

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

FOURTH SECTION

DECISION

Application no. 28864/18
Sally GRIBBEN
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 25 January 2022 as a Chamber composed of:

Yonko Grozev, *President,*
Tim Eicke,
Faris Vehabović,
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Ana Maria Guerra Martins, *judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to the above application lodged on 7 June 2018,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having regard to the comments submitted by the Northern Ireland Human Rights Commission,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Sally Gribben, is an Irish national, who was born in 1961 and lives in Dungannon. She is represented before the Court by Mr F. Shiels of Madden & Finucane Solicitors, a law firm based in Belfast.

2. The Government of the United Kingdom ("the Government") are represented by their Agent, Mr J. Gaughan of the Foreign, Commonwealth & Development Office.

3. The Northern Ireland Human Rights Commission has been granted permission to intervene as a third party. The Government of Ireland did not seek to exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court).

A. The circumstances of the case

4. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The shootings

5. On 9 October 1990 the applicant's brother, Martin McCaughey, and Desmond Grew were shot and killed by soldiers from a specialist unit of the British Army who were providing support to the Northern Ireland police force (then the Royal Ulster Constabulary, or "RUC"). The soldiers had been carrying out a night-time surveillance operation near a mushroom shed at a farm complex. At around midnight Mr McCaughey and Mr Grew appeared outside the shed armed with AK47 rifles and wearing gloves and balaclavas. The Irish Republican Army subsequently stated publicly that the deceased were IRA volunteers on active service at the time.

6. Nine soldiers were involved directly in the operation. Soldiers A, B, C and D were located in the field and all four fired at the deceased. They fired a total of seventy-two shots. Most of the shots were fired over the course of approximately ten to fifteen seconds, although there was evidence that two to three shots were fired at Mr Grew and possibly also Mr McCaughey at closer range. According to soldier D, when he opened the door of the mushroom shed he thought he heard Mr Grew gasp and saw him move, and fired a further two shots to eliminate the danger. No shots were fired by the deceased. Soldiers E and F were nearby and did not fire any shots. Soldiers G and I were providing mobile support and only arrived at the scene after the shooting. Soldier H, who was in charge of the operation, was located in the headquarters of the RUC Tasking and Coordination Group and was in radio contact with soldier A.

7. The autopsy of Martin McCaughey described the cause of death as "laceration of the brain due to bullet wounds to the head", noting that he had been struck by approximately ten high-velocity bullets in all. The autopsy of Desmond Grew described the cause of death as "multiple injuries due to multiple high-velocity bullet wounds of trunk and limbs", noting that there were approximately forty-eight wounds made by bullets entering and exiting his body.

8. These shootings were two of several which took place around the same time and which fuelled allegations that the security forces had a "shoot to kill" policy in Northern Ireland.

2. The police investigation and decision not to prosecute (1991-1993)

9. The RUC initially conducted an investigation into the deaths and interviewed the soldiers involved.

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

11. On 25 July 2011 the Acting Deputy DPP provided the following reasons for the 1993 decision not to prosecute:

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

3. The commencement of the inquest proceedings and the first judgment of this Court

12. Steps to hold an inquest began in 1994 and the inquest opened on 12 March 2012. The events which occurred between 1994 and the commencement of the inquest are set out in detail in *McCaughey and Others v. the United Kingdom* (no. 43098/09, §§ 12-63, ECHR 2013).

13. On 29 July 2009 an application was lodged with the Court by the mother of Martin McCaughey and the father and daughter of Desmond Grew. They made a number of complaints under the substantive and procedural aspects of Articles 2 and 13 of the Convention.

14. While that application was pending before the Court, the Supreme Court held that an inquest should comply with Article 2 of the Convention even if the death occurred before the Human Rights Act 1998 came into force in 2000 (see *In the matter of an application by Brigid McCaughey and another for Judicial Review* [2011] UKSC 20). Following that decision the Coroner confirmed that the inquest would be conducted as an Article 2 inquest and that matters of planning and control would form part of its scope.

15. In *McCaughey and Others* (cited above), which was delivered on 16 July 2013, the Court held that there had been a violation of the procedural requirements of Article 2 of the Convention by reason of excessive investigative delay. However, it found the complaints under Article 2 of the Convention which did not concern investigative delay to be inadmissible as being premature and/or on the ground that domestic remedies had not yet been exhausted within the meaning of Article 35 § 1. Although the inquest had by that time concluded, the applicant had made a number of judicial review applications (see below) through which the courts would have the opportunity to review key aspects of the inquest against the procedural

guarantees of Article 2. Therefore, pending the outcome of the domestic proceedings, the Court considered that it could not examine whether the inquest had been deprived, by prior investigative shortcomings or delay, of its ability to establish the facts and determine the lawfulness or otherwise of the deaths in question. It acknowledged that in the case of *Hugh Jordan v. the United Kingdom* (no. 24746/94, 4 May 2001) the Court had identified certain procedural deficiencies before the inquest had even taken place; however, pursuant to the 2011 judgment of the Supreme Court (see paragraph 14 above), the inquest in the present case had to comply with the procedural requirements of Article 2 (see *McCaughey and Others*, cited above, §§ 40 and 83).

16. The Court went on (ibid., § 128) to state that

> "should the applicants be dissatisfied in the future with the progress or outcome of those domestic procedures, it would be open to them to reintroduce these complaints under the substantive and procedural aspects of Article 2 of the Convention."

4. Events leading up to the opening of the inquest

17. In October 2011 solicitors for the next of kin raised concerns with the Coroner that the soldiers involved in the shooting of Mr McCaughey and Mr Grew had been involved in other fatal shootings. In doing so, they referred to the allegation that this was a "shoot to kill" incident. Further statements prepared by soldiers A, B, C, D, E, G and I were disclosed to the next of kin in or around February 2012. In his statement soldier A referred to an incident involving a Mr B., in which he had opened fire, and a further incident involving a Mr M., in which he had not personally opened fire. Soldiers C, D and G also disclosed that they had each been involved in another incident, but did not disclose whether they had fired in those incidents and did not provide any further details. Soldiers E and I were silent about their involvement in other incidents.

5. Preliminary hearing on disclosure

18. The next of kin and the Ministry of Defence made written submissions to the Coroner in advance of a preliminary hearing which took place on 1 March 2012. The next of kin argued that they were entitled to disclosure of information regarding the involvement of the military witnesses in other incidents in which lethal force was used. They considered this material to be relevant to the justification advanced by the soldiers for the recourse to lethal force. Moreover, the existence either of a "shoot to kill" policy or an environment in which soldiers were implicitly encouraged or permitted to have recourse to lethal force was relevant to the question of whether the operation had been planned and controlled so as to minimise recourse to lethal force. In their view, the refusal to disclose details of other such incidents denied them the right to participate meaningfully in the inquest and prevented

the jury from subjecting the soldiers' conduct to appropriate scrutiny. However, the Ministry of Defence contended that the other incidents were irrelevant to the issues to be determined in the inquest and their inclusion would broaden its scope and cause considerable delay.

19. At the hearing, the Coroner was not persuaded that he could assess the relevance of the other incidents in the abstract. He therefore required details of the incidents to be produced to him. Having carefully considered this material and the submissions of the parties, and having subjected the personnel files of every soldier scheduled to give evidence to careful scrutiny, he concluded, in a ruling given on 8 March 2012, that there was one incident involving soldier A (concerning the death of Mr B.) that was potentially relevant to the issues to be determined in the inquest because the circumstances were not dissimilar to those which arose in the present case. He therefore directed that the statement made by soldier A at the inquest into the death of Mr B. and the findings of that inquest should be disclosed to the next of kin. He further stated that prior to the evidence of soldier A he would hear further submissions on whether evidence relating to the other incident was relevant and if so whether the material should properly be introduced at the hearing or whether it should be excluded.

20. As for the remainder of the material, he concluded:

> "It can confidently be stated that no reasonable avenue of inquiry about those witnesses that might yield material relevant to the issues at this inquest has been left unexplored."

21. Nonetheless, he indicated that he would revisit and revaluate the evidence should evidence given during the inquest cast material previously deemed irrelevant in a new light.

6. An application for leave to apply for judicial review by Brigid McCaughey *[2012] NIQB 20*

22. The next of kin sought further information about the incident involving Mr M. and the incidents involving soldiers C, D and G; and statements from soldiers B, E and I, who had thus far remained silent (see paragraph 17 above). The next of kin of Mr McCaughey therefore sought leave to apply for Judicial Review of the Coroner's decision of 8 March 2012 (see paragraph 19 above).

23. The High Court refused the application on 12 March 2012. The judge would have been minded to grant leave in relation to soldiers B, E and I and soldiers C, D and G, had the inquest not already commenced. However, after years of waiting he considered it to be inappropriate that there should be Judicial Review proceedings that might interfere with the inquest's conduct and progress.

7. Ruling on the questioning of soldier A

24. During the inquest, which opened on 12 March 2012, eight of the nine soldiers directly involved in the operation gave evidence. Only soldier B did not attend, and the statement he gave to the RUC in 1990 was read to the jury. Evidence was also heard at the inquest from soldier J about the training of the soldiers in the unit, including firearms training and training on the rules of engagement, and from soldier K, who was the officer commanding the specialist soldiers. Soldier K gave evidence in relation to the concept of military operations and the planning and control of operations involving the use of lethal force.

25. Soldier A arrived in Belfast on 22 March 2012 and gave evidence at the inquest from 26 to 28 March 2012.

26. Counsel for the next of kin wished to question soldier A about the deaths of Mr B. and Mr M. In a ruling dated 23 March 2012 the Coroner held that soldier A's involvement in the death of Mr B. was potentially relevant to the incident on 9 October 1990. However, the inquest papers relating to that death did not include any express or implied criticism of soldier A's conduct. In addition, a new inquest had since been ordered into that death leaving the findings of the earlier inquest in limbo. As such, the Coroner considered that there would be a very real danger of unfairness if questions were put to Soldier A regarding his involvement in a contentious and unsettled death. He also noted the risk that the jury might overestimate the significance of a previous, similar incident. He continued:

> "I have no jurisdiction to conduct a general inquiry into SAS [the specialist unit of the British army] deaths in Northern Ireland. I consider that to admit references to [Mr B.'s] death would have substantial potential to both distract and dilute attention from consideration of the central issues to be addressed by the jury in these inquests."

27. The Coroner therefore refused to admit the evidence of soldier A concerning the death of Mr B.

28. The Coroner further concluded that the death of Mr M. was not a relevant previous lethal force incident for the purpose of the present inquest. Accordingly the Coroner ruled that soldier A would not be examined about it and the reference to the incident in soldier A's statement would be deleted.

8. An application for leave to apply for Judicial Review by Brigid McCaughey (No. 2) *[2012] NIQB 22*

29. The next of kin of Martin McCaughey applied to the High Court for a declaration that evidence from soldier A concerning his involvement in the operations that led to the deaths of Mr B. and Mr M. was admissible at the inquest. The grounding affidavit stated that a significant number of controversial deaths had occurred as a result of SAS operations in Northern Ireland, giving rise to allegations of a "shoot to kill" policy, defined by the applicant either as an institutional policy within the army to kill those who

might otherwise have been arrested; as the operation by individual soldiers of an approach to their task that promoted an outcome that resulted in unnecessary deaths; or the training of soldiers engaged in operations so as to promote an outcome that resulted in unnecessary deaths.

30. In a judgment dated 28 March 2012, the High Court held that the question of whether the deaths of Mr McCaughey and Mr Grew were brought about by a "shoot to kill" policy was a central issue in the inquest, and the Mr B. incident was potentially relevant to a proper inquiry into whether or not such a policy existed. However, it considered that the Coroner had been right to reject the evidence concerning the Mr M. incident as it did not go to the essence or the substance of the present inquest (see paragraph 28 above).

9. Subsequent attempts to secure soldier A's reattendance

31. Although soldier A lived and worked in the Middle East, having since retired from the Armed Forces, the Ministry of Defence had previously informed the Coroner that he would be available for the duration of the week commencing 26 March 2012. However, it appears that soldier A left Northern Ireland on 28 March 2012, the same day the High Court gave its ruling (see paragraph 30 above). The Coroner was informed of this on 29 March when he sought to recall soldier A in light of that ruling. The Ministry of Defence indicated that while soldier A would not be available the following week, he might be available the week commencing 9 April 2012. However, that week followed the Easter weekend, meaning that the first possible sitting would be on Wednesday 11 April.

32. On 6 April 2012 the Coroner directed that soldier A make himself available in person to the inquest on 11 April 2012 and on subsequent days as deemed necessary by the court.

33. On 10 April soldier A notified the Coroner through an English firm of solicitors that, while he did not object to giving further evidence, he would not be in a position to attend the inquest the following day. He had travelled to Northern Ireland to give evidence to the inquest and returned to the Middle East shortly thereafter. He had come back to the United Kingdom on 6 April but was due to leave on a family holiday on 11 April after which he was to return to the Middle East. He further indicated that he had only learned that he had been directed to return to give evidence on 7 April, and only had the opportunity to seek legal advice on 10 April. Given the gravity both of this inquest and the upcoming inquest into the death of Mr B., he wished to have an opportunity to take proper legal advice on his position. Moreover, he was concerned that he would suffer serious prejudice to his future position in the inquest into the death of Mr B., which had occurred more than twenty-six years previously, if he was now required to give evidence about it without a proper opportunity to recall what happened.

34. As soldier A had indicated a willingness to give evidence, the next of kin contended that every step should be taken to secure his attendance – by

adjourning the inquest, if necessary. However, on 13 April 2012 the Coroner directed the jury that it was not possible to question soldier A about the death of Mr B. He therefore read to the jury soldier A's statement concerning the earlier incident, together with the ballistics evidence, the pathology evidence and the findings of the first inquest.

35. The inquest was then adjourned to 25 April to accommodate certain jurors' holiday commitments.

36. Prior to the resumption of the inquest, the Coroner sat without the jury to hear further submissions by the participants about the attendance of soldier A. The English solicitors who had been in communication with the Coroner (see paragraph 33 above) indicated that soldier A was on a cruise on the Pacific Ocean and that they had no instructions to act on his behalf. They had simply attempted to assist the court by forwarding correspondence from him in circumstances where his identity was secret and for security reasons he could not communicate directly with the inquest.

37. On 23 April 2012 the Coroner stated that while the death of Mr B. was relevant, it was not the death currently under the scrutiny of the court. He supported the notion that soldier A ought to reattend, but indicated that he was in the dark about his current and future whereabouts and availability and had no means of finding out. He noted that the questions that could be asked of soldier A concerning the death of Mr B. were limited. Similarities between the two incidents were before the jury and in his view soldier A's non-attendance did not necessarily damage the Article 2 integrity of the inquest. He considered the possibility of a subpoena, but dismissed it as it would have to be served personally on soldier A, who was currently outside the United Kingdom, was habitually resident outside the United Kingdom, and no one knew when he would return. Finally, the Coroner indicated that two jurors had given him notice of holiday plans between 3 May and 15 May. A further adjournment would therefore have involved a break until 16 May at the earliest, and there was no guarantee soldier A would return on that date, or at all.

38. The Coroner therefore considered that the value in completing the inquest efficiently with the evidence he had outweighed the value in speculatively trying to seek the attendance of soldier A, which would have required "some kind of open-ended review of his availability". Such a course would be neither manageable nor desirable in the context of the inquest and it would have incurred further unquantifiable delay. Accordingly, he concluded that the proportional approach would be to allow the participants to comment on soldier A's absence in their closing submissions and for him to remind the jury in his own address that soldier A had been directed to appear in relation to Mr B. and had failed to do so. It would then be for the jury as to what it made of soldier A's non-attendance. As such, he concluded the inquest without further evidence from soldier A.

10. The application to discharge a juror

39. On 26 March 2012 the next of kin applied to have a juror discharged on the basis that he had been seen to "nod off" in the course of the proceedings, and that – according to both an expert witness and a member of the Press Association – his physical reactions demonstrated hostility to the case explored by the next of kin.

40. The Coroner refused the application. He indicated that, from his vantage point, he had no concerns about the behaviour of any of the jurors.

41. A further application was made the following day, in which the next of kin raised concerns about increasing hostility on the part of the juror. The Coroner indicated that he would keep the matter under review, and would have no hesitation discharging the juror if he saw any hint of hostility towards the next of kin.

42. Concerns were again raised on 30 March 2012 and the Coroner again declined to discharge the juror. A further application for his discharge was made on 4 April 2012 on the basis of the aforementioned concerns and the fact that he was repeatedly glaring at the next of kin in the public gallery. The Coroner again declined to discharge the juror. He noted that neither the expert witness, nor the member of the Press Association (see paragraph 39 above), nor any other jurors had raised any concerns with him directly. He further indicated that he had been focused intently on the members of the jury from his unique vantage point and could categorically say that he had not witnessed anything. However, he noted that the juror was positioned in direct line with the family members which might have given the impression that he was looking at them. He nevertheless issued a warning to the jury, reminding them to consider the evidence in an impartial and fair manner and to retain their concentration at all times.

43. A further application for the juror's discharge was made on 26 April 2012, as the sister and brother of one of the deceased claimed that on the preceding evening the juror had spat on the footpath in front of them as he passed by. The Coroner refused the application on 27 April 2012. He accepted that the event took place but considered that there were any number of possible interpretations of the juror's behaviour. The next of kin had interpreted it through the prism of concerns they had previously raised, concerns which he had held to be unfounded. He expressed reluctance about discharging the juror and jeopardising the jury dynamic on the basis of a highly ambiguous act. Moreover, it had been made clear to the jury on numerous occasions that they should bring any concerns to the attention of the Coroner. Although the jury had sent numerous notes in the course of the inquest, no concerns whatsoever had been raised about the juror in question. The Coroner further indicated that he had observed this particular juror carefully and had been impressed by his dedication and enthusiasm.

11. An application for leave to apply for Judicial Review by Brigid McCaughey *[2012] NIQB*

44. The next of kin applied for permission to judicially review the Coroner's decision of 27 April 2012 (see paragraph 43 above). At the time the application was brought the inquest jury had already retired to consider their verdict.

45. In an affidavit, the Coroner stated that he had not observed the juror sleeping in the course of the inquest, although he acknowledged that there were moments when this juror – and other jurors – had appeared fatigued and closed their eyes. When that had happened, he had intervened to guard against the possibility of jurors loosing focus and, where appropriate, he had afforded the jurors a break. He had not observed any hostility on the part of the juror, despite having observed him keenly.

46. The High Court refused the application for leave. In its view, the factual matrix had to be determined by the Coroner; he had observed this particular juror and was impressed by his dedication and enthusiasm. Therefore, an informed and fair-minded observer would not conclude either that the juror was biased or that he had the appearance of bias. The judge indicated that even if he was wrong in that analysis he would in any event have refused leave. The present inquest had commenced after years of waiting and it should not be disrupted unless there were exceptional circumstances. The present circumstances were not exceptional and would not therefore warrant the grant of leave at this late stage.

12. The inquest: questions to the jury

47. After hearing the parties' submission on his draft questions, the Coroner asked the jury the following questions:

> "1. What were the medical causes of the death of (a) Mr McCaughey and (b) Mr Grew?
>
> 2. Summarise the scenario in which the deaths occurred, so that if I were a newcomer to the case which no knowledge of it, I could understand the broad background and circumstances.
>
> 3. What role, if any, did the soldiers on the ground have in the deaths of Mr McCaughey and Mr Grew?
>
> In particular:
>
> (a) What was the nature and purpose of the operation in which the soldiers were involved that night?
>
> (b) If you find that the deaths occurred as a result of shots fired by soldiers, then when the soldiers opened fire, what was their state of belief as to the circumstances in which they did so?
>
> (c) After opening fire did the soldiers continue to fire? If so, what was their state of belief as to the circumstances as they did so?

(d) If a shot or shots were fired in the vicinity of the mushroom sheds themselves, how many shots were fired there, in what circumstances were they fired and what was the state of belief of the soldier or soldiers who fired as to the circumstances?

(e) Having regard to your answers above, particularly in relation to the soldiers' state of belief as to the matters raised, was the force used by each of them, at each point in the incident that force was used, reasonable in the circumstances?

(f) Having regard to your answers above, particularly in relation to the soldiers' state of belief as to the matters raised, was there another reasonable course of action (or other reasonable courses of action) open to the soldiers as an alternative to (i) opening fire and (ii) firing thereafter?

(g) Having regard to the above, was the operation conducted by the soldiers on the ground in such a way as to minimise to the greatest extent possible any recourse to lethal force?

(h) Was there any aspect of the training of, or planning by, any soldier or soldiers on the ground that could account for the deaths?

...

5. Please identify, if you consider it possible to do so, what wound or wounds caused Mr McCaughey's death? From whereabouts was that wound or were those wounds inflicted? Where was Mr McCaughey positioned when he sustained that wound or those wounds? Did he receive any injury or injuries in addition to the fatal wound/s? If so, in what circumstances did the other injury or injuries occur? Having regard to all the evidence, including the evidence of the soldiers, the pathologists and the ballistics experts, what other conclusions (if any) can you reach concerning the force used against Mr McCaughey?

6. Was the operation planned, controlled and supervised in such a way by the RUC and the military as to minimise to the greatest extent possible any recourse to lethal force?

Consider in particular:

(a) the purpose of the operation;

(b) the roles and responsibilities of the various personnel involved;

(c) the state of knowledge of police and military personnel involved in the planning of the operation as to the likely presence of the deceased or other persons at the location of the deaths on the night that the deaths occurred;

(d) the state of knowledge of the soldiers involved in the operation on the ground as to the likely presence of the deceased or other persons at the location of the deaths on the night that the deaths occurred;

(e) whether there were other reasonable steps that might have been taken in the course of the planning and control/supervision of the operation.

7. What part, if any, did Mr McCaughey and Mr Grew have in their deaths?

8. Beyond any findings you have made on consideration of the above questions, is there any other factor that you would wish to record as having in some (more than minimal) way caused or contributed to the deaths of Mr McCaughey or Mr Grew?"

13. The inquest: the next of kin's closing and the summation by the coroner

48. Counsel for the next of kin, in their final submissions to the jury, drew parallels between the shooting of Mr B. and the shooting of Mr McCaughey and Mr Grew, and reminded the jury that they had been denied the opportunity to question soldier A because he refused to make himself available, despite the direction of the court.

49. In a lengthy summation to the jury, the Coroner explained that in the course of the inquest they had heard two broad theories about how the deaths occurred. The soldiers described a surveillance operation, in the course of which they were surprised by armed men. They opened fire when the men started to advance towards them with their weapons in the ready position; and they continued to fire because, having misinterpreted sparks and tracer rounds as muzzle flashes, they believed that the two men, and possibly others, were firing back at them. An alternative theory put to them was that it was in actual fact more of an ambush than a defensive action. The Coroner explained that it was for the jury to determine whether either theory was correct or if the truth lay somewhere in between.

50. It taking the jury through the relevant evidence he referred to question 3(e) and said the following:

> "What you are being asked here is: Was the force used by each of [the soldiers], so you have to consider each of them, at each point in the incident that force was used, was that reasonable in the circumstances?"

51. On the soldiers' training, the Coroner said:

> "Now of course, ladies and gentlemen, whenever you are looking at all of this evidence much will depend on our own impressions about the credibility of the soldiers, really just do you believe the soldiers. These men have really been presented to us as professional soldiers, and we have been told that they were well trained. It is open to you to consider, of course, ladies and gentlemen, that even a soldier who is well trained, well, is that soldier not going to be surprised, or not going to be scared whenever this kind of incident takes place? ... So think about this, ladies and gentlemen; these are men who have been presented to us as professional, well trained soldiers. We have also been told that they acted calmly in the events that unfolded. Weigh that, then, ladies and gentlemen, against the scenario that they say they found themselves in, and what you think about that scenario. But if you believe the scenario that the soldiers have placed before you, if they are taken by surprise by this situation, by armed men arriving at the shed, is it reasonable, do you think, that they would have been anxious about that situation? These are all matters of course, ladies and gentlemen, for you to weigh up and consider whenever you are remaking your assessment of this matter."

52. With regard to the soldiers' mistaken belief that flashes and sparks were muzzle rounds (see paragraph 47 above), he said:

> "Now, was this ... a misapprehension that could be made by experienced soldiers?"

53. The Coroner also addressed the soldiers' apparent belief that bullets were passing over their heads:

> "There were no bullet fragments recovered from behind the soldiers' positions. They were experienced soldiers. You have heard evidence of the extensive training that they received in dealing with conflict scenarios, so on the one hand, ladies and gentlemen, you have to weigh the confused picture with which the soldiers say they were confronted, but on the other hand you have to bear in mind that they were professionally trained to deal with situations of this kind or fire fight scenarios ..."

54. On the subject of the yellow card, which was carried by the soldiers and which set out the army's terms of engagement, the Coroner said:

> "Perhaps it's worth just rehearsing what the yellow card said at this stage. Under general rules at number 1 it said: 'In all circumstances you are to use the minimum force necessary. The firearms must only be used as a last resort.' ... On opening fire then at paragraph 5 it says: 'You may only open fire against a person: A, if he is committing or likely to commit an act likely to endanger life and there is no other way to prevent the danger. ... At number 6 it then states: 'If you have to open fire you should A, fire only aimed shots; B, fire no more rounds than are necessary; and C take all reasonable precautions not to injure anyone other than your target."

55. The Coroner also mentioned that soldier A had not reattended the inquest despite having been specifically instructed to do so. He then set out the circumstances of Mr B.'s death while also pointing out that soldier A had a long military history which had included two commendations. He had been involved in many operations in Northern Ireland over a number of years but had only discharged his weapon on two occasions. No criticism was aimed at him in the earlier inquest into the death of Mr B., but the jury was reminded that there was to be a second inquest which would be greater in size and shape. He continued:

> "Now, whenever you look at the [Mr B.] incident it may, of course, cause you to be more questioning about soldier A's account of his involvement in the deaths of Mr McCaughey or Mr Grew. On the other hand, you might regard it as illustrative of the difficult role a solider deployed on operations of this type in Northern Ireland in the 80s and 90s was required to perform. Or, indeed, ladies and gentlemen, it is quite open to you to conclude that the [Mr B.] incident doesn't really assist you at all in determining the issues to be considered regarding the deaths of Mr McCaughey and Mr Grew. It is a matter entirely for you what to make of it."

56. Finally, the Coroner repeatedly reminded the jurors of their need to consider the evidence in an impartial and fair manner, and to report any concerns about the dynamic of the jury or the actions of any other jurors.

57. A juror subsequently asked if a shot fired into a corpse could legally be defined as excessive force. After hearing submissions from the parties the Coroner brought the jury back in and said the following:

> "the principle interest of the inquest is of course how the person came by their death. So technically, ladies and gentlemen, once you are satisfied on the balance of probabilities that somebody is dead, then at that stage you can draw a line underneath it. ... if however, ladies and gentlemen, you feel that in order to properly understand a death you need to comment on a sequence of events, well that is something of course that I will consider in the course of your findings. But it is my view ladies and gentlemen that in a strict legal sense questions of excessive force concern events that lead to the

> death in the context of the inquest and not events that take place after you are satisfied on the balance of probabilities that the person is dead."

14. The inquest: narrative verdict

58. The inquest ended on 2 May 2012 with a unanimous verdict of "lawful killing". In addition to this short-form verdict, the jury also returned a narrative verdict in which it made findings regarding the background circumstances and the cause of death. It found that the operation on 8 October 1990 was part of an ongoing surveillance operation by the RUC to continue surveillance of a car in the mushroom shed, arrest anyone involved in terrorist activity and place a camera in the premises. With regard to the state of belief of the soldiers when they opened fire, the jury found that they

> "opened fire and shot the two men in the belief that their position was compromised and that their lives were in danger. The soldiers believed that radio 'tones' may have alerted the men to their position. Mr McCaughey and Mr Grew were approaching the soldiers with their guns in the ready position."

59. The jury also found that the soldiers

> "continued firing believing that they were under sustained fire. They interpreted sparks, rebound flashes and tracer rounds, as they saw them through their night sights, as muzzle flashes."

60. The jury considered that in the circumstances the soldiers had used reasonable force. While they were not unanimous about whether, on the balance of probabilities, there had been an opportunity for the soldiers to have arrested Mr McCaughey and Mr Grew before they felt compromised, once they felt compromised the jury agreed that there had been no other reasonable course of action.

61. As for the planning, control and supervision of the operation, the jury considered that a specialist military unit had been used to minimise the danger to RUC officers; each individual had a specific role and there had been no ambiguity; and while soldier H had overall control of the operation (see paragraph 6 *in fine* above), soldier A had been in command of the soldiers on the ground and had therefore been in the best position to make decisions and to minimise to the greatest extent possible any recourse to lethal force.

62. With regard to the part Mr McCaughey and Mr Grew had in their own deaths, the jury found that they had put their lives in danger by being in the vicinity of a stolen car expected to be used in terrorist activity, and by being armed with guns and wearing gloves and balaclavas.

15. In the Matter of an Application by Sally Gribben for Judicial Review and in the Matter of Rulings by the Coroner

(a) Permission to apply for judicial review

63. The applicant in the present case subsequently brought an application for permission to apply for judicial review. In particular, she sought an order

of certiorari to quash the verdicts of the jury of 2 May 2012 (see paragraphs 58-62 above); a declaration that the inquest proceedings did not comply with the State's investigatory obligation under Article 2 of the Convention; and an order of mandamus directing a fresh inquest into the deaths. In particular, she complained about the refusal to provide the next of kin with disclosure of information relating to the involvement of military witnesses in other lethal force incidents in Northern Ireland, the editing of the statements provided to the jury to remove references to their involvement in such incidents, and the fact that the next of kin were prevented from questioning military witnesses about their involvement in such incidents; the failure to secure the reattendance of soldier A; the decision to conduct the inquest with a jury; the Coroner's decision not to discharge one juror who appeared to be hostile to the next of kin (see paragraphs 39-43 above); and the nature of the Coroner's questions, directions and summation to the jury concerning the justification for the use of force (see paragraphs 47-57 above).

64. In a judgment of 18 October 2012, the High Court was satisfied that the evidence of soldier A was potentially relevant to the "shoot to kill" issue raised in the present case, and considered it "arguable" that the Coroner should have taken further steps to secure his presence at the inquest. Leave to apply for judicial review was therefore granted on this ground. However, permission was refused on the remaining grounds. Regarding the use of a jury, the High Court noted that this issue was not raised before the Coroner and had only emerged in the application for judicial review.

65. The applicant appealed to the Court of Appeal, which, on 3 June 2014, granted leave on the following additional grounds: the Coroner's failure to disclose to the next of kin potentially relevant material relating to the involvement of military witnesses in other lethal force incidents in Northern Ireland; the Coroner's refusal to permit the next of kin to cross examine military witnesses as to their involvement in other lethal force incidents in Northern Ireland; and the Coroner's redaction of the statements of military witnesses to remove references to their involvement in other lethal force incidents in Northern Ireland.

66. Before the Court of Appeal the applicant had also argued that the anonymity of the jury and the requirement of unanimity was not compliant with Article 2 of the Convention. Shortly beforehand the High Court, *In The Matter Of Three Applications By Hugh Jordan For Judicial Review* ([2014] NIQB 11), had held that the inquest in that case should not have been held with a jury because there was a real risk of a perverse verdict. As that case was subject to appeal, the Court of Appeal did not grant leave in relation to the jury issue but noted that the applicant might wish to raise it with the judicial review judge once the Court of Appeal judgment in *Jordan's (Hugh) Applications* was available.

67. Leave was refused on the remaining grounds (see paragraph 63 above) as they were not considered to give rise to any arguable case with a reasonable prospect of success.

(b) Judgment of the High Court

68. In a judgment of 13 April 2015 (*An Application by Sally Gribben for Judicial Review* [2015] NIQB 51) the High Court refused leave for a challenge to be made to the engagement of a jury at the inquest. Pursuant to the judgment of the Court of Appeal in *Jordan's (Hugh) Applications* [2014] NICA 76 (see paragraph 88 below) it could not be said that there was inevitably a real risk of a perverse verdict in legacy inquests if the Coroner sat with a jury. The High Court reiterated that in the present case the applicant had not challenged the engagement of a jury before or during the inquest (see paragraph 64 *in fine* above). In its view, this was an issue that ought to have been dealt with by application to the Coroner prior to the commencement of the inquest. This did not happen, despite the applicant having brought multiple challenges by way of judicial review, before, on the eve of, and during the inquest. She had therefore opted for a jury hearing until the jury had returned its verdict. In any event, the judge noted that in the present case nothing had occurred that called into question the conduct of the jury in reaching a verdict, nor had anything occurred that would warrant quashing the jury's verdict.

69. The judge was further satisfied that there had been an effective examination and investigation of the "shoot to kill" issue for Article 2 purposes. The expression "shoot to kill" could be variously understood. However, in the present case the applicant did not contend that there was a general policy or order issued to shoot all suspected terrorists. Rather, she contended that unnecessary force was used when soldiers confronted armed men by not being prepared to effect arrests. The planning of the operation was also said to have been marked by aggressive positioning so as to promote the use of lethal force, and a culture was said to have developed with the soldiers of taking unnecessarily aggressive action towards suspects. Soldier K, the officer commanding the unit (see paragraph 24 above), had been questioned about the existence of such a policy in relation to suspects. Soldier H, the officer commanding the operation (see paragraph 6 above), was asked about the appropriate positioning and expert evidence had also been called on this issue. Soldiers A, C and D, who had fired their weapons (soldier B, who had also fired, was unable to attend the inquest – see paragraph 24 above) gave evidence about the culture and manner in which the operation was conducted, and the four support soldiers (soldiers E, F, G and I) were available to be questioned on this issue. The jury had therefore had the opportunity to consider all this evidence touching on the "shoot to kill" issue. While it had subsequently become the practice in inquests to disclose the involvement of witnesses in other incidents to the representatives

of the deceased so that they could make inquiries and/or submissions to the Coroner, that was not a requirement in all cases. In the present case the Coroner had considered the material, determined which instances were relevant, and kept the matter under review as the inquest progressed.

70. With regard to the attendance of soldier A, the High Court acknowledged that the Coroner had a difficult decision to make. However, he had put the following before the jury: soldier A's statement prepared for the inquest into the death of Mr B., the deposition of the State pathologist, the deposition of the ballistics expert, and a summary of soldier A's career in the military. Counsel for the next of kin had the opportunity to comment on the Mr B. incident to the jury and highlight its significance from their perspective, and soldier A had not been able to contradict their assertions. The next of kin were also able to comment on soldier A's decision not to attend the inquest despite having been directed to do so, and the Coroner had dealt with the matter in his summation to the jury. Therefore, despite soldier A's absence on the issue of Mr B.'s death the judge was satisfied that the inquest process had been fair and Article 2 compliant.

(c) The second application to this Court

71. On 27 April 2015, following the High Court ruling, the applicant and the daughter of Mr Grew brought an application to this Court in which they complained under Article 2 of the Convention that there had been a breach of the procedural obligation to conduct an "effective official investigation" into the death of their relatives. In particular, they complained about the Coroner's failure to discharge a juror who lacked impartiality, and about the Coroner's failure to direct the jury in a manner consistent with Article 2 of the Convention.

72. The Court declared the application inadmissible as being premature and/or on the ground that domestic remedies had not yet been exhausted within the meaning of Article 35 § 1 of the Convention since it was open to the applicants to appeal against the decision of the High Court. It noted, however, that should the applicants be dissatisfied in the future with the progress or outcome of the domestic proceedings, it would be open to them to reintroduce these complaints under the procedural aspects of Article 2 of the Convention (see *Gribben and Quinn v. the United Kingdom* (dec.), no. 20855/15, 15 March 2016).

(d) Judgment of the Court of Appeal

73. The applicant appealed to the Court of Appeal on the following grounds: that the Coroner failed to disclose to the next of kin relevant or potentially relevant material relating to the involvement of military witnesses in other lethal force incidents in Northern Ireland; that the Coroner refused to permit the next of kin to cross examine military witnesses as to their

involvement in such incidents; that the Coroner redacted statements of military witnesses to remove all references to their involvement in such incidents; that the Coroner failed to recall a witness to permit questioning regarding his involvement in such incidents; and that the judge had erred in refusing leave to apply for judicial review of the Coroner's decision to conduct the inquest with a jury (see paragraph 67 above).

74. In a judgment of 10 March 2017 (*In the matter of an application for leave to apply for judicial review by Sally Gribben and in the matter of decisions made by the Coroner for Belfast in the inquest touching on the deaths of Martin McCaughey and Desmond Grew* [2017] NICA 16) the Court of Appeal observed that inquest practice had now changed so that details of the involvement of soldiers in other lethal force incidents were provided as a matter of course. It therefore asked to see the materials provided to the Coroner but not disclosed to the next of kin, together with underlying materials that had not been provided to the Coroner. It further ordered that the respondent provide the applicant with redacted copies, both of the material that had been provided to the Coroner and the material that had been provided to the Court of Appeal which the Coroner had not seen. The respondent also provided an affidavit explaining the redactions and the process by which the documents were identified.

75. While the applicant accepted that she had previously not made the case that there was a general policy or order issued to shoot all suspected terrorists, she contended that the failure of disclosure had inhibited her ability to explore that case. The Court of Appeal disagreed, pointing out that had the applicant wished to explore this issue she should have brought it to the attention of the Coroner long before the proposed hearing of the inquest. No such submission was made and consequently the broad parameters of the enquiry pursued by the next of kin were either that soldiers took up unnecessarily confrontational positions or that there was a general culture of soldiers taking unnecessarily aggressive action. In those circumstances, the Coroner had not been obliged to embark upon an extended examination of whether there was such a policy pursued by the security forces in Northern Ireland at the relevant time.

76. Having reviewed the material, and heard the applicant's submissions, the Court of Appeal was satisfied that the material it directed should be provided to the next of kin was material that should have been directed by the Coroner to enable the applicant to participate in the decision as to its relevance and its effect upon the scope of the inquest. However, it did not consider this to be a case where the material now disclosed opened a door on an otherwise unknown and undiscovered area, and it did not accept that the cumulative effect of the material had such probative significance that it would have provided a justifiable basis for an extension of the scope onto a wider plain. On the contrary, it was satisfied that the material was "not relevant or not material".

77. Regarding the attendance of soldier A, the Court of Appeal accepted that a series of "most unfortunate events and actions" by the witness, the Ministry of Defence and the English solicitors (who, by acting as a "post box" that delivered communications in only one direction, had concealed soldier A's future whereabouts while maintaining his thin assertion that he was nevertheless willing to assist) had presented the Coroner with a *fait accompli*. It had been impossible for him to know if soldier A would ever return voluntarily to the inquest or when he would return to the United Kingdom, where he could be served with a subpoena. The Court of Appeal therefore considered that in all the circumstances the Coroner's decision had been reasonable, proportionate and well within his discretion. Indeed, it considered that he had no practical option but to proceed as he did while the evidence was sufficiently fresh in the minds of the jury. Furthermore, he did everything possible to compensate for soldier A's failure by explaining to the jury on 13 April 2012 what had happened, by providing the jury with the written materials from the inquest into the death of Mr B., by inviting the parties to address the incident in their submissions, and by addressing it in his own closing observations to the jury. In the circumstances, he could have done no more and the absence of soldier A did not render the inquest non-compliant with the requirements of Article 2. This ground of appeal was therefore also rejected.

78. Finally, the Court of Appeal concluded that the High Court had also come to the correct determination on the matter of the engagement of a jury. The raising of this point of objection had come at a very late stage indeed, reflecting the fact that no-one involved in the case appeared to discern a risk to the administration of justice at the outset or during the course of the inquest. The court further observed that the anonymity of juries complied with Article 6 of the Convention; pursuant to *Jordan's (Hugh) Applications* (see paragraphs 67 and 88 below) there was not an inevitable risk of a perverse verdict; the jury pool had been questioned and any person who might not be independent or impartial was rejected; the Coroner had reminded the jury on a number of occasions to approach the matter with an open mind; the High Court judge, who had already presided over two judicial review applications during the currency of the impugned inquest, had considered, with the benefit of retrospection, that the jury had dealt with the matter in a comprehensive and thorough manner and found no reason to conclude that the process had been flawed; and the examples of difficulties raised by the applicant were neither compelling nor particularly relevant to the argument now made.

79. The appeal was therefore dismissed.

80. On 14 December 2017 the Supreme Court refused the applicant permission to appeal.

B. Relevant domestic law and practice

81. A detailed summary of the relevant domestic law and practice is set out in *McCaughey and Others* (cited above, §§ 68-89)

1. Inquests

(a) Legislation

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

83. Section 18(2) of the 1959 Act permits the Coroner to summon a jury if it appears that it is desirable to do so.

84. Pursuant to section 31(1) of the 1959 Act the jury's verdict must be reached unanimously.

(b) Relevant case-law

85. Prior to the judgment of this Court in *Hugh Jordan v. the United Kingdom* (cited above, §§ 64 and 129), in Northern Ireland the inquest jury's verdict could only give the identity of the deceased and the date, place and cause of death.

86. In *R (Middleton) v. West Somerset Coroner* ([2004] 2 AC 182), the House of Lords held that in order to comply with Article 2 of the Convention, an inquest had to consider "by what means" and "in what circumstances" the deceased came by his death.

87. On 11 March 2004 the House of Lords found that there was no obligation to conduct an inquiry compatible with Article 2 when the death had occurred before the Human Rights Act came into force (*In re McKerr* [2004] 1 WLR 807). However, following this Court's judgment in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009), the Supreme Court reversed the House of Lords' judgment in *McKerr* and accepted that an inquest should be compliant with Article 2 even for a pre-Human Rights Act death (*In the matter of an application by Brigid McCaughey and another for Judicial Review* [2011] UKSC 20: see paragraph 14 above).

88. On 7 May 2014 *In The Matter Of Three Applications By Hugh Jordan For Judicial Review* [2014] NICA 76 the Northern Ireland Court of Appeal acknowledged that there were problems both of jury intimidation and perverse verdicts in Northern Ireland. It therefore held that a Coroner, in exercising his or her discretion under section 18(2) of the 1959 Act (see paragraph 83 above), having considered the facts of the case, had to ask if there was a real possibility that a jury would be biased. If, having done so, there appeared to be a real risk of a perverse verdict, the Coroner had to take steps to remove that risk to a fanciful or remote level. However the court did

not find that there was inevitably a real risk of a perverse verdict in legacy inquests. In its view, each inquest must be dealt with on a case by case basis.

89. The Court of Appeal concluded with the following comments, highlighting the problem that legacy inquests are posing in Northern Ireland:

> "The impact of [deficiencies in the coronial system] has been most pronounced in the conduct of legacy inquests. This is the group of historical inquests in which there are allegations of state involvement in the deaths and issues including murder of suspected terrorists, collusion, planning and control, individual error and cover-up. There are at present 51 such cases involving 78 deaths. The oldest of the cases relates to a death in February 1971 and the most recent to a death in July 2005. This number may increase as a result of future referrals by the Attorney General.
>
> The absence of adequate powers for Coroners and procedures suitable for investigation and hearings has resulted in the inquests becoming an adversarial battleground instead of a Coroner led inquiry. The adversarial nature of the proceedings is evidenced by the fact that in the case of the death of Pearse Jordan alone there have been 24 judicial reviews, 14 appeals to the Court of Appeal, 2 hearings in the House of Lords and one hearing before the European Court of Human Rights. The issues in dispute have included questions of scope, relevance and disclosure of materials. If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040."

2. The Stormont House Agreement

90. The Stormont House Agreement was agreed and published in December 2014. It proposed four new institutions to take forward responsibility for legacy cases: a Historical Investigations Unit to take forward outstanding investigations into Troubles-related deaths; an Independent Commission on Information Retrieval to enable family members to seek and privately receive information about the Troubles-related deaths of their relatives; an independent Oral History Archive to enable people from all backgrounds to share experiences and narratives related to the Troubles; and an Implementation and Reconciliation Group to promote reconciliation and anti-sectarianism, and to review and assess the implementation of the other legacy institutions proposed.

91. Implementation of the agreement has been delayed due to differences of opinion on a number of controversial issues and the new institutions have not yet been established. Responsibility for legacy investigations in Northern Ireland is currently held by separate bodies. Investigations into Troubles-related deaths are carried out by the Legacy Investigations Branch of the Police Service of Northern Ireland, which replaced the previous Historical Enquiries Team in 2015. Historical allegations of police criminality and misconduct are handled by the Historical Investigations Directorate of the Office of the Police Ombudsman for Northern Ireland ("OPONI"), and inquests are carried out by the Coroners Service for Northern Ireland. Separate investigations into the purported activities of "Stakeknife", an

alleged State agent who, it is believed, oversaw the murders of informants on behalf of the Provisional IRA, are being carried out under Operation Kenova.

3. The "five year plan"

92. In 2016 the then Lord Chief Justice of Northern Ireland announced a plan to hear the pending legacy inquests within a timeframe of five years. That plan included the creation of a dedicated Legacy Inquest Unit and envisaged improvements to case management, disclosure and case allocation arrangements. Delivery of the plan was to begin in April 2020 but has been delayed on account of the COVID-19 pandemic. In fact, in April 2020 all inquests were adjourned as the courts were only dealing with urgent or agreed matters.

C. Relevant Committee of Ministers Resolutions

93. In addition to its earlier judgment in the present case (*McCaughey and Others*, cited above), the Court has adopted seven other judgments concerning the investigation of killings by security forces in Northern Ireland between 1968 and 1998 (see *Hugh Jordan*, cited above; *McKerr v. the United Kingdom*, no. 28883/95, ECHR 2001-III; *Shanaghan v. the United Kingdom*, no. 37715/97, 4 May 2001; *Kelly and Others v. the United Kingdom*, no. 30054/96, 4 May 2001; *McShane v. the United Kingdom*, no. 43290/98, 28 May 2002; *Finucane v. the United Kingdom*, no. 29178/95, ECHR 2003-VIII; and *Hemsworth v. the United Kingdom*, no. 58559/09, 16 July 2013).

94. The Committee of Ministers has been supervising these cases since 4 May 2001. A detailed overview of this process is set out in the Committee of Ministers information document of 27 May 2014 (see CM/Inf/DH(2014)16-rev).

95. The Committee last examined the group of cases at its 1419th meeting on 30 November – 2 December 2021. As regards individual measures, the Deputies expressed their concern about the authorities' lack of clarity on the intended next steps in the *McKerr*, *Shanaghan* and *Kelly and Others* cases; urged them to provide information on the status of the investigative steps previously announced and to cooperate efficiently with the judicial review proceedings in the case of *Finucane* and to inform the Committee without delay of their outcome; and exhorted the authorities to do everything possible to ensure that the cases of *McKerr*, *Shanaghan,* and *Kelly and Others* can be brought to a conclusion and keep the Committee informed of progress in the domestic proceedings.

96. As regards general measures, the Deputies expressed profound regret about the authorities' failure to take any concrete steps to enable effective investigations into the outstanding cases and thus noted with concern what would appear to be a change of approach from the Stormont House

Agreement (see paragraphs 90-91 above) in the authorities' latest proposals (which included a proposal for a statute of limitations to apply equally to all Troubles-related incidents, bringing an immediate end to criminal investigations and prosecutions); strongly encouraged the authorities to engage with all stakeholders in finalising any intended legislative proposals and to settle their position as soon as possible; noted that despite setbacks experienced as a result of the COVID-19 pandemic, there has nonetheless been some progress in legacy inquests; invited the authorities to respond fully to the questions posed at the Committee's last examination of the case concerning the functioning of the OPONI and the Police Service of Northern Ireland; and urged the authorities to provide sufficient support and resource to legacy inquests, and other bodies involved in case processing in particular the OPONI, so as to safeguard the progress being made, albeit limited, whilst awaiting the outcome of the authorities' latest reflection.

97. During the previous consideration of these cases, during the1398th meeting on 9-11 March 2021, the Deputies had also expressly recalled the vital role played by the inquest system and the OPONI in investigating cases.

COMPLAINTS

98. The applicant complains under the procedural aspect of Article 2 of the Convention that there has been a failure to conduct an effective investigation into the circumstances of the death of her brother, Martin McCaughey. In particular, she alleges that the Coroner failed to disclose potentially relevant material to the next of kin; that he failed to take adequate steps to secure the recall of soldier A; that he should not have conducted the inquest before a jury; that he failed to discharge a juror who lacked impartiality; and that there were failings in his questions, directions and summations to the jury, in particular as to the requirements of the "absolute necessity" standard.

THE LAW

99. The applicant complained of a breach of Article 2 of the Convention, which reads, insofar as relevant, as follows:

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

A. The parties' submissions

1. The Government

100. At the outset, the Government contended that the Court's conclusions on delay in *McCaughey and Others v. the United Kingdom*

(no. 43098/09, ECHR 2013) were "freestanding", and it should therefore now proceed separately and independently to consider whether the investigation complied, in all other respects, with the procedural requirements of Article 2 of the Convention. A conclusion regarding "promptness" was not determinative of the overall effectiveness or fairness of an investigation.

101. The Government submitted that, when considered overall, the investigation into the death of Mr McCaughey was effective for the purposes of Article 2 of the Convention. The inquest proceedings were spread over eight weeks with twenty-seven sitting days. The next of kin were represented throughout by a team of legal representatives, including leading and junior counsel. The parties were afforded every opportunity to influence the scope and conduct of the inquest, and the Coroner considered oral (and frequently written) submissions on all contentious issues.

102. Moreover, notwithstanding the delay of twenty-one years between the incident giving rise to the inquest and its commencement, all of the key witnesses and documentary materials generated by the police investigation were available to the inquest. In addition to the soldiers (see paragraph 24 above), evidence was also heard from two pathologists, an expert on military affairs, two ballistics experts, a police officer who had been involved in the operation, and two detectives involved in the subsequent RUC investigation. The Coroner also admitted into evidence a variety of statements and documents, the majority of which had been generated in the course of the police investigation. The evidence provided a comprehensive picture not only of the immediate circumstances of the deaths, but also of the planning and control of the operation which led to them, thereby enabling the jury to reach a clear conclusion on all aspects of the case. Indeed, the jury's narrative verdict was extremely detailed and there were no issues material to Article 2 of the Convention – including the planning, control and supervision of the operation – upon which they were unable to express a view by reason of the passage of time since the events had occurred.

103. Each of the matters now relied on by the applicant was subject to full argument before the Coroner and the domestic courts, and the latter, in carefully reasoned decisions, had correctly upheld each of the decisions reached by the Coroner in the course of the inquest.

104. There had been no prejudice by reason of the absence of soldier A. Had soldier A been recalled, and had counsel for the next of kin been permitted to question him about the death of Mr B., she would have been bound by his answers. Therefore, if anything the next of kin were placed in a better position because they were able to make serious, wide-ranging and uncontradicted allegations against soldier A. In any case, the material relating to the death of Mr B. had been placed before the jury in a fair and balanced way.

105. Finally, it had not been suggested to soldier H that there was a "shoot to kill "policy in Northern Ireland and at the conclusion of closing

submissions counsel for the next of kin had clarified the case being advanced and did not contend that the security forces were operating such a policy in Northern Ireland in 1989 and 1990 (see paragraph 75 above). In any event, the Article 2 procedural obligation did not require contracting States to consider, as a matter of course, a range of incidents separate to the death which was the subject of the inquest.

2. The applicant

106. The applicant agreed with the Government (see paragraph 100 above) that the Court should approach its conclusions as to delay in *McCaughey and Others* (cited above) as freestanding and proceed to determine whether the investigation complied in all other respects with the procedural requirements of Article 2.

107. In this regard the applicant submitted that in respect of the police investigation, the decision of the DPP not to prosecute and the civil proceedings (see *McCaughey and Others*, cited above, § 45), there were strong parallels between the present case and that of *Kelly and Others v. the United Kingdom* (no. 30054/96, 4 May 2001) and consequently there was no basis on which the Court could depart from its conclusions in that case.

108. Nonetheless, she accepted that in the present case the inquest was the primary vehicle whereby the next of kin could seek to secure an effective investigation into the deaths and, in her view, it had not complied with the Article 2 procedural obligation. First of all, the Coroner had restricted the scope of the inquest by refusing to provide the applicant with disclosure of the involvement of the soldiers in other lethal force incidents and had further prevented the next of kin from questioning the soldiers about such matters. This had limited the next of kin's ability to explore parallels with other lethal force incidents and thereby prevented matters relevant to the deaths from being examined (compare *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, 4 May 2001). Furthermore, the next of kin were not permitted to ask witnesses about soldiers' involvement in other lethal force incidents and references to such incidents in the soldiers' statements were not put before the jury, thereby creating a false impression that the soldiers had not been involved in such incidents.

109. Secondly, the Coroner had failed to ensure the recall of soldier A (see paragraphs 31-38 above), despite the fact that the High Court considered his evidence to be an important aspect of a proper inquiry into whether or not there was a "shoot to kill" policy. In her view, the shooting of Mr McCaughey on the one hand, and Mr B. on the other, were factually similar with the consequence that the justifications advanced by soldier A for his recourse to lethal force in the case of Mr B. were relevant to whether the justifications he advanced in respect of the use of lethal force against Mr McCaughey should have been accepted by the jury. However, the Coroner's delay and failure to secure his return prevented the next of kin from questioning the only military

witness they were permitted to ask about involvement in other lethal force incidents. The statements placed before the jury had been a wholly inadequate alternative.

110. Thirdly, the Coroner had sat with a jury despite the formidable difficulty in being satisfied that the insidious nature of bias had been removed in terrorism-related cases. Moreover, the fact that the jury was anonymous had prevented any scrutiny of their impartiality.

111. Fourthly, the Coroner had failed to discharge a juror who had displayed clear animus towards the next of kin and who could not, on any analysis, have been regarded as impartial (see paragraphs 39-43 above).

112. Finally, the questions posed by the Coroner to the jury and his summation to the jury (see paragraphs 47-57 above) fell significantly short of ensuring that the soldiers' recourse to lethal force was assessed by reference to the Convention standard of "absolute necessity". The Coroner simply asked the jury about the soldiers' state of belief when they opened fire and when they continued to fire. In doing so, he treated the soldiers as a collective rather than as individuals and failed to apply the two-limb test under domestic law which asked first, whether the soldiers' belief that their lives were in danger was an honest one, and secondly, whether it was reasonable. In addition, the Coroner failed to direct the jury that this test had to be met not only for each soldier but also for each shot. Moreover, the Coroner's formulation did not make it adequately clear that a higher standard of care was demanded of trained soldiers and therefore had the potential to mislead the jury into believing that it was open to them to accept that the soldiers' training and experience may have led to their acting in the way that they did in light of the threats they believed they confronted.

3. The Northern Ireland Human Rights Commission

113. The Northern Ireland Human Rights Commission reiterated that in Northern Ireland, as in England and Wales, an inquest was the means by which the State ordinarily discharged its obligation to investigate under Article 2 of the Convention. However, in Northern Ireland the inquest played an enhanced role in respect of conflict related deaths since in such cases other aspects of the "death investigation system" were very often inadequate. For example, killings by army personnel were often investigated by the police force in circumstances where the investigating officers were connected (albeit indirectly) to the operation under investigation, and the DPP did not give reasons for a decision not to prosecute.

114. At present, in addition to the ongoing coronial case-load, there were approximately forty-four inquests yet to be held into sixty-eight deaths arising from the conflict in Northern Ireland. Others had been heard and were awaiting findings, or were still at the hearing stage. These legacy inquest cases fell into two categories: cases where an inquest had never been held; and cases where an inquest was held but a new inquest was nevertheless

considered "advisable". Approximately half of the outstanding legacy inquests were cases in which no inquest had yet taken place, and those cases concerned deaths which occurred between 1982 and 2000. One such case was the death which was the subject of *McKerr v. the United Kingdom* (no. 28883/95, ECHR 2001-III), where the Coroner reopened the inquest in September 2007 but at the date of the third intervener's observations (16 December 2020) a date had yet to be fixed for its hearing. The second category of cases concerned deaths which took place between 1971 and 1992, and where directions for a fresh inquest were made between 2010 and 2019. The case of *Kelly and Others* (cited above) fell into this category; a new inquest was directed in 2015 but, at the date of the third intervener's observations, no date had yet been fixed for the hearing.

115. The experience in Northern Ireland demonstrated that the right to an investigation might require challenge on a piecemeal and incremental basis. At present, there were many cases in which the immediate problem was one of delay in commencing the inquest and legal proceedings might be required to bring that delay to an end. While an Article 2 compliant investigation could subsequently take place, in order for the protection of the right to life to be practical and effective the subsequent investigation had to be open to scrutiny and that scrutiny had to permit the further finding of a violation of Article 2, if necessary.

B. The Court's assessment

1. General principles concerning the Article 2 procedural obligation

116. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 169, 14 April 2015). The specific requirements of the duty to investigate can be found in *Mustafa Tunç and Fecire Tunç* (cited above, §§ 169-182). In summary, compliance with the procedural requirement of Article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in itself. Rather, they are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues must be assessed (see *Mustafa Tunç and Fecire Tunç*, cited above, § 225).

2. Preliminary observations on the present application

117. It is clear from *Mustafa Tunç and Fecire Tunç* (cited above, § 225) that the Court did not intend for the specific requirements of the duty to investigate to be considered in a piecemeal and incremental fashion. As the separate requirements – including promptness – are not ends in themselves, compliance with the essential parameters should be considered jointly and not separately.

118. Furthermore, when the Court has referred to the assessment of the effectiveness of an investigation, it has almost certainly envisaged a global assessment – by reference to the aforementioned essential parameters – of all of the relevant investigatory steps taken by the authorities. However, in the cases concerning conflict-related deaths in Northern Ireland the focus has been primarily on the inquests. This is because, even though an inquest, in and of itself, is neither necessary nor necessarily sufficient to discharge the State's investigatory duty under Article 2 of the Convention, in the United Kingdom inquests play an important role in discharging the State's investigatory duty under Article 2 of the Convention, but the Court cannot lose sight of the fact that an inquest, in and of itself, is neither necessary nor necessarily sufficient to discharge that duty. An Article 2 compliant investigation must be capable not only of leading to the establishment of the facts and a determination of whether the force used was or was not justified in the circumstances, but also of identifying and – if appropriate – punishing those responsible (see *Mustafa Tunç and Fecire Tunç*, cited above, § 172, and *Armani Da Silva v. the United Kingdom* [GC], no. 5878/08, § 233, 30 March 2016). An inquest may elucidate the facts surrounding a death and make findings as to the lawfulness of the recourse to force, but as an inquisitorial procedure it is inherently incapable of "punishing those responsible". It is not for the Coroner, but rather for the DPP in Northern Ireland (and the Crown Prosecution Service in England and Wales), to determine whether any prosecutions are appropriate, and, if so, it is for the criminal courts to conduct the trial. Similarly, the Coroner has no power to award compensation to the next of kin, although such awards may be made by the civil courts should the next of kin successfully bring a claim for damages.

119. Without doubt, there are good reasons why such emphasis has been placed on the inquest procedure in Northern Ireland (see paragraph 113 above), and in the present case the main thrust of the applicant's complaints concerned the conduct of the inquest (see paragraphs 123-126 below). However, it is evident that the inquest procedure is currently unable to cope due to the large number of ongoing and pending legacy inquests and that the coronial system is beset by systemic delay (see paragraph 95 above). As the Northern Irish Court of Appeal observed in *In The Matter Of Three Applications By Hugh Jordan For Judicial Review*, legacy inquests have become "an adversarial battleground instead of a Coroner-led inquiry" (see paragraphs 88-89 above). In that case, the Court of Appeal noted that the

inquest proceedings had given rise to twenty-four judicial reviews, fourteen appeals to the Court of Appeal, two hearings in the House of Lords and one hearing before the European Court of Human Rights. In fact, the matter has since been the subject of further appeals to the Court of Appeal and Supreme Court (*In the matter of an application by Hugh Jordan for Judicial Review (Northern Ireland)* [2019] UKSC 9). A similarly protracted procedural history is evident in the present case.

120. That being so, it would be neither desirable nor appropriate for this Court to act as a court of further appeal in that "adversarial battlefield", addressing each and every challenge to the inquest procedure if and when it arises. Not only would this Court effectively become a "court of fourth instance" (when its role is not to act as a court of fourth instance: see, for example and in the ambit of Article 6 of the Convention, *Schatschaschwili v. Germany* [GC], no. 9154/10, § 124, ECHR 2015), but the problem of delay at the domestic level would also be further exacerbated. That is not to say that the next of kin should necessarily defer lodging their application with the Court until all domestic proceedings have concluded. On the contrary, it is clear that in cases concerning an investigation into the suspicious death of a relative, applicants are expected to take steps to keep track of the investigation's progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (see, for example, *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III, and *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002).

121. However, once an application is lodged, it will usually fall to the Court, at the point at which it examines the complaints, to carry out a global assessment of the investigation which has taken place to date by reference to the essential parameters identified in its case-law. Should it find a violation of the procedural obligation under Article 2 of the Convention it will be for the Committee of Ministers, acting under Article 46 of the Convention, both to address the issue of what – in practical terms – may be required of the respondent Government to ensure compliance with that obligation, and to supervise the measures taken to remedy the violation. Such measures should only form the subject of a new application that may be dealt with by the Court if they raise a new issue which was undecided by the judgment (see, *mutatis mutandis*, *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 47, 11 July 2017).

122. Nonetheless, in *McCaughey and Others* (cited above, § 128) the Court dealt only with the complaint concerning the promptness of the investigation and informed the applicants that if they were dissatisfied in the future with the progress or outcome of the ongoing domestic procedures it would be open to them to reintroduce their complaints under the substantive and procedural aspects of Article 2 of the Convention. Consequently, the Court, in its Article 46 indication, stated that compliance with its judgment

had to involve the State taking, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 were complied with *expeditiously* (ibid., § 145). As such, on the particular facts of the case at hand the Court would accept that the present application concerns new aspects which it did not cover in its previous judgment.

3. The scope of the present complaint

123. In her application to the Court, the applicant complained solely about the conduct of the inquest. However, in her observations she sought to introduce complaints about the original police investigation, the decision of the DPP not to prosecute, and the civil proceedings.

124. As already indicated, the Court would normally assess compliance with the duty to investigate under Article 2 of the Convention by carrying out a global assessment of all the investigatory steps that have been taken and, indeed, this was the approach taken in *Hugh Jordan*, *McKerr*, *Kelly and Others* (all cited above), *Shanaghan v. the United Kingdom*, no. 37715/97, 4 May 2001, *McShane v. the United Kingdom*, no. 43290/98, 28 May 2002, and *Finucane v. the United Kingdom*, no. 29178/95, ECHR 2003-VIII. It is clear from the Court's judgment in *McCaughey and Others* that the applicants had expressly complained about the entirely of the investigative steps taken, including the investigation by the RUC and the decisions taken by the DPP (see *McCaughey and Others*, cited above, §§ 105-106). However, the Court dealt only with the complaint concerning the promptness of the investigation and informed the applicants that it would be open to them in future to reintroduce their remaining complaints under the substantive and procedural aspects of Article 2 of the Convention (ibid., § 128; see also paragraph 122 above). It was therefore open to the applicants in that case – or the applicant in the present case – to complain about these aspects of the investigation when introducing a fresh complaint under the procedural aspect of Article 2 of the Convention.

125. Nonetheless, when the applicant lodged the second application with the Court on 27 April 2015, she complained only about the conduct of the inquest (see *Gribben and Quinn v. the United Kingdom* (dec.), no 20855/15, 15 March 2016, as well as paragraphs 71 and 72 above). Similarly, when she introduced the present application, she initially limited her complaints to the inquest only. Although she has since, in her observations, sought to widen the scope of her complaint, she has submitted no documents in support of these new allegations. On the contrary, all of the material submitted in support of her applications concerns the conduct of the inquest and the related litigation before the domestic courts.

126. Furthermore, the Court cannot ignore the fact that more than thirty years have now passed since the death of Mr McCaughey. It is axiomatic that

the greater the delay, the greater the difficulty the authorities will have in complying with the other essential parameters of an effective investigation since the lapse of time will inevitably be an obstacle to the location of witnesses and the ability of witnesses to recall events reliably (see *Brecknell v. the United Kingdom*, no. 32457/04, § 71, 27 November 2007). Consequently, the Court has accepted that the extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply may well be influenced by the passage of such a considerable amount of time (ibid., § 72). However, in this case the Court has already found a violation of Article 2 on account of the delay in conducting the inquest and it has not been suggested that there was any further culpable delay on the part of the authorities following its earlier judgment. Consequently, the Court will confine its assessment to the specific complaints made by the applicant about the conduct of the inquest.

4. The Court's assessment of the inquest

127. The applicant makes five specific complaints about the conduct of the inquest (see paragraphs 108-112 above). The Court will consider each in turn before addressing whether, when viewed in the round, there has been a failure to comply with the investigatory duty under Article 2 of the Convention.

(a) The disclosure of material to the next of kin

128. The other legacy inquests considered by the Court took place at a time when the family of the deceased was not able to obtain copies of any witness statements until the witness concerned was giving evidence. The Court held that the non-disclosure of these witnesses' statements prior to their appearance at the inquest prejudiced the ability of the applicants to participate in the inquest and contributed to long adjournments in the proceedings (see *Hugh Jordan*, cited above, § 133; *McKerr*, cited above, § 147; *Shanaghan*, cited above, § 116; *Kelly and Others*, cited above, § 127; and *McShane*, cited above, § 123).

129. No such issue arises in the present case. Rather, the applicant's complaint is more specific: namely, that the Coroner refused to provide her with disclosure of the involvement of the soldiers in other lethal force incidents and prevented the next of kin from questioning the soldiers and other witnesses about such matters; and that references to such incidents in the soldiers' statements were not put before the jury, thereby creating a false impression that the soldiers had not been involved in such incidents (see paragraph 108 above). As the Court of Appeal made clear, inquest practice has since changed so that details of the involvement of soldiers in other lethal force incidents would now be provided to the next of kin as a matter of course

(see paragraph 74 above). However, that fact alone is not determinative of the applicant's complaint. Rather, it falls to the Court to decide whether the failure to disclose this information before or during the inquest prevented any particular matters relevant to the death of Mr McCaughey from being examined.

130. In comparison to previous legacy inquest cases, in the present case the Coroner was not required to confine his investigation to the matters directly causative of the death (compare *Hugh Jordan*, cited above, § 128; *McKerr*, cited above, § 143; and *Shanaghan*, cited above, §§ 110-111). In fact, in order to comply with Article 2 of the Convention, the inquest had to consider "by what means" and "in what circumstances" the deceased came by their deaths (see paragraph 86 above). This meant that matters of planning and control of the operation formed part of its scope (see paragraph 14 above). The Court has repeatedly held that so long as the inquest is not prevented from examining the planning and conduct of the operation, the fact that the Coroner is required to confine his investigation to the matters directly causative of the death and not extend his inquiry into the broader circumstances does not, in and of itself, contradict the requirements of Article 2 (see *Kelly and Others*, cited above, § 122; compare *Shanaghan*, cited above, § 111). In fact, the Court has expressly acknowledged that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Instead, the question of whether an inquest failed to address necessary factual issues will depend on the particular circumstances of the case (see *Kelly and Others*, cited above, § 122).

131. In any event, it would not appear to be in dispute that the "shoot to kill" issue was – at least in some capacity – within the parameters of the inquest into the death of Mr McCaughey. The next of kin had first raised the issue of a "shoot to kill" policy in October 2011 (see paragraph 17 above). In examining the merits of the judicial review application, the High Court accepted that "shoot to kill" was an issue in the inquest but noted that this concept was capable of a number of different meanings (see paragraph 69 above). The applicant herself had not contended that there was a general policy or order issued to shoot all suspected terrorists. Rather, she contended that unnecessary force was used when soldiers confronted armed men by not being prepared to effect arrests; that the planning of the operation was marked by aggressive positioning so as to promote the use of lethal force; and that a culture was said to have developed with the soldiers of taking unnecessarily aggressive action towards suspects (see paragraph 69 above).

132. Before the Court of Appeal the applicant accepted that she had previously not made the case that there was a general policy or order issued to shoot all suspected terrorists, but nevertheless contended that the failure of disclosure had inhibited her ability to explore that case. The Court of Appeal disagreed, pointing out that had she wished to explore this issue she should have brought it to the attention of the Coroner long before the proposed

hearing of the inquest. No such submission was made and consequently the broad parameters of the enquiry pursued by the next of kin were either that soldiers took up unnecessarily confrontational positions or that there was a general culture of soldiers taking unnecessarily aggressive action. In those circumstances, the Coroner had not been obliged to embark upon an extended examination of whether there was a more general "shoot to kill" policy pursued by the security forces in Northern Ireland at the time (see paragraph 75 above).

133. The Court would agree with this assessment. Since the 1980s the existence of a "shoot to kill" policy in Northern Ireland has been the subject of considerable speculation. This speculation gained further traction following an official investigation into three shooting incidents. Although the outcome of the investigation was never made public, in the late 1980s one of the investigating officers published a book and gave press interviews in which he addressed questions relating to the existence of a "shoot to kill" policy (see *McKerr*, cited above, §§ 21-34). In fact, in the early 1990s the Coroner in the *McKerr* case had sought material about the "broad circumstances" in which the killings took place in order to deal with rumours and suspicions that a "shoot to kill" policy existed (ibid., § 60). Therefore, had the applicant in the present case wished the inquest to examine whether there was a general policy or order issued to soldiers to shoot all suspected terrorists, she could, and should, have brought this to the attention of the Coroner at the outset.

134. Bearing this in mind, the Court is satisfied that the inquest adequately addressed the allegations pursued by the next of kin at the inquest. Soldier K, the officer commanding the unit, was questioned about the existence of a "shoot to kill" policy in relation to suspects. Soldier H, the officer commanding the operation, was asked about the appropriate positioning of the soldiers and expert evidence was also called on this issue. Soldiers A, C and D gave evidence about the culture and manner in which the operation was conducted, and the four support soldiers were also available to be questioned on this issue (see paragraph 69 above). In addition, soldier A's statement concerning his involvement in an earlier lethal force incident, together with the ballistics evidence, the pathology evidence and the findings of the first inquest which followed that incident were also put before the jury (see paragraph 34 above), and the next of kin were permitted to make submissions to the jury about the significance of this incident (see paragraphs 48, 70 and 77 above).

135. Moreover, the Court of Appeal itself asked to see the materials provided to the Coroner but not disclosed to the next of kin, together with underlying materials that had not been provided to the Coroner (compare *McKerr*, cited above, § 150, where the Court expressly noted that the High Court judge had not been able to examine the undisclosed material). It further ordered that redacted copies be submitted to the applicant, together with an affidavit explaining the redactions and the process by which the documents

were identified (see paragraph 74 above). Having reviewed the material, and heard the next of kin's submissions, the Court of Appeal was satisfied that the material it directed should be provided to the next of kin was material that should have been directed by the Coroner to enable the applicant to participate in the decision as to its relevance and its effect upon the scope of the inquest. However, it did not consider that this material opened a door on an otherwise unknown and undiscovered area, and it did not accept that the cumulative effect of the material had such probative significance that it would have provided a justifiable basis for an extension of the scope of the inquest onto a wider plain. On the contrary, it was satisfied that the material was "not relevant or not material" (see paragraph 76 above).

136. While the Court would agree that this material ought to have been disclosed to the next of kin when it was first sought in October 2011 (see paragraph 17 above), in light of the foregoing it is not persuaded that as a consequence of the non-disclosure the applicant was excluded from the investigative process to such a degree as would infringe the minimum standard under Article 2. Furthermore, in view of the Court of Appeal's conclusion that this material was either not relevant or not material, the Court is similarly not persuaded that the decision to prevent the next of kin from questioning the soldiers and other witnesses about these other lethal force incidents and to remove references to such incidents in the statements put before the jury prevented examination of those aspects of the planning and conduct of the operation which fell within the scope of the inquest into the killing of Mr McCaughey.

(b) The recall of soldier A

137. In the previous legacy inquest cases persons suspected of causing the death could not be compelled to give evidence. In practice the military witnesses did not attend and the Court criticised the use of their statements only (see *Hugh Jordan*, cited above, § 127; *McKerr*, cited above, § 144; *Kelly and Others*, cited above, § 121; and *McShane*, cited above, § 120). In the present case, all the soldiers (except for soldier B) made themselves available to give evidence to the inquest (see paragraph 24 above). Evidence was also heard from two pathologists, an expert on military affairs, two ballistics experts, a police officer who had been involved in the operation, and two detectives involved in the subsequent RUC investigation (see paragraph 102 above). In view of the fact that over twenty years had elapsed since the shooting of Mr McCaughey, and at least some of the soldiers had been discharged from the army and were no longer resident in the United Kingdom, this feat was nothing short of remarkable. The applicant's complaint, however, focuses on the failure of the Coroner to secure the recall of soldier A to give evidence about the death of Mr. B. (see paragraph 109 above). However, while the domestic courts considered it desirable for soldier A to have returned to give further evidence at the inquest, in the Court's view the

Coroner's decision to conclude the inquest without that further evidence cannot be impugned.

138. For the Court, difficulties such as those connected with the recall of soldier A are an inevitable consequence of the delay in conducting the inquest. By the time the inquest took place, soldier A was a private citizen living and working in the Middle East (see paragraph 31 above). He had returned to the United Kingdom and given evidence to the inquest over the course of three days (see paragraph 25 above). It has been suggested that he and/or the Ministry of Defence misled the inquest about his future availability but there have been no clear findings on this issue (the Court of Appeal referred to a series of "most unfortunate events and actions" by the soldier A, his English solicitors and the Ministry of Defence (see paragraph 77 above)). In any event, regardless of how the confusion arose, it remained the case that following his communication of 10 April 2012 (see paragraph 33 above) the Coroner was wholly in the dark about soldier A's current and future whereabouts and availability, and he had no means of finding out this information. A subpoena could not be served on soldier A unless and until he returned to the jurisdiction, and there was no guarantee that he would return at all (see paragraph 37 above). In the circumstances, the Coroner considered that the value in completing the inquest efficiently and while the evidence was still fresh in the mind of the jury outweighed the value in speculatively trying to seek the attendance of soldier A. Nonetheless, soldier A's statement concerning the earlier incident, together with the ballistics evidence, the pathology evidence and the findings of the first inquest were read to the jury (see paragraph 34 above). The jury was given a robust indication of the desirability of soldier A's attendance, and informed that a ruling had been made requiring him to attend on a date when he was known to be in the United Kingdom, and that he had failed to appear (see paragraph 55 above). The participants were also permitted to make their own submissions to the jury with regard both to the shooting of Mr B. and its relevance to the conduct and planning of the operation which resulted in the shooting of Mr McCaughey, and to soldier A's decision not to return to give evidence on this matter (see paragraphs 48, 70 and 77 above).

(c) The conduct of the inquest with a jury

139. The applicant further challenges the decision of the Coroner to hold the inquest with a jury (see paragraph 110 above). Her complaint concerns the engagement of a jury *per se*; save for her complaint about one particular juror (see paragraphs 111 above and 141 below) she does not make any specific allegations about the impartiality of the jury empanelled for the inquest into the death of Mr McCaughey. However, the Court observes that she did not challenge the engagement of a jury before or during the inquest, despite her having brought many other challenges by way of judicial review, both before and during the inquest (see paragraphs 67 and 78 above). In the

context of Article 35 § 1 of the Convention, the Court has made it clear that applicants are required to make "normal" use of remedies before the "appropriate domestic body" in order to prevent a breach of the Convention and remedy directly the impugned state of affairs (see *Wright and Brown v. the United Kingdom* (dec.), 52334/13, § 42, 18 October 2016). In the present case, the Court considers that "normal" use of domestic remedies would have entailed an application to the Coroner prior to the commencement of the inquest (see paragraph 67 above). Had such an application been unsuccessful, it would have been open to the applicant to have sought permission to apply for judicial review. If the applicant had pursued this challenge prior to the commencement of the inquest, the Coroner and possibly the domestic courts would have been able to consider the risk of bias and, if such a risk had been found to exist, direct that the inquest be conducted by the Coroner sitting alone. Such a challenge would therefore have been capable of remedying directly the impugned state of affairs. Instead, the applicant only brought her challenge after the jury had delivered its verdict, when the only remedy would have been to quash the inquest verdict and order that a further inquest take place. A fresh inquest would have caused significant further delay which would in turn have further compromised the adequacy and effectiveness of the investigation into the death of Mr McCaughey.

140. As such, the Court does not consider that the High Court and the Court of Appeal can be criticized for refusing leave to apply for judicial review on this ground (see paragraphs 67 and 78 above) and, accordingly, the decision to conduct the inquest with a jury will not be taken into account for the purposes of its Article 2 assessment of the investigation in the case at hand.

(d) The decision not to discharge a juror

141. For the Court, the applicant's complaint about the decision not to discharge the juror (see paragraph 111 above) is in essence a challenge to the facts as found by the Coroner. Following the complaints by the next of kin the Coroner observed the juror closely but saw nothing that would have substantiated their allegations of inappropriate or hostile behaviour towards them. He also made inquiries of the legal representatives in the courtroom and took into account the fact that no complaints had been made from other jurors (see paragraphs 42-43 above). It would have been open to the Coroner to have investigated, of his own motion, the allegations apparently made to the next of kin by the expert witness and the member of the Press Association (see paragraph 39 above). Indeed, in view of the highly sensitive nature of the inquest, it would perhaps have been preferable for him to have done so. However, in view of the Coroner's clear findings, which were twice upheld on appeal (see paragraphs 46 and 67 above), and the jury's clear and unanimous verdict (see paragraphs 58-62 above), the Court does not consider

this to have been in and of itself a matter of serious prejudice to the investigation as a whole.

(e) The Coroners questions, directions and summations to the jury

142. Unlike the previous legacy inquests that have been considered by the Court, and indeed the inquests in *McCann and Others* (27 September 1995, Series A no. 324) and *Bennett v. the United Kingdom* ((dec.), no. 5527/08, 7 December 2010), in the present case the jury was tasked with providing not just a short form verdict but also a longer, narrative verdict on the issues central to the inquest (see paragraphs 58-62 above). This verdict was elicited by a series of eight detailed questions put to the jury by the Coroner (see paragraph 47 above). The parties were given the opportunity to make submissions on the questions to be asked of the jury (see paragraph 47 above) and the final draft was not subject to legal challenge by the next of kin before the narrative verdict was delivered. While the Coroner's questions, directions and summations to the jury helped shape the narrative verdict, in the Court's view the narrative verdict provided an important check on the role of the Coroner as it allowed the jury to elucidate the reasoning behind its verdict of "lawful killing", and made it possible to determine the impact on the jury of any deficiencies in the Coroner's directions.

143. That being said, the Court is not persuaded that there were any significant deficiencies in his questions, directions or summation. In *Bennett* (cited above, § 63) the father of the deceased had argued that there was a violation of the procedural aspect of Article 2 because the Coroner did not incorporate the test of "absolute necessity" into her direction to the jury. The Court found that, while the Convention standard appeared on its face to be stricter than the national one, the difference between the two standards was not "sufficiently great" for a violation of Article 2 § 1 to be found on this ground alone (see *Bennett*, cited above, §§ 70-71; see also *McCann and Others*, cited above, §§ 154-155). Therefore, the Court held that while it might have been preferable for the inquest jury to have been directed explicitly using the terms "absolute necessity", the fact-finding role of the inquest had not been undermined (see *Bennett*, cited above, § 74).

144. Moreover, in the present case the Court cannot accept the applicant's submission that the Coroner treated the soldiers as a collective rather than as individuals and that he failed to direct the jury that the test for self-defence under domestic law had to be met not only for each soldier but also for each shot (see paragraph 112 above). On the contrary, the Coroner expressly asked the jury whether, at each point in the incident that force was used, having regard to the soldiers' state of belief, the force used by each of them was reasonable in the circumstances (see paragraph 48 above).

145. As the applicant points out, the application of the test of self-defence imposes in principle a higher standard of care on firearms-trained police officers than, for example, on untrained civilians (see paragraph 112 above).

However, it is clear from his summing up to the jury that the Coroner reminded the jurors both of the instructions on the yellow card (namely, that firearms should only be used as a last resort if there is no other way to prevent the danger; that if firearms are used, only aimed shots should be fired; that no more rounds than are necessary should be fired; and that all reasonable precautions should be taken not to injure anyone other than the target – see paragraph 54 above) and of the fact that the soldiers were professionals who were, according the evidence before the inquest, well trained (see paragraphs 51-53 above).

146. Therefore, the Court does not consider that the Coroner's direction to the jury fell significantly short of ensuring that the soldiers' recourse to lethal force was assessed by reference to the Convention standard of "absolute necessity", or that the fact-finding role of the inquest has in any way been undermined. When the narrative verdict is considered together with the Coroner's questions and summation to the jury, it is clear that the jury considered that each of the soldiers honestly and reasonably believed that their lives were in danger both when they opened fire and as they continued to fire; that the force used throughout was reasonable in the circumstances; and that once the soldiers felt compromised the use of force had been absolutely necessary, there having been no other reasonable course of action available to them. It could not, therefore, be said that the inquest verdict failed to provide the next of kin with the possibility of establishing responsibility for the death of Mr McCaughey, nor did it "fail to allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed" (compare *Hugh Jordan*, cited above, § 142).

(f) Conclusion

147. The essential purpose of an Article 2 investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Brecknell*, cited above, § 65). In the present case the inquest was undoubtedly thorough, with a scope which extended beyond matters directly causative of the deaths and which encompassed broader questions relating to the planning and scope of the operation. While the Court has identified certain weaknesses in the inquest (most notably, the failure to disclose to the next of kin material relating to other fatal shootings the soldiers were involved in, the absence of soldier A, and the Coroner's decision not to further investigate claims that a juror was demonstrating animus towards the next of kin – see paragraphs 136, 137 and 141 above), for the reasons set out above it does not consider that these weaknesses, either individually or cumulatively, undermined the ability of the inquest to fulfill this essential purpose.

148. The application must therefore be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 17 February 2022.

Ilse Freiwirth Deputy Registrar	Yonko Grozev President