matters are particularly important when applied to countries in post-conflict transition (Jelic v Croatia (2014) ECHR 601, Mocanu v Romania (2015) 60 EHRR 19).

[81] The Applicant further submits that both domestic law and Strasbourg authority now chimes with developments in other international human rights law and relies on the UN General Assembly Resolution 60/147 of 16 December 2005 on 'The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of Humanitarian Law' at Article 3(b) and 22 and Ben Emmerson QC, Special Rapporteur on Human Rights and Counter-terrorism, *Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives*, 17 April 2013, A/HRC/22/52 at sections 23-26 in this regard.

Conclusion on Article 2

[82] The Applicant concludes that the Respondent's affidavit evidence makes it clear that they have failed to appreciate, adequately or at all, the wider requirements of Article 2 in this context. Not every HET review of a legacy case automatically gives rise to an Article 2 duty. But depending on what it discovers, it may do. In this instance, it obviously did because the evidence and the findings of the RSRs are so serious. The Article 2 obligation was thus revived and required reasonable discharge by this particular Respondent based upon its possession of HETs findings and the underlying documentation upon which those findings are based. In answer to the question what was reasonable in terms of discharging the revived Article 2 duty at this stage in the process, the Respondent's agents, themselves, answered that question by commissioning and promising to publish the thematic report. This duty remains on the Respondent.

[83] The Applicant submits that if the Respondent is under a duty to comply with the procedural obligation under Article 2, and has suspended or abandoned this project with regard to discharging the duty by reference (at least in part) to financial and logistical restraints, this is not sufficient an excuse in ECHR terms.

[84] However, when one considers broader functions of the investigatory duty, it is right to bear in mind clear evidence of public support for the need to deal fully and adequately with the past in Northern Ireland.

[85] Finally, in producing the report as sought by way of remedy in this case it will be necessary for the Respondent to replicate the institutional independence that it previously regarded as necessary in order for the White team to be compliant with Article 2 Criteria.

Common Law

[86] The Applicant submits that the subject matter of this claim is inescapably important to assessing whether the common law will tolerate the Respondent being allowed to reasonably and fairly refrain from completing what it regarded as necessary and had already started and, in fact, substantially completed.

[87] The Applicant contends that the impugned decision breaches the common law requirements in respect of the investigation of Patrick Barnard's murder which include an obligation of anxious scrutiny, transparency and the need to consider restorative justice. The case law on investigating controversial deprivation of life embraces these values. These are common law values that require objectively justifiable and proportionate reasons to lawfully override. These common law values and interests provide the context for considering the Respondent's public law error in breach of 1) legitimate expectation, 2) prior policy, 3) reasonableness and/or proportionality.

Legitimate Expectation

[88] The decision not to complete and publish a thematic report was in breach of a substantive legitimate expectation that the Applicant had that such a report would be completed and published. The Applicant's legitimate expectation was generated by the analysis carried out by the HET of the Glenanne series and the clear and unequivocal promises to produce a linked thematic report in respect of the same. This expectation was engendered for the following reasons:

(a) Numerous individual HET RSR's relating to the Glenanne cases cited the need for an overarching report that would publicly establish the links between them;

(b) Internally the need for the overarching analysis was acknowledged, commissioned and approximately 80% completed pending final conclusions;

(c) Detailed discussions took place between HET and the Pat Finucane Centre with regard to the preparation of the report and what it would entail.

(d) The Applicant clearly believed that such a report would be produced and considered this to be a very important aspect into his brother's murder. He saw the text of the RSR in relation to the Hillcrest Pub that expressly referred to ongoing work.

[89] No adequate justification for the frustration of the Applicant's legitimate expectation has been provided by the Respondent. In considering the issue of justification/proportionality it is important to recall the context of the impugned decision including 1) the gravity of the issues under human rights law and the common law; 2) the wider and recognised public interest (recognised in Hass and the SHA); 3) the fact that the report is said to have been approximately 80% complete; 4) the time and money that has now been effectively wasted by not finishing and publishing what was started and substantially completed by the HET; 5) the suspicions and concerns generated by the refusal to complete and publish the report in this context; and 6) the substantive benefits (beyond compliance with legal obligations) that would flow from completion and publication including the significance of the State's imprimatur on the report, the possibility of providing a gateway to further investigation and factors relating to restorative and transitional justice issues.

[90] The Applicant submits that it is obvious, given those factors outlined, that the Respondent has failed to strike a fair balance in terms of the proportionality of the decision to refuse to complete and publish a thematic report. The subsequent frustration of the Applicant's expectation that such a report would be published is so unfair as to amount to an abuse or misuse of the Respondent's power in this context.

[91] It is submitted that, against those circumstances, the impugned decision is much harder to justify as proportionate. That is not least because the original decision was based on resources consideration without reflection upon the draft report or the broader human rights context that would be contributed to by completing the report. Moreover, in so far as good government and human rights go hand in hand, in this context, the abandonment of a project of this critical and sensitive nature given its near completion by reference to resources is *prima facie* beyond justification. The fact that the initial case adopted by the Respondent (i.e. reliance on resources) has - in effect - been substantially displaced in the Respondent's replying affidavit only serves to demonstrate the lack of any adequate and proportionate justification. The shifting sands of justification in this case do not provide the Respondent with any firm basis upon which to defend these proceedings.

[92] The obligation to complete and publish the report does not fall away with the demise of the HET. The PSNI have already acknowledged that they will continue to comply with their investigative duties. Furthermore there is no guarantee (if the current position is maintained) that the HIU will take this work forward in the sense contemplated by the SHA. The HIU would, in effect, have to start again. The Applicant shares the concerns of the JCHR that it will be around 2 years before the HIU even commences work. The Applicant is further concerned that the HIU does not yet exist. More significant is the fact that there is no justification for simply doing nothing given that the job is nearly done, Haas does not contemplate such a hiatus and in fact assumes transitional continuity. Furthermore this work (i.e. the published report) may act as a gateway to inquests and other possible investigations.

[93] Moreover, the future of truth and accountability for Glenanne requires as quickly as possible to overcome this present impasse. Both the consideration and representations concerning further inquiries would be greatly assisted by publication of a single thematic analysis of the Glenanne series based on access to the underlying documentation and witnesses.

Unjustified Departure

[94] The Applicant submits that the Respondent was obliged to act in accordance with their hitherto policy, which was unambiguously and publicly stated as an intention to prepare and publish an overarching thematic report regarding the Glenanne series of cases. That intention was put into action by the substantial completion of that report. Public law illegality can arise from unjustified departure from such a policy position (whether publicly made or otherwise) and there is a duty to adequately justify any such departure.

[95] In this case the HET had a clear and unambiguous policy - to prepare and publish a thematic report. This policy objective also represented the natural outworking of the wider policy objectives of the HET as articulated by the Chief Constable and then Director of the HET in 2006 and the last Director of HET in 2013. They invested significant resource and were uniquely placed (with access to the HEAD system) to deliver that policy goal. The Respondent has reversed this policy and no longer intend to provide such a report. This calls out for very compelling reasons to justify such a complete and unexpected reversal contrary to what had been previously promised. For the reasons already given it is submitted that the Respondent has failed to provide any adequate justification for this departure from their hitherto unambiguous policy position regarding the need for a thematic report. The Respondent's replying affidavit manifestly fails to provide such justification.

Failure to take into account, fettering of discretion, irrationality and improper purpose

[96] The issues at stake concern investigation into deprivation of the right to life and therefore engage the common law values and interest discussed above. In light

of recent developments in public law and as reflected in this challenge, this is manifestly an issue that would now traverse objective reasonableness and a common law proportionality standard of review. Given the subject matter of the impugned decision that test requires a structured assessment giving the most careful scrutiny to matters of weight and balance, suitability, necessity, and the benefits and disadvantages of the impugned decision (including, it is accepted, the position of the decision-maker, albeit as only one factor to be considered in that proportionality exercise).

[97] The key passages from the Respondent's affidavit indicate that the Respondent has adopted an unlawful and unduly narrow approach to their obligations in this regard. The Respondent now makes the case that the fundamental issue was an absence of operational need or benefit. The affidavit explanation demonstrates an obvious and impermissible fetter on the Respondent's discretion which also gives rise to criticism that the resources aim is not legitimate. The Respondent has, in effect, closed their mind to all considerations beyond a criminal investigation into the murder of Patrick Barnard. Indeed, it is not accepted that the Respondent has even properly considered that narrow context in any event given the potential for such a criminal investigation of [C] in any event. However, given the overriding value in obtaining truth and accountability with regard to the series of cases, the Respondent has manifestly failed to strike a proper balance between those values that reside in the bereaved families and wider civil society and its narrow concern to refrain from reporting notwithstanding what its project to date has discovered.

[98] The concerns regarding an improper motive have not been entirely assuaged by the Respondent's replying affidavit. If anything that affidavit has only served to give further cause for concern given 1) the apparent omission of certain details in and failure to fully explain the process that led to the impugned decision and 2) the fact that the Respondent has adopted a substantially different defence/explanation than had hitherto been articulated.

Respondent's Arguments

[99] The Respondent makes the following points in general defence to this application:

“(a) No representation was made to the Applicant at any time by HET or PSNI that an overarching report would be produced linking the investigation into the death of his brother and any wider series of investigations.

(b) The draft overarching report was presented to the Director of HET in May 2010. No further work was undertaken from that date on the draft. Those

advising the Applicant were clearly aware that the report was not being progressed but raised no issue about it until March 2014 by which stage the author of the draft report had ceased employment with the HET. There has thus been a failure to comply with the promptitude requirements of Order 53. The Respondent argues that the delay has been prejudicial to the Respondent because the HET has been disbanded and none of the staff who were involved in compiling the RSRs under consideration are in the employment of the Respondent.

(c) The draft overarching report prepared by the HET has now been disclosed to the Applicant for the purpose of these proceedings and it is clear that it neither includes nor sought to include the Hillcrest bar bombing.

(d) The Applicant refers to the 'linked Glenanne Gang cases' and states that the murder of his brother has been attributed to the Glenanne Gang. However, it is apparent that the draft report makes no reference at all to the murder of the Applicant's brother nor does it refer to the Hillcrest Bar incident or to the RSRs completed in respect of that incident.

(e) The HET made no attempt to bring definition to the Glenanne series of cases. Thus, while the RSR states that it is regarded as one of the overall series it was never referenced anywhere in the overarching report prepared by the HET.

(f) The HET no longer exists. It is now, obviously impossible for HET to complete this work.

(g) The overarching report itself is a synthesis of the existing HET reports and RSRs. It contains no new analytical work and repeats existing information that has been shared in the RSRs issued to families.

(h) The reviews already conducted by HET have closely considered the linkages of suspects, weapons and ballistics. The draft overarching report adds nothing to this analysis.

(i) The Chief Constable is not prepared to stand over the draft HET report in terms of its content being finalised and issued as a comprehensive quality assured document suitable for consideration by the public or next of kin. In this regard the criticisms of HET advanced by the HMIC report are relevant.

(j) If there are any credible investigative opportunities arising from HET materials these can be pursued.

(k) The contention that the LIB is not sufficiently independent to be Article 2 compliant is at odds with the ECtHR finding in *Brecknell* that the PSNI was institutionally independent from its predecessor even if it inherited officers and resources. It is notable that the Committee of Minister's restated that the HET was sufficiently independent in the 2008 progress report.

(l) Paradoxically, the Applicant seeks *mandamus* compelling LIB to complete an overarching investigation to satisfy Article 2 while simultaneously arguing that LIB cannot satisfy the Article 2 requirement of independence.

(m) The Chief Constable has acted rationally in respect of an operational policing matter. He has decided not to complete an overarching report because:

- i. it would not give rise to, or develop, any investigative opportunities beyond those which were identified during the original review process; and
- ii. Any evidential overlaps and investigative opportunities will already have been identified in the original individual reports."

[100] Having surveyed the details of the genesis and remit of the HET the Respondent argues that the Applicant's central Article 2 argument is based on the false premise that HET was (and somehow is) the State's means of discharging the Article 2 investigative obligations. It submits that, at most, the work of the HET

could contribute to the discharge of those obligations – by informing the work of the Coroner’s Service or allowing for prosecutions or leading to investigations by the Police Ombudsman – but it could not provide the sole vehicle for Article 2 compliance because:

- (a) HET was involved in review and not investigation;
- (b) HET was never intended to discharge the State’s Article 2 investigative obligations;
- (c) HET never had a remit to conduct overarching or thematic investigations or produce reports on such investigations.

[101] The draft overarching report which the Applicant contends should be completed is not a Review Summary Report. It was not ‘commissioned’ by the Chief Constable nor is there evidence that it was commissioned by the Director of HET. The draft report contains information and speculation that could not properly be placed in the public domain. For example, individuals are identified as suspects in relation to various incidents on the basis of intelligence reports only. It cannot be presumed that the named individuals were involved in those offences or that the intelligence is accurate. Publicly identifying individuals as suspects relating to terrorist atrocities, either correctly or incorrectly, engages their Article 2 and Article 8 rights.

Article 2

[102] The Respondent argues that the first of the twofold Article 2 obligations on the State is to set up an effective judicial system by which any death that might involve an allegation of negligence or misconduct by a State agent can be investigated. The provision of a legal system that allows for an open and independent investigation of the death will satisfy this requirement. This obligation will be discharged where there has been a criminal investigation, a prosecution and/or a coronial inquest. In this case, it is submitted, there has been an investigation, prosecution, conviction and an inquest. Extensive review of the original materials has identified no new evidential possibilities. In cases where there is no credible evidence of State involvement in the death – as in this case – the availability of prosecution mechanisms, civil liability and a coronial inquest have been held to satisfy the Article 2 obligation. The Respondent thus submits that this first obligation has been satisfied.

[103] The Respondent argues that the second type of investigative obligation pursuant to Article 2 arises in cases where there is a duty to proactively investigate because there is credible evidence suggesting a possible breach of the State’s

substantive duty to protect the life of those in its direct care. The Respondent submits that this does not arise in the instant case.

[104] The Respondent argues that the only Article 2 obligations, if any, that arise in the present case are those that require the State to have in place appropriate mechanisms to allow for investigation. It submits that this obligation has been met.

[105] The Respondent submits that there is a retroactivity issue at play in relation to this case. In the absence of any renewed coronial inquest this is a case where every active investigative step took place more than a decade before the patriation of the Convention into domestic law. It submits that this renders nugatory any further debate about whether the Article 2 procedural obligations have been discharged. It further submits that this issue does not require adjudication by the Court because it is beyond dispute that the core elements of the Article 2 procedural obligation have been fully discharged by the original prosecution, conviction and inquest.

[106] The Respondent argues that the procedural obligation is one of result, not one of means and that the prosecution and conviction of one of the perpetrators is testament to the fact that the means of discharging the Article 2 obligation were clearly available. Further the fact that there was a criminal trial demonstrates that the most effective means of safeguarding Article 2 rights was used.

[107] The Respondent notes that the Strasbourg Court has acknowledged in Hackett that in cases where there has been a prosecution or conviction, circumstances might later arise that cast doubt on the effectiveness of the original investigation and that the nature of any further investigation required pursuant to the procedural obligation would depend on the circumstances of the particular case. It is submitted that, because the HET have categorically determined that there are no further realistic investigative opportunities available, the *Hackett* caveat does not apply.

[108] The Respondent also relies on the limitations on Article 2 apparent in Brecknell. It relies first on the dicta of the Strasbourg Court to the effect that there is no absolute right to obtain a prosecution or conviction:

“the fact that an investigation ends without concrete, or only limited, results is not indicative of any failings as such. The obligation is of means only.”

[109] Second it relies on the following comments as to the limited extent of the Article 2 procedural obligation:

“it is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to contracting parties to provide further protection or guarantees. For

example, contrary to the Applicant's assertion, if Article 2 does not impose the obligation to pursue an investigation into an 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 does not impose an impossible or disproportionate burden on the authorities."

[110] Finally the Respondent notes that the Court in Brecknell also found that the PSNI was institutionally distinct from its predecessor the RUC.

Legitimate Expectation

[111] The Respondent makes two submissions in this regard. First that the Applicant's claim must fail because he cannot establish the necessary representation to ground a legitimate expectation. Second, even if he could demonstrate an unequivocal promise on the part of the Respondent devoid of any relevant qualification, to the effect that an overarching report would be completed, he cannot escape the fact that a public authority is entitled to change its mind – only in the most exceptional case, where a departure from a quasi-contractual commitment would amount to an abuse of power, that the Court will uphold a case based on substantive legitimate expectation. It is submitted that there has been no behaviour amounting to an abuse of power in the present case.

[112] In relation to the first submission the Respondent makes the following observations. The Applicant has not engaged with the HET since 2007. He was not in receipt of RSRs. He did not attend meetings with the HET at the PFC and has been given no assurance by any of the Respondent's personnel that such a report would be completed. He does not aver to a specific representation about the draft overarching report. The evidential basis for the argument is found in the affidavit of his solicitor, Mr Mackin. Mr Mackin details five examples of representations each of which, it is argued, are vague, and none of which refer specifically to the Hillcrest Bar case.

[113] In relation to the second submission the Respondent argues that nothing in the conduct of the Respondent in this matter could properly be construed as an abuse of power. Any representations by the HET must be considered against the background context of the powers and objectives of that body. As the Committee of Minister's have noted, the conduct of *de novo* investigations formed no part of the remit of the HET. The HET was established as a reviewing body confined to a consideration of the investigations previously conducted for the purpose of

determining whether there were any available investigative opportunities. The HET was never given a remit of compiling overarching analytical reports into linked cases – and never actually did so. Those who engaged with HET received RSR reports when the final resolution stage of the review process had been completed. The presentation of the RSR marked the end of the process and indicated whether there were any potential investigative opportunities. In the case of the Hillcrest Bar bombing the HET remit was discharged by the productions of the three RSRs which all stated, unequivocally, that there were no further realistic investigative opportunities. The fact that the Chief Constable has declined to complete an overarching investigative report against that background betokens pragmatic and prudent allocation of his limited resource rather than an abuse of power.

Other Arguments

[114] The Respondent contends that the Applicant's Order 53 statement is misconceived in that it has fundamentally misunderstood the nature of the HET function. In challenging the refusal on the part of the Chief Constable to conduct a 'lawful, effective and independent investigation into the murder of Patrick Barnard', the Applicant overlooks that the HET were engaged in review not investigation. Where investigative opportunities were identified they were passed to the Crime Operations Branch for further action.

[115] In relation to the Applicant's argument that it is necessary to complete an overarching report in order to understand the extent to which the Glenanne Gang murders were part of a State practice, the Respondent submits that the HET RSR into the Hillcrest Bar bombing deals conclusively with this issue as far as the Applicant is concerned. That RSR found that there was no evidence of collusion in relation to that incident and in that regard further exploration of 'State practice' in respect of this case would be futile.

[116] The Respondent submits that the Applicant's argument in this regard conflates the responsibility that lies on the State to conduct appropriate investigations into cases where Article 2 is engaged with the much narrower responsibility on the HET to conduct reviews into previous investigations. The Respondent points in this regard to the Committee of Minister's acknowledgement that the HET was never intended to discharge the State's Article 2 obligations. The Respondent argues that if the Applicant wishes to make the case that Article 2 is engaged and that the obligations have not been discharged by the State then these are matters beyond the remit of the Respondent.

[117] The Respondent argues that the common law requirements of anxious scrutiny, transparency and restorative justice have been met in relation to the Hillcrest Bar bombing by the production of the RSRs.

[118] The Respondent argues that the Applicant at no points identifies where and when a representation was made to him to found his alleged legitimate expectation.

Even if such a representation were made it was clear that the HET has been disbanded, circumstances have changed, and the Respondent is entitled to form the view that there is no further useful purpose to be served in completing the draft HET report.

[119] In relation to the Applicant's argument that the failure to complete and publish the report marks a reversal of policy, the Respondent submits that the policy and objectives involved a review function rather than an investigative one and that HET never gave any policy commitment to the publication of an overarching thematic report.

[120] In relation to the Applicant's argument that the Respondent failed to take into account the fact that the report was 80% complete and that the HEAD database could be used to make linkages the Respondent submits that the affidavit of Mr Murphy clearly answers these points. The facts that the draft report is not considered to meet contemporary policing standards and the fact that the question of forensic and evidential linkages has been properly evaluated in the individual RSRs informed the decision of ACC Harris.

[121] In relation to the Applicant's argument that the Respondent unlawfully fettered its discretion the Respondent submits that the decision of the Chief Constable of 14 June 2014 is indicative of a public authority properly exercising a fully informed discretion. There has been no impermissible fetter. The Applicant's central argument is that the Chief Constable should be constrained – by the Court – to invest resource in completing an unsatisfactory report in circumstances where there is no investigative benefit.

[122] The Respondent submits that the Applicant's bad faith/improper motive challenge is not advanced with particularity and cannot be sustained.

[123] The Respondent argues that the Applicant has been given confidential access to the draft report which has been sought, that there is no need for any further remedy and that, given the disbandment of the HET, the Chief Constable is entitled to determine the operational allocation of his investigative resources.

Applicant's note on Keyu

Article 2

[124] The Applicant submits that Keyu supports the Applicant's Article 2 challenge because:

- (a) There are 'procedural acts' that have continued in the period after the HRA has come into force that are relevant to the identification and punishment of those responsible, including ensuring the

accountability of State agents or bodies for deaths occurring under their responsibility, or to an award of compensation for the injured party;

(b) Further, the obligation to investigate has been revived by virtue of the fresh evidence that has come to light since the judgment in *Brecknell* in 2007, and in the circumstances of this case there is a 'genuine connection' to the trigger events either because they occurred after 1968 or because the prima facie evidence demonstrates that an arguable State practice of mass killing involving State agents such as to contravene Convention values as a whole;

(c) In so far as the Court recognises that the combination of the various criminal, civil and public law investigations that have taken place since October 2000 are relevant procedural acts for the purpose of engaging the separate and autonomous investigatory standards under Article 2, then the HRA applies by virtue of the decision of *McCaughey* and reaffirmed in *Keyu*.

(d) Alternatively, if the Court finds that the combination of various investigations are not 'procedural acts' akin to inquests, but there is a present default to investigate substantial fresh evidence of wider significance than the previous criminal proceedings, then it should make that finding and go on to consider whether the duty to investigate arises under the HRA notwithstanding that *McKerr* on this issue remains good law, and is subject to further higher Court determination where the executive is in default of investigating credible evidence that has come into the public domain for the first time.

[125] The Applicant submits that Keyu supports the common law claim because:

(a) The Supreme Court has underscored the extent to which the reasonableness of a decision in this context will require recognition of the values at stake. The provision of information engages a fundamental right at common law. The production of the Thematic Report, that is, the provision of information, was regarded as necessary, publicly

promised and nearly completed. To deny that information now would require compelling justification. There has been no justification to date and it has been admitted in these proceedings that the refusal to comply with the previous promise was '*purely reactive*', such that it gave no consideration to the fact of the promise, the reasons for its making and the extent to which the process was 80% complete.

(b) The judgment in *Keyu* does not mean that the common law lacks a commitment to accountability, transparency and respect for dignity when it comes to the provision of information that touches upon the personal development of family members whose children, siblings or parents have died in traumatic circumstances and where the State is the primary custodian of relevant information and best placed to manage the entry of the material into the public domain.

[126] In relation to the Respondent's submission that it is '*the wrong target*' the Applicant submits that this is wrong in principle because the application of the investigatory duty as it translated into domestic law, means that different obligations fall upon different public authorities, especially depending upon their functional position in the chain of investigation. He submits that the Respondent is absolutely the right target for the remedy sought. The HET was established as an independent mechanism to review the existing materials in the State's possession and examine possibilities for further inquiry. The Committee of Ministers was informed of this function. The PSNI is already acting as both an interested person in the Step Inn inquest, but is also obligated as a public authority to assist that process by virtue of the provision of information.

[127] The provision of the report in the format that they seek would itself provide assistance (by way of information and imprimatur) in moving towards the next stages of investigation. The Respondent is a keeper of the relevant material. He manages its passages on to other parties. The resolution of the legacy issue in Northern Ireland concerns gateways and gatekeepers. This Respondent bears a particular responsibility at this particular stage.

[128] The work of the HET White team is of a high quality. It does not fall within the broader criticisms of the earlier HET reviews relating to the reports concerning military killings in 1970-1973. These were the subject of the HMIC corporate criticisms of the HET in 2013. Some, but not all, of the generic conclusions of the White Team can be found by an exhaustive review of the RSRs, but each of the RSRs made it clear that the further reasonable and forensically necessary task required an

overview. That task is almost complete and prime for completion both as a matter of principle and on the practical basis that if the Respondent who controls the materials will not do it, then who will?

Respondent - Keyu

[129] The Respondent argues that the Supreme Court in Keyu did not determine the issue and that the leading authority remains the Court of Appeal decision in that case which found that McCaughey did not overrule McKerr. The Respondent reiterates its argument that, in the absence of a renewed inquest or any fresh commencement of an investigation, the Article 2 procedural obligation does not adhere to a case such as the present where the investigation, prosecution, conviction and inquest all took place a decade before the Human Rights Act came into force.

Discussion

What structures were developed in order to deliver Article 2 compliant investigations into historic cases?

[130] The development of mechanisms intended for this purpose is described in detail above.

[131] It began with the establishment of the Serious Crimes Review Team (SCRT) but this quickly evolved into the Historical Enquiries Team (HET) set up in 2005 and commencing work in 2006.

[132] The development of this specialist team was part of an evolving Package of Measures that the UK Government adopted and presented to the Committee of Ministers ("CM") designed to address the ECtHR's findings in the McKerr cases, which found a number of violations of the procedural obligation under Article 2 ECHR, and to prevent such failings from happening again.

[133] From the outset it was conceived that this package of measures would include mechanisms designed to address both individual grievances and systemic findings in the previous investigative mechanisms. This dual nature of the Package of Measures is confirmed by the HMIC report which describes the measures and the scrutiny of that package by the CM as follows:

"[The package of measures] included individual measures, designed to address the breaches that had been found in the McKerr case themselves, and general measures (A-K), which were designed to address systemic failings in the approach to investigating deaths arising out of 'the Troubles' and to prevent such failings from happening again."

[134] The UK Government adopted a number of measures to give effect to the judgments, including reforms to the inquest procedure and the establishment of bodies to carry out investigations, including the Police Ombudsman of NI and the HET. These were the processes established to provide the effective investigations which Article 2 ECHR requires (see para 3.3 of the JCHR 7th Report of Session 2014-2015). The CM closed its supervision of a number of implementation issues as a result of these measures and the information that was provided to it by the UK Government in relation to 'the work carried out by the [HET] including its objectives, processes and the rationale behind its establishment' (see 2007 Interim Report set out at para 17 above). From the outset the HET had the three main objectives summarised in the 2007 Interim Report from the CM as follows:

"1. To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to 'the Troubles' between 1968 and the signing of the Belfast Agreement in April 1998.

2. To re-examine all deaths attributable to 'the Troubles' and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;

3. To do so in a way that commands the confidence of the wider community."

[135] The 2007 Interim Report from the CM sets out in detail the information provided by the UK Government in relation to the work carried out by the HET including its objectives, processes and the rationale behind its establishment. They note at para 23 that the HET seeks to identify and address issues that are unresolved from the families' perspective and that "its primary aim is to address, as far as possible, all the unresolved concerns that families raise". They also record that "the HET is part of a process (which includes the Public Prosecution Service) aiming to achieve as Article 2 compliant an investigation as possible". In the context of the Glennane series of atrocities the principal unresolved concern of the families is to have identified and addressed the issues and questions as to the existence, nature, scope and extent of any collusion on the part of State actors including whether, as the Applicant contends, there is evidence of a State practice. Despite the passage of time including the 16 years since the judgment in *McKerr* in 2001 these concerns have still not been addressed. Indeed as I will shortly develop the package of measures has been dismantled by the decisions of the Chief Constable.

[136] Turning back to the 2007 Interim Report the CM were informed by the UK Government that the HET looks into cases on a chronological basis but that there are

exceptions to this approach which include “Linked series of cases: the HET will pursue the evidential opportunities presented by each case. If cases appear to be linked, then they will be considered together”.

[137] The CM was also informed by the UK Government that a HET review of a case is a step process involving the following stages: collection, assessment, review, focussed re-investigation and resolution. So focussed re-investigation forms part of the HET process. The HET processes are then described in detail at paras 28-31 which are set out above at para 17 of this judgment.

Cases where there are Allegations of Collusion

[138] The CM was informed by the UK Government that in cases where there are allegations of collusion, as here, it was specifically provided that these are (1) “handled by the HET’s White Team and Complex Inquiry Team”; (2) “... both of which are staffed by police officers outside Northern Ireland”; (3) “the teams will look for evidence of offences which might be characterised as collusion..”; (4) these specialised teams “will also examine any links which can be identified between cases...”. These types of cases are also referred to the Police Ombudsman, who will conduct a parallel investigation (see para 36 of the 2007 Interim Report); (5) “the whole process is underpinned by a developing analytical database which contains details relevant to each case and which can be used to identify both links between cases (intelligence or forensic/ballistic), gaps in intelligence or any other trends/evidential opportunities”.

[139] Careful review of the contemporary materials shows that there were always intended to be two main strands to the work of the HET which I will refer to as the Individual and the Collective strands.

[140] The Individual strand of the work involved interacting directly and personally with the families of each separate victim of the Troubles killed within the timescale covered by the HET remit (1968 - 1998). The purpose here was to “bring a measure of resolution” to those families and to “identify and address issues and questions that are unresolved from the families’ perspective ...”.

[141] The Collective strand of the work is reflected more in Objectives 2 and 3 of the HET. In these objectives the HET pledges to:

“re-examine [the] deaths ... and to ensure that ALL investigative and evidential opportunities are subject to a thorough, professional examination in a manner that satisfies the PSNI’s obligation of an ‘effective investigation’, in conformity with Article 2 of the PSNI Code of Ethics, as far as possible.”

[142] There is also an undertaking to:

“do so in a way that commands the confidence of the community” (objective 3)

[143] So, from its inception, the HET was conceived as a structure/mechanism that would first, perform a victim liaison role ideally with the active participation of victims’ families, but this would be offered even in cases where families chose not to co-operate. Secondly, there was an overriding/overarching element to the work of the HET. They were tasked to re-examine all Troubles linked deaths and they were committed to ensuring that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the PSNI obligation of an ‘effective investigation’ as outlined in Article 2, Code of Ethics for PSNI and to do so in a way that commands the confidence of the wider community.’

[144] The materials are less clear about how this collective function might be discharged. This is because in 2007 it was not clear where the evidence to facilitate the ‘collective’ aspect of the review might come from or what it might consist of. However, it was understood that effective discharge of the collective strand and discharge of the general duty to conduct these inquiries in a manner that commanded the confidence of the wider community required something more than the simple re-examination of individual past crimes.

[145] To reflect this understanding that something must be put in place to address the ‘collective’ or systemic aspects of the work in investigating State collusion it was originally agreed that an analytical team would be set up to gather the materials that might facilitate this work and that there would be a general commitment to undertaking this work which would underpin the entire mechanism and be a main pillar of the rationale for the existence of the entire mechanism.

[146] But it was clear that it was understood, even in 2007, to be cumulative and evolving in its nature. So as the re-examination of each death progressed the details of each case were to be stored in an evolving database referred to in para 31 of the 2007 Interim Report. This paragraph also describes the explanation given by the UK authorities to the CM to the effect that the whole process is underpinned by a developing analytical database which contains details relevant to each case and which can be used to (i) identify both links between cases (intelligence or forensic/ballistic), (ii) gaps in intelligence or (iii) any other trends/evidential opportunities.

[147] So in the original conception of the work of the HET it was always intended to develop a database to facilitate the cross-referencing of material and the quest for evidential links and patterns which might not appear from review of individual cases alone. The development of this element of the HET process was the UK’s proposal for addressing the systemic nature of some of the failings identified in the McKerr series. This was the mechanism the UK proposed and publicly adopted to facilitate the overarching examination of patterns and systems and links which by the nature

of things might well not emerge when cases are reviewed separately in individual boxes.

[148] The nature of this strand two collective element of the HET review is further elaborated in para 36 of the 2007 Interim Report, specifically in relation to cases where there are allegations of collusion. Para 36 summarises the UK's proposals in relation to delivering Article 2 compliant cases as follows:

“36. Cases in which there are allegations of State collusion are handled by the HET's White Team and Complex Inquiry Team, both of which are staffed by police officers from outside Northern Ireland. The teams will look for evidence of offences which might be characterised as 'collusion' The teams will also examine any links which can be identified between cases. These types of cases are also referred to the Police Ombudsman, who will conduct a parallel investigation. The HET will focus on investigating the incident itself while the Ombudsman looks at the conduct of police officers. Where there is sufficient evidence of offences, as with any HET case, this will be submitted to the Public Prosecution Service for consideration and a decision on prosecution.”

[149] This paragraph describes a system in which HET teams staffed by officers from outside Northern Ireland investigated the available materials specifically looking for evidence of 'collusion'. This investigation will “also examine any links which can be identified between cases” the discovery of which is likely to be facilitated by the “developing analytical database”. While the incidents of alleged collusion were to be re-examined by the HET in the way described, collusion cases were also to be referred to the Police Ombudsman whose remit was to conduct a parallel investigation focusing on the conduct of police officers but not the army or any other State agencies outside the PSNI.

[150] So the system proposed by the UK for dealing with potential 'collusion' cases involved two elements. First, there would be an investigation of each case conducted in-house by the HET's White Team and Complex Inquiry Team both of which were based in England and comprised investigators recruited from outside Northern Ireland and who had no prior link with the RUC and/or the PSNI. Those investigators were to conduct their enquiries with the specific purpose of “looking for evidence of offences which might be characterised as 'collusion'”.

[151] In addition to the in-house HET re-investigation of these cases they would also be referred to the Police Ombudsman who would conduct a parallel investigation focussed on the conduct of any police officers potentially linked to the offence.

[152] The original system therefore involved a specialised “collusion focussed” re-investigation conducted in-house by the HET teams in England as well as referral to the PONI who would specifically investigate potential police misconduct.

[153] Accordingly the system which the UK Government proposed to the CM as the mechanism for delivering Article 2 compliant investigations in cases in which there are allegations of State collusion had strong and clear elements of independence built into it.

[154] These elements include the creation of the “White Team” of investigators comprised of officers with no links to the RUC or PSNI and operating in a geographically removed sphere namely South East England.

Operational independence from the Chief Constable of NI

[155] The degree of operational independence enjoyed by the HET was described by Mr Cox to a sub-committee of the Barron Inquiry in the following terms:

“Operationally, we are an independent unit, I report directly to the Chief Constable and not to any other line of command in the PSNI. That is exactly the same process when I was working on an external inquiry, the Stevens inquiry, before I came to the Historical Enquiries Team. As the Chief Constable is the statutory authority for the investigation of crime in Northern Ireland, all external investigations must report to him in any event. We are no different in that way. That does not mean the Chief Constable has time on his hands to make operational decisions. It means I report to him in terms of accountability.

Through the Chief Constable I report to the Northern Ireland Policing Board. ... I am also accountable to the Northern Ireland Office. It wants to know what I am doing with its money ... There is the inspectorate function of Her Majesty’s Inspectorate of Constabulary which can inspect any area of policing and publish reports.”

[156] The funding of the work of the HET was also secured in a way which maximised its independence. Under the original funding arrangements the NIO made £34m available to establish the HET and fund its work. As the HMIC notes:

“... This was ring-fenced funding that was separate from the main police grant and which was initially apportioned over a six-year period until 2010/2011.”

[157] In summary, the package of measures proposed by the UK Government had the following key features. These were:

- Provision of teams of experienced investigators to re-examine all these cases. These teams included at least one which was especially tasked to be responsible for cases in which there are allegations of State collusion.

The key features of this team were that:

- It did not include any investigators who had previous links with the RUC or PSNI;
- It was based outside Northern Ireland and was entirely operationally independent from the PSNI;
- Also the funding of this team was separate and distinct from the general funding of the PSNI - another vital element in securing independence.

[158] On the understanding that the UK would now handle such cases by the mechanisms described in its package of measures, the CM closed its examination into the investigation of historical cases on 19th March 2009 “ **as the HET has the structure and capacities to finalise its work”.**

[159] In 2010 fundamental changes were made to the practices of the HET. Those changes are described in the HMIC report:

“Prior to 2010, it was general practice that the HET would review cases *and, if any evidential opportunities existed, investigate them*. This is consistent with the CM’s observation in 2007 that investigations would be conducted ‘in-house’. In 2010, there was a change in this regard.”

[160] According to HMIC the change occurred because of a recommendation by PONI that the PSNI should reinvestigate a series of serious crimes. The then Chief Constable, Hugh Orde, referred these cases to the HET which set up a complex Enquiries Team to deal with them. Complex Enquiry Teams are used within the White Team to investigate cases of alleged collusion.

[161] The HET set about investigating the new series of cases referred to it and made very significant progress in this regard which was a considerable drain on the HET’s resources.

[162] This apparently, was the reason why:

“a decision was made by the Chief Constable [Matt Baggot] to transfer the operation to the PSNI...” (my emphasis)

[163] In addition, the Chief Constable decided that all cases with potential evidential opportunities would be transferred to the PSNI for further investigation instead of being investigated “in house” by the HET (see para 17 HMIC Report).

[164] These two decisions begin the process of dismantling the UKs package of measures which the Committee of Ministers had “signed off” on 19th March 2009 “as the HET has the structure and capacities to finalise its work”.

[165] Another important change which occurred around this time was that:

“The Chief Constable met with the Performance Committee [of the Policing Board] on 18 September 2014 and informed Members that PSNI had implemented all the HMIC recommendations within their operational remit. He outlined that due to severe budgetary pressures, PSNI was considering drawing together its legacy operations under a single command, provisionally referred to as the ‘Legacy Branch’. This Branch would be fully integrated into the Crime Operations Department, accountable to the Chief Constable through the Assistant Chief Constable...”

[166] As already observed the CM examined the progress of the HET (along with the other measures) from its inception until 2009. The CM closed its examination on the basis of the understanding that: “the HET has the structure and capacities to finalise its work”.

[167] The “structure and capacities” referred to were those in place in March 2009. The core elements of that structure were:

- Institutional independence of the HET from the PSNI secured by the organisational and geographical separation of the “White Team” and the Complex Inquiry Team from the PSNI and the absence of any chain of command linking the two organisations other than the formal requirement that the Head of the HET report to the Chief Constable of the PSNI which was a mere ‘reporting’ function and not a mechanism for receiving direction from the PSNI.
- Operational independence of the HET from the PSNI secured by careful avoidance of any overlap of personnel ie the requirement that the operations

based in England were to be staffed exclusively by officers recruited from outside Northern Ireland and who had no previous links with the RUC and/or the PSNI.

- Separate ring-fenced funding of the HET in the form of £34m allocated to it by the NIO which was not part of the general police budget.
- The Article 2 compliant 'structure and capacities' also included an agreed 'rationale and objectives' for the HET which were:
 - To assist in 'bringing a measure of resolution' to those families affected by deaths attributable to the security situation in Northern Ireland between the years 1968 to 1998;
 - To re-examine all deaths in this respect and to ensure that all investigative and evidential opportunities are subject to a thorough, professional examination in a manner that satisfies the PSNI's obligations of an 'effective investigation' in conformity with Article 2 of the PSNI Code of Ethics, as far as possible; and
 - To do so in a way that commands the confidence of the wider community.

[168] This reflects the understanding between the UK Government and the CM that the purpose of the HET involved three interlinked strands:

“(i) The individual strand;

(ii) The collective strand involving the active pursuit of investigative and evidential opportunities arising from an overview of linkages and connections between the individual cases. It was also understood that in 2009 it was not yet possible to envisage what the linkages and connections between the cases might be but there was at least an agreement about the mechanism that would be put in place and used to unearth whatever such material might be. The agreed mechanism was described in para 31 of the 2007 Interim Report as follows:

'31. This whole process is underpinned by a developing analytical database which contains details relevant to each case and which can be used to identify both links between cases (intelligence or forensic/ballistic), gaps in intelligence or any other trends/evidential opportunities.'

(iii) The public confidence strand which required that all the work of the HET in each strand should be conducted in a manner capable of commanding the confidence of the wider community.”

[169] These were the elements of the Article 2 compliant mechanism agreed between the UK Government and the CM in 2009:

- Institutional independence from the PSNI ;
- Operational independence secured by separate personnel and separate and sufficient ring-fenced funding for the HET operation;
- An agreed and sufficiently wide rationale and set of objectives for the HET which facilitated effective review of all three strands of interest identified within the objectives;
- Adequate supportive infrastructure in the form of “a developing analytical database” identified to facilitate achievement of strand 2, the collective element of the review.

[170] These were the minimum necessary elements recognised in 2009 as being required to address cases, such as the present, where there are allegations of collusion. It is in fact incontrovertible that collusion has already been established in a number of the linked Glennane cases. For example in the course of these proceedings the PSNI produced a draft report entitled “South Border Security Situation” which states that “associated with many of the deaths are allegations of collusion, in that they were caused by loyalist terrorists, who included amongst their numbers serving police officers and soldiers of the British Army. A number of security force personnel were convicted of involvement of some of the deaths; and that there was collusion in those cases is indisputable”. There is no reason in principle that I can discern which would justify the dilution of the minimum necessary elements identified by the UK Government and which led the CM in 2009 to conclude its examination “as the HET has the structures and capacity to finalise its work”.

What changed in 2010?

[171] In 2010 the workload of the HET was increased significantly by the referral to it of a series of serious crimes which the PONI had recommended for re-investigation.

[172] When it received this referral the HET set up a Complex Inquiry Team to deal with this series - an indication that this set of cases gave rise to concerns about collusion and applied significant resources to re-investigating these crimes. The

series was originally called “Operation Ballast” but was later renamed “Operation Stafford”.

[173] Eventually, according to a report made by the officer in charge of Operation Stafford to the HMIC, the HET was unable to properly resource these investigations alongside its other work and this, apparently, was the catalyst for a decision by the new Chief Constable (Matt Baggott) to transfer this investigation back to the PSNI. The Chief Constable further decided “that all cases with potential evidential opportunities would be transferred to the PSNI for further investigation instead of being investigated “in-house” by the HET”. These are the first of a series of decisions which give rise to the present proceedings.

[174] The second element of this series of decisions was communicated to the Policing Board by the Chief Constable in the manner described above. This was his intention to draw together all the legacy operations of the PSNI (including those previously conducted independently in England) under one single command provisionally known as the “Legacy Branch”.

[175] This Branch would be fully integrated into the Crime Operations Department accountable to the Chief Constable through the Assistant Chief Constable” (see para 21 of HMIC report).

[176] Although this intention was communicated to the Policing Board in September 2014 the PSNI had in fact already adopted “new terms of reference for the Historical Enquiries Team re the in-house PSNI team now known as the Legacy Investigations Branch (LIB)”.

[177] These new terms set out the purpose and role of the new structure. These are set out as follows in the HMIC report which states:

“2.13 We set out its term of reference in full below:

...

Our Role

- To refer to [the Office of the Police Ombudsman for Northern Ireland] any matter arising from our work which raises a concern of possible police criminality or serious misconduct

...

What we cannot do

...

- We cannot undertake wide ranging reviews into the broader context of ‘The Troubles’ in Northern Ireland.”

[178] It is clear from these re-drafted terms of reference that the new internal LIB section of the PSNI was specifically prohibited from undertaking the wide ranging/overarching thematic investigation in cases of alleged State collusion that HET had been committed to, from any active *investigation* of linkages between individual historical crimes and from the active pursuit of new evidential leads/‘missed’ opportunities for investigation which might have arisen due to the compartmentalisation of the earlier investigations into individual crimes which might form part of a linked series.

[179] The LIB is further limiting itself strictly to a “review role” and is expressly excluding any element of investigation from its work. This is most clearly reflected in the adoption of the new name changes set out at para 2.16 of the same document which I have earlier set out.

[180] In terms of investigation of concerns about possible historic police criminality or serious misconduct the new terms of reference confine the LIB to a simple referral role:

“Our role’ in this regard is defined as ‘To refer to the PONI any matter arising from our work which raises [such a] concern (para 2.13).”

[181] This differs significantly from the role and objectives of the HET which were originally approved by the CM in 2009. The CM’s Interim Report of 2007 does set out a vital investigative role for the HET. The Interim Report of 2007 records the following information given by the UK Government in relation to the HET:

‘The PSNI ... has established a new unit of the SCRT, that is dedicated to re-examining all deaths attributable to the security situation in Northern Ireland between 1968 and the Good Friday Agreement in 1998 (‘the Troubles’). This Historical Enquiries Team (HET) has been designed to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist. The HET is operationally independent and reports

directly from its Head of Branch to the Chief Constable.

The review process is designed to be exhaustive, and includes a re-examination of all documentation, any exhibits associated with the case and any intelligence on the case (both internal, partner agencies and open source). The intention is to take advantage of any developments in forensic science (eg fingerprint technology, DNA possibilities) to identify any evidential opportunities arising from witnesses (either people never seen or where the passage of time allows for changed loyalties etc), and to exploit any potential opportunities from intelligence that may have arisen since or which were not used at the time.

If evidential opportunities are identified during the review process by the HET, the investigation of the death will proceed and where there is credible evidence available reports will be forwarded to the Public Prosecution Services with a view to prosecution. The investigation process will be undertaken 'in-house' by the HET, and will be focused on the evidential opportunities that the review process identifies.' ...".

[182] Thus the investigative role of the HET as originally conceived was to focus on actively investigating the possibility that evidential opportunities might have been 'missed' in the original compartmentalised investigations of individual crimes.

[183] It was clear that this vital investigative role "would be undertaken in-house by the HET".

[184] And also clear that if evidential opportunities were identified in the course of these operations then "available reports will be forwarded to the PPS with a view to prosecution".

[185] In the 2008 Interim Resolution of the CM it states:

'[t]he Secretariat recalls that the HET does not carry out Article 2 compliant investigations in historical cases. The HET will not only view existing evidence but will also examine the potential of gathering new evidence either from lines of enquiry, missed opportunities or from turning information/intelligence into evidence. If sufficient evidence is found and can realistically be pursued, the HET will forward files to the Public Prosecution Service.'

[186] Thus in the original package of measures the HET's role was to actively investigate the possibility of linkages/new evidential leads arising from its re-examination of individual and linked historic cases and if any such link was uncovered by its own in-house investigations of that aspect, then the files were to be forwarded to the PPS and/or the Police Ombudsman.

[187] The new terms of reference agreed for the LIB specifically eschew the role of active investigation of potential evidential leads arising out of reviews of linked cases.

[188] The other change to the operation of the HET which underlies the present case is the decision, contrary to what the families and others had been unequivocally told, **not** to prepare an overriding thematic report into cases referred to as the "Glenanne Gang linked cases".

[189] This decision was communicated to the Applicant's representative by Assistant Chief Constable J A Harris in a letter dated 12 June 2014 in the following terms:

"The preparation of an overarching report would not provide any evidential opportunities not currently being considered during the Review process. The HET does not intend to prepare an overarching thematic report into those cases referred to as the 'Glenanne Gang linked cases'. To prepare such a report would divert HET resources from their central role of conducting a review and preparing a report for families specific to the death of their loved one".

[190] The changes in the structure and process introduced after 2009 makes it clear that the structure and process now in place lacks most, if not all, of the essential safeguards which the UK Government agreed with the CM to put in place for future investigations of cases of this nature in order to comply with the decisions of the ECtHR in the McKerr series of cases. These changes came about apparently as a result of the decisions of the Chief Constable and Assistant Chief Constable.

[191] The ability of the LIB to continue the work of the HET is undermined by the fact that it has (i) less resources, (ii) significantly reduced scope and (iii) is not independent in the manner required by Article 2 and the package of measures. The LIB structure/procedure lacks:

- Structural independence – it is inextricably linked with the PSNI. The teams investigating historical cases include personnel who have/may have previous links with the RUC and/or the PSNI;
- It lacks operational independence as it is subject to the direct control of the Chief Constable via the Assistant Chief Constable;
- The lack of operational independence is further underlined by the removal of independent funding for legacy work which is ring-fenced and not part of the general policing grant for Northern Ireland;
- It lacks functional reach because of the changes to the objectives of which are such as to specifically exclude the possibility of active investigation of past cases with a focus on seeking out potential evidential materials/missed investigative opportunities arising from, inter alia, the compartmentalisation of investigations in linked cases;
- In many cases, such as the present one, it will lack meaningful output because the enquiries of LIB are specifically limited to reiterating material that the family already knows about the death of Patrick.

[192] The Chief Constable and the PSNI have their own obligations to deliver policing which complies the ECHR and with the previous rulings of the ECtHR. I agree with the Policing Board Working Group that the PSNI (i) must discharge its legal obligations and (ii) may not defer or delay the discharge of those obligations; (iii) that any process which is confined to reviewing unsolved deaths without more will not in itself comply with Article 2; and (iv) that it “.. is abundantly clear that any process must not operate so as to violate Article 2 and undermine the package of measures”.. It is clear to this court that the changes introduced by the Chief Constable are fundamentally inconsistent with Article 2 and the package of measures.

[193] The elements of the system and processes required to deliver Article 2 compliant investigations of the legacy cases in the very sensitive conditions of today’s Northern Ireland have been clearly and painstakingly established during the lengthy process of supervision of the Package of Measures by the CM.

The system which currently exists does not contain the required minimum elements

[194] The HMIC, itself an agency of the UK Government, recognises the requirements itself:

“4.22 As we have said, if an investigation is to comply with Article 2 of the European Convention on Human Rights, those who are responsible for both overseeing and carrying it out, must be independent of those implicated in the events. This means that there must be not only an absence of hierarchical or institutional connection, but also practical independence.”

[195] It subsequently recognises that the current LIB branch of the PSNI cannot comply with even this basic aspect of compliance.

The decision not to complete an overarching report

[196] The Applicant argues that the decision not to complete an overarching thematic report is a breach of Article 2 ECHR because:

“(a) The failure/refusal to produce an overarching thematic report amounts to a failure/refusal to consider and investigate the extent to which the murders and activities of the Glenanne Gang could be considered to be part of a ‘State practice’.

(b) The HET, as a significant part of the State mechanism for compliance with the requirements of Article 2, has failed to conduct an effective, independent investigation into the murder of Patrick Barnard which requires a wider examination [including completion and publication of the said overarching thematic report] in all the circumstances.

(c) The failure/refusal is compounded by the lack of opportunity to investigate the said ‘State practice’ under the present system of investigating ‘legacy cases’ (and in the absence of an alternative investigative framework).”

What was the function of the HET?

[197] The details of the establishment of the HET are discussed in detail above. The following facts/statements are of particular relevance to where the HET stood in relation to the State’s discharge of its Article 2 obligations:

(a) The HET provided a *'family centred'* approach. It sought to *'identify and address issues and questions that are unresolved from the families' perspective'* [CM summary of the information provided by the UK in relation to the work of the HET in its 2007 Interim Report – paragraph 23].

(b) *'The HET is part of a process... aiming to achieve as Article 2 compliant an investigation as possible....'* [CM summary of the information provided by the UK in relation to the work of the HET in its 2007 Interim Report – paragraph 23].

(c) Where the HET considered cases to be linked, it undertook to consider those cases together. [CM summary of the information provided by the UK in relation to the work of the HET in its 2007 Interim Report – paragraph 27].

(d) The HET considered that links between cases and gaps in intelligence were, in themselves *'evidential opportunities'* – *'The whole process is underpinned by a developing analytical database which considers details relevant to each case and which can be used to identify both links between cases (intelligence or forensic/ballistics), gaps in intelligence or any other trends/evidential opportunities'* [CM summary of the information provided by the UK in relation to the work of the HET in its 2007 Interim Report – paragraph 31].

(e) The HET undertook to complete reviews of cases *'regardless of whether or not there is family involvement'* [CM summary of the information provided by the UK in relation to the work of the HET in its 2007 Interim Report – paragraph 32].

(f) The HET established the White Team specifically to deal with cases in which collusion was alleged: *'Cases in which there are allegations of State collusion are handled by the HET's White Team and Complex Inquiry Team, both of which are staffed by police officers from outside Northern Ireland. The teams will look for evidence of offences which might be characterised as 'collusion'... The teams will also examine any links which can be identified between cases'* [CM summary of the

information provided by the UK in relation to the work of the HET in its 2007 Interim Report – paragraph 36].

(g) The HET initially undertook to investigate evidential opportunities in-house [CM summary of the information provided by the UK in relation to the work of the HET in its 2007 Interim Report].

(h) The HET realised that its original two team structure was **not** sufficient to deal with cases in which there was an allegation of collusion: *‘collusion is one part of the linked series... The HET is an evolutionary concept and we are looking at how we can take these cases forward. They do not fit the structure I outlined very well because its assessment and review phases are pitched at looking at whether there are individual evidential opportunities rather than whether this is a case of State involvement’* [David Cox, Director of HET, speaking to the Republic of Ireland’s Joint Committee on Justice, Equality, Defence and Women’s Rights Sub-committee on the Barron Report in November 2006]. That is, the HET accepted that individual reviews were not intended to, and not capable of, assessing evidential opportunities in relation to the existence or otherwise of collusion. Later Mr Cox said *‘The investigative process is different in cases of collusion’*.

(i) The HET accepted that *‘a report as opposed to an individual case finding’* would be provided *‘where we examine wider issues that touch on the involvement of other agencies of the State’*. [David Cox, Director of HET, speaking to the Republic of Ireland’s Joint Committee on Justice, Equality, Defence and Women’s Rights Sub-committee on the Barron Report in November 2006].

(j) The HET accepted that collusion issues fell within its remit because *‘We are ultimately a victim-centred operation – we work closely with the families. It is about trying to answer their questions. Obviously, if collusion is the big question, then we will front it up and try to find the answers for them.’*

[198] It must be recalled that the objectives of the HET were:

(a) To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to 'the Troubles' between 1968 and the signing of the Belfast Agreement in April 1998;

(b) To re-examine all deaths attributable to 'the Troubles' and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;

(c) To do so in a way that commands the confidence of the wider community.

[199] The package of measures, including the HET, were implemented in order to address the Article 2 breaches which were identified in the McKerr series of cases. Their compliance with Article 2 was signed off on by the CM on the basis of information submitted by the UK Government. That information included that the HET a) had an investigatory function, b) would investigate linked cases together and that c) where collusion was alleged the investigation would be undertaken by non-RUC/PSNI investigators based in the UK. Further where, as here, the HET was examining wider issues that touch on the involvement of other agencies of the State a **report** as opposed to an individual case finding (ie. RSR) **would** be provided. In 2010, one year after the CM signed off on the HET, the role and function of the HET changed significantly in that it no longer had an investigatory function. At some stage it also resiled from its commitment to investigate linked cases together (at least in the manner clearly envisaged in the various documents set out above) and it appears that the White Team never completed its work, at least in respect of the Glenanne series. It never produced its report into the wider issues and the Assistant Chief Constable has now ordered that it will not do so.

[200] The HET considered 89 cases to be part of the Glenanne series. In at least three of these cases it reported in its RSRs that there was direct evidence of collusion. The remaining cases were 'linked' by suspects, ballistics or intelligence. Therefore, because of the work done and the reports made by the HET, there is a credible suspicion of collusion in respect of the remaining cases and a revived article 2 duty arises.

[201] The HET repeatedly acknowledged that its work in respect of Glenanne series cases was not complete and that the Overarching Thematic Report was a key process by which it may be possible to unearth evidential opportunities that were not capable of discovery by looking at cases in isolation.

[202] Given that an article 2 duty arose in respect of Patrick Barnard (and all other victims in the Glenanne series) there was a requirement on the State to carry out an

effective investigation into his death which required thorough examination of the wider and unresolved issue of State involvement. The duty of the HET in that context included seeking out credible evidential opportunities which would form the basis of such an effective investigation. In relation to Patrick Barnard (and the others) the HET recognised that its regular, non-White Team practice was **insufficient** to find evidential opportunities in collusion cases and put in place the analysis driven White Team to parse the evidence arising from a joined-up consideration of linked cases to meet its remit. The Chief Constable in halting that process which had been openly promised and which was acknowledged to be essential to the HET's purpose has defeated the legitimate expectations of the families and others and turned his back on the potentially rich source of evidential opportunities into the wider issues of State collusion which the HET recognised their processes, as described to the CM and the ROI sub-committee on the Barron Report, might uncover. This decision frustrates any possibility of an effective investigation to examine the wider issues of state involvement which could fulfil the Article 2 duty which now arises and has foreclosed any possibility that the Article 2 duty will be fulfilled.

Legitimate Expectation/Article 2

[203] The HET made repeated representations to the families of the Hillcrest victims and to the PFC to the effect that the Glenanne series would be separately analysed and that a **report** would be completed. The HET made these representations in the full knowledge that the Applicant was engaging with the PFC. The UK Government made representations to the CM wherein it indicated that the White Team would investigate allegations of collusion in linked cases and would identify links. It represented that reviews of cases would take place regardless of whether or not there was family involvement. The HET made representations to the Republic of Ireland's Joint Committee that individual reviews were not sufficient to identify evidence of collusion and instead that those issues would be specially analysed by the White Team that would then issue a **report**.

[204] In Re Loreto [2012] NICA 1 Girvan LJ said:

[42] Whatever undesirable uncertainties may exist in the law of substantive legitimate expectation, it is clear from the authorities that a legitimate expectation can only arise where there has been, in Bingham LJ's succinct terminology, a "clear and unambiguous representation devoid of relevant qualifications" as to the decision maker's future conduct (see for example Attorney General for Hong Kong v Nvunyen Shieu [1983] 2 WLR 735...) A legitimate expectation may arise from an express promise given by or on behalf of a public authority or it may arise from the existence of a clear and regular practice which a claimant can reasonably expect to continue.... It has been stated...

that “only the clearest of assurances can give rise to a legitimate expectation”... The promise of representation must come close to the character of a contract... In R(Niazi) SoS v The Home Secretary Laws LJ held that the court must be able to find that the public authority has “distinctly promised” for such a legitimate expectation to arise.’

[205] In the instant case, there were clear and repeated promises to families of the Hillcrest victims through the RSRs, through the meetings with the PFC, through the information provided to the CM and through the comments made by David Cox to the Republic of Ireland’s Joint Committee on the Barron report to provide an overarching **report**. I therefore find that there was a relevant representation.

[206] It remains to be decided then, whether the change of policy of the Respondent amounted to an abuse of power. Lord Justice Laws said the following about the concept of an abuse of power in the *Begbie* case:

“The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the Court’s supervision. More than this, in that field, true abuse of power is less likely to be found, since within it changes of policy fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy.

83. The present case does not lie in the macro-political field. It concerns a relatively small, certainly identifiable number of persons.”

[207] Here, as in the Begbie case, the policy concerns a small and identifiable number of persons.

[208] In Rashid [2005] EWCA Civ 744 the Court of Appeal said the following about the concept of abuse of power:

“The nature of a decision will, therefore, always be relevant to the question whether the frustration of an expectation is an abuse of power. The court will not only have regard to whether wide-ranging issues of policy are involved, but also whether holding the public body to its promise or policy has only limited temporal effect and whether the decision has implications for a large class of persons. The degree of

unfairness is also material. That is why in *R v Inland Revenue Commissioners ex parte Unilever* [1996] STC 681 Simon Brown LK referred to “conspicuous unfairness”, amounting to an abuse of power. The more extreme the unfairness, the more likely it is to be characterised as an abuse of power.”

Conclusion

[209] The unfairness here is extreme – where the Applicant had believed that the murder of his brother would finally be considered in context for the purposes of discovering if there was any evidence of collusion in the murder, that process is now completed and will not be taken up by any other body. The frustration of the HET commitment communicated by the ACC completely undermined the “...primary aim [of the HET] to address as far as possible, all the unresolved concerns that families have”. It has completely undermined the confidence of the families whose concerns are not only still unresolved but compounded by the effects of the decisions taken by the then Chief Constable. It is a matter of very grave concern that almost two decades after the McKerr series of judgments decisions were taken apparently by the Chief Constable to dismantle and abandon the principles adopted and put forward to the CM to achieve Article 2 compliance. There is a real risk that this will fuel in the minds of the families the fear that the State has resiled from its public commitments because it is not genuinely committed to addressing the unresolved concerns that the families have of State involvement. In the context of the Glennane series, as I said earlier, the principal unresolved concern of the families is to have identified and addressed the issues and questions regarding the nature, scope and extent of any collusion on the part of State actors in this series of atrocities including whether they could be regarded, as the Applicant argued, as part of a ‘State practice’. I consider that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgments in the McKerr series and with the package of measures.

[210] I will allow the parties time to consider the judgment and to try and agree the appropriate form of relief.

GLOSSARY

ACC	<i>Assistant Chief Constable</i>
CM	<i>Committee of Ministers</i>
ECHR	<i>European Court of Human Rights</i>
HET	<i>Historical Enquiries Team</i>
HMIC	<i>Her Majesty’s Inspectorate of Constabulary</i>
JCHR	<i>Joint Committee on Human Rights</i>
LIB	<i>Legacy Investigations Branch</i>
NIO	<i>Northern Ireland Office</i>
PFC	<i>Pat Finucane Centre</i>

PSNI *Police Service of Northern Ireland*
RSR *Review Summary Report*
RUC *Royal Ulster Constabulary*
SCRT *Serious Crimes Review Team*
SIO *Senior Investigating Officer*
UK *United Kingdom*
UVF *Ulster Volunteer Force*