In The Supreme Court of the United Kingdom

BETWEEN

THE QUEEN on the application of
CHONG NYOK KEYU and others

Appellants

-and-

SECRETARY OF STATE FOR
FOREIGN AND COMMONWEALTH AFFAIRS and another

Respondents

(1) ATTORNEY GENERAL FOR NORTHERN IRELAND
(2) PAT FINUCANE CENTRE AND RIGHTS WATCH (UK)

Interveners

WRITTEN SUBMISSIONS OF THE SECOND INTERVENERS

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1. The Second Interveners, the Pat Finucane Centre and Rights Watch (UK), are both charities that represent the bereaved families of those killed during the Northern Ireland conflict. They focus on deaths that had some state involvement, and try to help, by advocacy and also by campaign work, to bring about proper investigations.

2. These submissions are confined to responding to the argument advanced in the Attorney General's written case. He submits that:

   2.1. Any proceeding that does not have as its object the identification and punishment of those responsible or an award of compensation "falls outside the procedural limb of article 2" (§3).

   2.2. Neither an inquest, nor an inquiry under the provisions of the Inquiries Act 2005, have that object (§8 and 10).

   2.3. Accordingly, inquests and inquiries fall entirely outside the article 2 procedural duty. They cannot play a role in the discharge of that duty;

and by the same token article 2 can never require the holding of an in inquest or an inquiry.

3. This submission would require a radical departure from the orthodox approach of the courts at the highest level both domestically and in Strasbourg. The article 2 procedural duty requires the state to bring about an effective investigation of its own motion that satisfies the following requirements: it must (1) be independent, (2) be prompt, and (3) be capable of leading to the identification and punishment of those responsible, (4) provide for a sufficient element of public scrutiny and (5) involve the deceased's family. The investigation should ascertain not only the actions of the state agents who directly used lethal force but also any failures in the planning and control of the operation that led to the death (*Al-Skeini v. United Kingdom* [2011] 53 EHRR 18, §163), and any systemic failures (*Oneryildiz v. Turkey* [2005] 41 EHRR 20, §94; *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, §31 and 41).

4. The procedural duty can be discharged by any mechanism or combination of mechanisms that – taken together - meet all of those requirements. As the House of Lords emphasised in *R (JL) v Secretary of State for Justice* [2009] 1 AC 588 , §31, "The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual state to decide how to give effect to the positive obligations imposed by article 2." In the United Kingdom, the article 2 investigative obligation may be discharged by a criminal investigation conducted by the police or other investigating authorities, by an inquest or inquiry, and by criminal or disciplinary proceedings. What is required will depend upon the facts:

4.1 Where a death involves a suspected breach by a public official of the negative obligation to refrain from taking life unlawfully, the primary vehicle for investigating the death will be a police inquiry and, where the evidence justifies it, a prosecution. Disciplinary proceedings may also play a role in less serious cases, where the death is the result of a breach of

duty of a non-criminal character. In many cases, nothing more will be necessary.

4.2 But there are certain instances where a criminal prosecution or disciplinary proceedings will be insufficient. This will typically be the case (a) where the death involves an arguable breach by public officials of their positive obligation to protect the right to life from homicide, issues that would not be examined in a criminal prosecution of the perpetrator; (b) where the death involves an arguable breach of the State's positive obligation to take adequate suicide prevention measures, so that there is no prosecution of the perpetrator; (c) where there is an allegation of system failure which caused or contributed to the death, but which would not be examined in a criminal trial; (d) where a police operation involves negligent planning which is outside the scope of a criminal prosecution; (e) where there are credible allegations of State collusion in an unlawful killing that cannot - or are not - properly examined in a criminal investigation and prosecution; (f) where the accused's plea of guilty prevents a full examination of the facts giving rise to possible breach of the State's negative or positive obligations to protect the right to life; (g) or where the issue at trial is confined to the mental state of the perpetrator; or (h) where the accused dies, absconds or flees the jurisdiction.

4.3 Put shortly, in any case in which there is a plausible allegation of a violation by the State of its negative or positive obligation to protect the right to life, a criminal investigation and prosecution which leaves key questions of State responsibility uninvestigated will not be sufficient to discharge the Article 2 investigative obligation. In such cases, the State is obliged to satisfy this obligation by some other means, and that will ordinarily require an inquest conducted according to the principles laid down in *R (Middleton) v. HM Coroner for Western Somerset* [2004] 2 AC 182, or a statutory inquiry.

4.4 Lord Bingham explained this schema in *Middleton* §30:

> "In some cases the state's procedural obligation may be discharged by criminal proceedings. This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in *Edwards* 35 EHRR 487), or the issue at trial is the mental state of the defendant (as in *Amin* [2003] 3 WLR 1169), because in such cases the wider issues will probably not be explored."

5. The Second Interveners submit (a) that an inquest and/or a statutory inquiry are each *capable of making a contribution* to the discharge of the state's procedural obligation under article 2 (since they can identify those public officials responsible for causing or contributing to an individual's death, reach conclusions about questions of fault, and set in train a process that is capable of leading to the eventual prosecution and punishment of those responsible, or to an award of compensation); and (b) that *in some circumstances*, an inquest or an inquiry or both will be *necessary* to discharge that duty – where other mechanisms (such as a police or disciplinary investigation) have left important issues of State responsibility unaddressed. Those two very simple propositions, if established to Your Lordships' satisfaction, are sufficient to dispose of the Attorney General's argument. They are supported by clear and consistent authority:

5.1. In *Amin* (a case of prisoner on prisoner homicide) the House of Lords concluded that a public inquiry "must be held to satisfy the obligations imposed by article 2" §15 and 38. This was because the criminal prosecution of the murderer (who had pleaded guilty) did not examine the alleged breach by the prison authorities of their positive obligation to safeguard the victim's right to life, and because the disciplinary investigations that had been conducted were either insufficiently independent or insufficiently thorough to meet the requirement of the article 2 investigative obligation. The House of Lords evaluated the aggregate of the investigative steps that had been conducted so far, and concluded that taken together they had left uninvestigated the important question of a possible violation of the positive obligation in Article 2.

5.2. Since the perpetrator in *Amin* had been prosecuted for murder, there had been no inquest. In direct contradiction to the position adopted by the Attorney General in the present case, the House of Lords observed at §33 that "it is very unfortunate there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation". It is thus clear that where important questions of State responsibility remained uninvestigated, their Lordships regarded an inquest as the appropriate vehicle by which the article 2 investigative obligation could be discharged.

5.3. Indeed, in *R (Middleton) v. HM Coroner for Western Somerset* [2004] 2 AC 182, §20, Lord Bingham for the House of Lords observed that an inquest is the *usual* way in which the article 2 obligation is discharged in England and Wales:

> "The European court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public inquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case."

In that case the House of Lords decided that where an inquest is the primary means adopted for investigating a death involving a potential breach by the State of its negative or positive obligations under article 2, the inquest must be conducted so as to give effect to the requirements set out in paragraph 3 above: §20 and 34-36.

5.4. The conclusion in *Middleton* applies equally to an inquest in Northern Ireland: *Jordan's Applications* [2014] NICA 76, Morgan LCJ, §110.

5.5. In *R (Smith) v. HM Coroner for Oxfordshire* [2011] 1 AC 1, the Supreme Court concluded that where the article 2 procedural duty arose, an inquest

must conform with it: §88, §106, §126, §131, §137, §200, §218, 309, §340.

5.6. *Re McCaughey* [2012] 1 AC 725 illustrates clearly the error of the Attorney General's approach. In a case involving a deliberate killing, the Supreme Court decided that "this country is under an international obligation under the Convention to ensure that, if it does hold an inquest into an historic death, that inquest complies with the procedural obligations of article 2" (Lord Phillips, §56).

6. Where the procedural duty is triggered, an inquest or inquiry will not in every case be necessary. In a straightforward case of alleged deliberate homicide by a public official (e.g. a "shoot to kill" case), a criminal investigation and (if justified) a prosecution, of the individual perpetrator may well be sufficient to excavate all relevant issues of State responsibility, arising under the negative obligation under article 2 to refrain from unlawful killing. However, where the facts give rise to a plausible allegation of other forms of state responsibility, an inquest or inquiry will be necessary. An alleged violation of the positive (*Osman*) obligation to prevent a killing by a private actor is the most obvious example. However similar considerations will arise where a criminal prosecution is impossible or inadequate; or where there are other relevant issues requiring investigation in addition to individual criminal responsibility of the perpetrator such as (for example) where there is an arguable violation arising from (a) mismanaged planning of a law enforcement operation; (b) other system failures which caused or contributed to the death; (c) collusion by public officials in a murder committed by a private individual; (d) a failure of past criminal or other investigations to get at the truth.

7. The Attorney General's submission is also inconsistent with the consensus of the political parties in Northern Ireland, as reflected in the Stormont House Agreement, concluded in December 2014. This was a written agreement between the five political parties that make up the Northern Ireland Executive, together with the UK Government, following 11 weeks of negotiation. It was

designed to resolve outstanding areas of disagreement so as to pave the way for more stable government in Northern Ireland. The agreement expressly provides that legacy inquests, which are those involving deaths during the Northern Ireland conflict, will be "conducted to comply with ECHR Article 2 requirements"[1].

8. The Second Interveners note that the Attorney General's submissions do not address the two temporal questions that lie at the heart of the *Keyu* appeal. His argument relates to the means by which an article 2 obligation is to be discharged, however and whenever it arises. However, it is right to point out that the deaths with which the Second Interveners are concerned each occurred after the coming into force of the Convention in respect of Northern Ireland, but prior to the coming into effect of the Human Rights Act 1998. The Second Interveners adopt the submissions in Part 2 of the Appellants' Case in this regard. The decision of the Supreme Court in *McCaughey* held that where an inquest takes place after 1 October 2000, in respect of a death occurring prior to that date (but after the coming into force of the Convention), then the inquest must comply with the requirements of the article 2 procedural duty. This would also apply where an investigation other than an inquest takes place in any given case – the investigative mechanisms, taken as a whole, must meet the requirements of article 2.

9. *McCaughey* did not specifically decide that where an inquest or inquiry (or other investigation) *has not been held* in the temporal circumstances described above, article 2 will require one. However the underlying logic of the decision in *McCaughey* (relying, as it does, on *Silih* principle that the substantive and procedural obligations in article 2 are severable) is that there may be cases where article 2 mandates the holding of an inquest or inquiry now, in respect of a death occurring prior to 2 October 2000. This will be where (a) important questions of state responsibility for the death were not fully and adequately investigated prior to 2 October 2000 (see paragraph 6 above); and (b) the conditions in *Silih* and *Janowiec* are met, that is either (i)

[1] www.gov.uk/government/news/the-stormont-house-agreement. That agreement accompanies these submissions.

a major part of the investigation required by article 2 was or should have been carried out in the ordinary course of events after 1 October 2000 or (ii) important fresh evidence has come to light after that date requiring a re-investigation that is compliant with article 2 (*Janowiec* §142-143, see also *Brecknell v United Kingdom* [2008] 46 EHRR 42, §66-72). In the Northern Ireland context, the situation in (b)(i) becomes increasingly unlikely with the passage of time. It is now 15 years since the 1998 Act came into force, and most legacy deaths have now been investigated. However the situation in (b)(ii) remains a very live possibility.

10. Put very simply, in the context of deaths occurring in Northern Ireland prior to 2 October 2000, there are two possible situations in which article 2 will currently generate an investigative obligation:

10.1. Where an inquiry (whether an inquest or otherwise) is in fact opened into an historical death that inquiry must meet the criteria for a full article 2 enhanced investigation (as set out in paragraph 3 above): *McCaughey.*

10.2. Where no such inquiry has been opened, article 2 may require one if there are important issues of State responsibility still to be addressed; and there is fresh evidence requiring a re-investigation: *Janowiec;* and *Brecknell.*

11. In seeking to argue that inquests and inquiries have no role to play in discharging the state's investigative obligation under article 2, the Attorney General principally relies on paragraph 143 of *Janowiec*:

> "143. The Court further considers that the reference to "procedural acts" must be understood in the sense inherent in the procedural obligation under Article 2 or, as the case may be, Article 3 of the Convention, namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party (see *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV, and *McCann and Others v. the United Kingdom*, 27 September 1995, § 161, Series A no. 324). This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth."

12. The Attorney General's submission is that this paragraph defines (and limits) the type of domestic proceedings which may be relevant to the satisfaction of the article 2 procedural duty, no matter when the death occurred – and that neither inquests nor inquiries fall within that definition because they cannot lead directly to the identification and punishment of the perpetrator or an award of compensation. The Second Intervener's case is that an inquest and an inquiry are each proceedings that are relevant to discharge of the procedural duty within the meaning of the first sentence of the paragraph.

13. Paragraph 143 does not say that the procedural obligation can only be discharged by criminal, civil or disciplinary proceedings which of themselves identify and punish those responsible:

13.1. The types of proceedings expressly contemplated in paragraphs 143 of *Janowiec* include not only criminal, disciplinary and civil proceedings in the strict sense, but also "administrative" proceedings such as an inquest or inquiry.

13.2. The proceedings at issue need not *themselves* identify and punish those responsible or award damages. They need only be *capable of leading to* that outcome. Inquests and inquiries can plainly contribute to that ultimate objective.

13.3. It is the "framework" (ie the combination) of the various types of proceedings which must, as a whole, be capable of leading to the contemplated outcome. A "procedural act" such as an inquest or inquiry, will qualify, providing it plays a part in a framework of proceedings which is able to lead to that result.

14. The Grand Chamber cannot have intended to exclude proceedings which are capable of leading to the identification and punishment of those responsible, and, at the same time, establish a historical truth. That would defy logic. Criminal, civil and disciplinary proceedings have, as a key part of their

purpose, the establishment of the historical truth of what happened. The two purposes simply cannot be disaggregated in the way envisaged by the Attorney General. As the Court observed in *El-Masri v. Macedonia* [2013] 57 EHRR 25, an investigation into serious alleged violations of article 3 had to be "capable of leading to the identification and punishment of those responsible for the alleged events *and of establishing the truth*" §193[2]. A key part of the very purpose of the procedural duty set out in *R (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, at §31 was the need to ensure "so far as possible that the full facts are brought to light".

15. Accordingly, the only limitation of scope imposed by last sentence of §143 of *Janowiec* is that the procedural duty in article 2 is not to be understood as extending to inquiries or investigations that can make *no contribution at all* to the identification and punishment of those responsible, or an award of damages.

16. In Northern Ireland, an inquest is capable of leading to the identification and punishment of those responsible:

16.1. The legislation governing the verdicts that may be left at an inquest in Northern Ireland is s.31 of the Coroners Act (Northern Ireland) 1959 read together with rules 16 and 22 Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. These provisions are quoted in paragraphs 12 and 14 of *Jordan v. Lord Chancellor*. They are supplemented by s.35(3) of the Justice (Northern Ireland) Act 2002, which requires the coroner to write to the Director of Public Prosecutions if he considers that a criminal offence may have been committed.

16.2. In 2001, *Jordan v. United Kingdom* [2003] 37 EHRR 2 decided that the Northern Irish inquest could play no effective role in the identification or

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2 This is supported by the reasons in the partly dissenting opinion in *Janowiec* of Judges Ziemele, De Gaetano, Laffranque and Keller, at §8-9.

prosecution of criminal offences, and in that respect fell short of the requirements of article 2 (§130). That was because the verdicts that could be left were limited to the identity of the deceased, and the date, place and cause of death (*Jordan v. UK* §129; see also §64-65). The only relevance the inquest might have had to a possible prosecution was that, as noted above, s.35(3) of the Justice (Northern Ireland) Act 2002 required the coroner to write to the Director of Public Prosecutions if he considered that a criminal offence may have been committed. However, at that time, the DPP was not required to take any decision in response to that notification (*Jordan v. UK* §129).

16.3. This has all changed. The prohibition on a verdict of unlawful killing remains the same. Nevertheless, the inquest may now identify those responsible for the death, and may end in a critical narrative verdict on the important issues in the case. Two authorities have brought about this change to the interpretation of the relevant coronial legislation. Firstly, *Jordan v. Lord Chancellor* [2007] 2 AC 226, at §39 observed that the jury may find facts "which may point very strongly towards a conclusion that criminal liability exists" (§39). Secondly, in *Jordan's Applications* [2014] NICA 76, Morgan LCJ confirmed at §110 that where article 2 arises, an inquest in Northern Ireland should follow the principles set out in *Middleton*. And *Middleton* decided at §20 that, in such cases, the inquest "ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case." This means the jury may leave "a judgmental conclusion of a factual nature, directly relating to the circumstances of the death." *Middleton* at §37.

16.4. The fact that the inquest is now required to culminate in a conclusion on the important factual issues in the case is sufficient to mean that the inquest is capable of leading to the identification and punishment of those responsible. That follows from what Lord Bingham in *Middleton* said about the case of *Keenan v. United Kingdom* [2001] 33 EHRR 38. In *Keenan* there had been an inquest into a prison suicide, but the European

Court decided it did not "constitute an investigation capable of leading to the identification and punishment of those responsible for the deprivation of life." Lord Bingham observed that:

> "A statement of the inquest jury's conclusions on the main facts leading to the suicide of Mark Keenan would have precluded that comment" (§17).

16.5. Further, now, if a reference is made to the DPP under s.35(3) of the 2002 Act by the coroner, the DPP would normally be required to reconsider whether to initiate a prosecution. That is what the Government accepted in *McCaughey v. United Kingdom* [2014] 58 EHRR 13, §100. And that is what Lord Bingham said in *Jordan v. Lord Chancellor*:

> "Where the jury's factual findings point towards the commission of a criminal offence, or it appears to the coroner that an offence may have been committed, the coroner's duty under section 35(3) of the Justice (Northern Ireland) Act 2002 is to report promptly to the Director of Public Prosecutions, who should no doubt take such action as is appropriate. He would plainly be failing in his duty if, receiving a report from a coroner indicating the possible commission of a criminal offence, he did not consider or reconsider the case with care." §40

16.6. The fact that the DPP will be required to reconsider criminal charges in these circumstances is another reason why the inquest is now capable of leading to the identification and punishment of those responsible. That is indicated by §129-130 of *Jordan v. United Kingdom*, where the lack at that time of any means by which the inquest could oblige the DPP to reconsider charges was an important factor in the court's conclusion that the inquest was not capable of leading to the required outcome.

17. An inquiry under the Inquiries Act 2005 is at least equally capable of leading to the identification and punishment of those responsible:

17.1. That is because it is capable of coming to factual findings which are of at least equal significance in securing accountability to those in an inquest. The only statutory restriction on the words the panel may use in its report is to be found in section 2 of the 2005 Act:

"(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.

(2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."

17.2. Section 2(1) thus prevents the panel from returning a determination that any person is guilty of a criminal offence. However, as section 2(2) makes quite clear, this does not inhibit the panel from recording key facts from which such an inference might be drawn, or from identifying those responsible.

17.3. Moreover, in an inquiry under the 2005 Act, the Chair (or panel) may return findings of fact according to the strength of the evidence unconstrained by any formal burden or standard of proof. As Sir William Gage held in the *Baha Moussa Inquiry* the general standard of proof is the civil standard. So where the Inquiry Chair (or panel) considers that a given factual conclusion is more likely than not to be true then this should be recorded as a proven fact in the final report. But where the evidence justifies greater certainty in relation to a particular factual finding the Chair (or panel) should indicate this in the final report (e.g. by finding a fact proved beyond reasonable doubt). Similarly where the Chair (or panel) concludes that the evidence gives rise to a reasonable suspicion, a strong suspicion, or a likelihood of a particular factual conclusion, but does not establish it on the balance of probabilities, then they should use whatever form of words most accurately reflects the degree of certainty that is borne out by their evaluation of the evidence. See also the ruling on the burden and standard of proof in the *Bloody Sunday Inquiry*.

17.4. This means that the inquiry can culminate in a conclusion on the important factual issues in the case, and can lead to the identification and ultimately the punishment of those responsible.

17.5. Moreover, whereas an inquest in Northern Ireland remains subject to the statutory restriction that the coroner or jury cannot return a verdict of unlawful killing, section 2(2) of the 2005 Act enables the Chair (or panel) of a statutory inquiry to record that verdict[3].

17.6. If that conclusion was recorded, the DPP would ordinarily be expected to reconsider whether to bring a prosecution. In *R v. DPP, ex p Manning* [2001] QB 330, Lord Bingham CJ, at §33, said that prosecutorial reconsideration would be expected if an unlawful killing verdict were left at an inquest. It is submitted that the same must follow from such a conclusion at a public inquiry. There have thus been fresh police investigations (and prosecutorial reconsideration) following the *Bloody Sunday* and *Azelle Rodney* inquiries.

17.7. The ability to come to a finding of unlawful death was a central reason why the inquest in *McCann* was capable of leading to the identification and punishment of those responsible. That is explained in *Middleton* at §10 and 14-15. Because of the prohibition on an unlawful killing verdict being left at an inquest in Northern Ireland, a statutory inquiry under the 2005 Act potentially has an even more direct role to play in leading to that outcome.

18. This demonstrates that both an inquest and an inquiry fall within the type of proceedings to which the court's extended temporal jurisdiction extends, according to paragraph 143 *Janowiec*.

19. There are two further reasons why it cannot be right that only those proceedings that in and of themselves determine criminal, civil or disciplinary liability can play a role in discharging the state's procedural duty under article 2.

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3 As Sir Christopher Holland did at the Azelle Rodney Inquiry: *Report*, 5 July 2013, HC552, §21.13.

19.1. Firstly, it may be necessary to conduct a preliminary independent investigation which reveals evidence and finds facts, before criminal, civil or disciplinary proceedings can even be initiated. Before that initial investigation reveals the relevant evidence there may be insufficient evidence to found a police investigation, and no prospect of civil proceedings being brought. The requirement for a preliminary fact-finding assessment to take place in some cases, before a full-blown inquiry was launched, was recognised in *R (JL) v Secretary of State for Justice.* The House of Lords concluded that, in a case of near-suicide, the article 2 procedural duty required an independent official investigation to take place in the first instance. In coming to that conclusion, Lord Rodger observed:

> "It is not a case where a criminal investigation would be in prospect. And even supposing that, despite the difficulties, civil proceedings in the name of L were to be contemplated, this is the kind of case envisaged by the court in *Makaratzis* 41 EHRR 1092 where the availability of such proceedings would, in all likelihood, be conditioned on an adequate independent investigation." (Lord Walker at §96 and Lord Mance at §114 agreed with this).

Thus, a preliminary inquiry may be encompassed within article 2 investigative obligations even though it could not, on any view, lead directly to the imposition of criminal or civil liability. A similar conclusion was reached in *Brecknell v. United Kingdom* (cited above). That case involved a killing by loyalist gunmen in 1975. In 1999 a man named John Weir made public allegations that there had been collusion between the security forces and the loyalist gunmen prior to the murder. The European Court decided that the article 2 procedural duty arose as a result of this fresh evidence. But the duty was limited in the first instance to an obligation "to verify the reliability of the information and whether a full investigation, with a view to bringing charges against any suspect, could usefully be launched" (§75). That duty was satisfied in part by a combination of police inquiries and a review by an independent investigatory unit called the Historical Enquiry Team. This also indicates

that, even if the evidence is insufficient to require a criminal investigation, article 2 may require an independent inquiry.

19.2. Secondly, the suggestion that only criminal, civil or disciplinary proceedings may be required in order to discharge the article 2 procedural duty, is inconsistent with the principle that it is for the individual state to decide how it will do so. The state is free to utilise (and to rely upon) any combination of mechanisms that (taken together) meet the requirements of article 2. The surprising implication of the Attorney General's submission is that the United Kingdom would not be able to rely on an inquest or inquiry in Strasbourg as discharging its investigative obligation under article 2. This cannot be right: see *Middleton* at §20.

20. The Attorney General submits that "civil or even disciplinary remedies may suffice" to discharge the procedural duty in cases involving non-deliberate killings. In support of that submission he relies on *Calvelli and Ciglio v. Italy* application no. 32967/96, 17 January 2002 and *Vo v. France* [2005] 40 EHRR 12 (which is referred to in *Oneryildiz v. Turkey*).

21. The Second Interveners submit that the procedural duty cannot in all cases be satisfied by civil or disciplinary proceedings, and *Calvelli* and *Vo* have no relevance to what is required by this duty. To understand why, it is necessary to explain, as the Court of Appeal did in *R (Humberstone) v. Legal Services Commission* [2011] 1 WLR 1460 at §52 to 68, that article 2 imposes on the state two different types of duty regarding investigations.

22. Firstly, the state must make available a judicial system by which a citizen can access an effective investigation into any death (*Humberstone* §52 and 58). Unlike the "procedural duty", in such cases the state is not required to bring about any inquiry of its own motion. For this reason, the availability of civil proceedings together with a traditional inquest will normally be sufficient (§67):

23. Secondly there is the article 2 "procedural duty" on the state to bring about of its own motion an independent and effective investigation. This is the duty with which cases like *Amin*, *Middleton* and *McCaughey* were concerned. This proactive obligation comes about whenever there is an arguable breach of the substantive article 2 duties, and in some other circumstances such as whenever someone dies in state custody (*Middleton* §3, and *R (JL) v. Secretary of State* §59). Arguable breaches of the substantive duties are plainly not limited to deliberate killings (*Humberstone* §70). Civil proceedings cannot be taken into account in the assessment of whether the state satisfied this duty, because they are undertaken at the initiative of the next-of-kin, not the state (*Al-Skeini* §165). In *Humberstone* Smith LJ, with whom Maurice Kay LJ and Leveson LJ agreed, explained:

> "I am satisfied from examination of all these authorities that, in respect of duties of investigation, there are two senses in which article 2 may be said to be engaged. It may be engaged in a very wide range of cases in which there is an obligation to provide a legal system by which any citizen may access an open and independent investigation of the circumstances of the death. The system provided in England and Wales, which includes the availability of civil proceedings and which will in practice include a coroner's inquest, will always satisfy that obligation. In addition, article 2 will be engaged in the much narrower range of cases where there is at least an arguable case that the state has been in breach of its substantive duty to protect life; in such cases the obligation is proactively to initiate a thorough investigation into the circumstances of the death."

24. *Calvelli and Ciglio v. Italy* and *Vo v. France* both fall into the first category of cases. That is because they involved "the specific sphere of medical negligence" (*Calvelli* §51), where there was no arguable breach of the substantive article 2 duties. *Calvelli* and *Vo* tell us nothing about the scope of the second category of cases: the article 2 procedural duty to conduct an enhanced investigation *proprio motu*, which arises when there is an arguable breach by the state of its negative or positive obligations to protect the right to life. They do not show that, in the circumstances where that article 2 procedural duty to conduct an enhanced investigation is triggered, civil or disciplinary remedies will suffice.

25. At §43-44 the Attorney General suggests that *Amin* should be revised in light of *Calvelli and Ciglio v. Italy*. But *Calvelli* has no relevance to the issue in *Amin*. *Amin* involved a death in custody in respect of which the state automatically came under the procedural duty to proactively investigate, and *Calvelli* only concerns cases in which that procedural duty does not arise.

26. Finally, the Attorney General relies on *Margus v. Croatia*. That case simply noted that granting an amnesty in respect of the killing and ill-treatment of civilians would run contrary to articles 2 and 3. It did not hold that preventing amnesties was the only requirement of article 2.

27. At §42 of his Case the Attorney General appears to recognise that *Middleton* is inconsistent with his principal submission that an inquest is not required to satisfy the procedural duty under article 2. He draws a distinction between cases of prison suicide and cases of deliberate killing, arguing that an inquest can never be required by article 2 in the latter circumstances. The Second Interveners submit that if an inquest is necessary in cases of suicide (where there are grounds to suspect a failure by the State to discharge its positive suicide prevention obligations) or homicide (where there are grounds to suspect that public officials may be in breach of their *Osman* duty to protect the right to life) this is because any criminal trial did not have the capacity to investigate the wider issues raised by the death. In the same way, an inquest will be necessary in some cases involving deliberate killing by state agents – where issues of state responsibility arise which cannot be (or have not been) investigated in the ordinary course of a criminal investigation and prosecution of the perpetrator.

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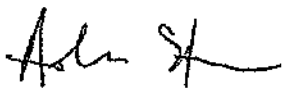

Adam Straw
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2 April 2015