



**THE SUPREME COURT**

**[Appeal No: 12/2021]**

**Clarke C.J.  
O'Donnell J.  
MacMenamin J.  
Dunne J.  
Charleton J.  
O'Malley J.  
Baker J.**

**BETWEEN/**

**THOMAS FOX**

**PLAINTIFF/APPELLANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND  
AND THE ATTORNEY GENERAL**

**DEFENDANTS/RESPONDENTS**

**Judgment of Mr. Justice Clarke, Chief Justice, delivered the 14th of September, 2021**

**1. Introduction**

- 1.1 There is no doubt but that the right to life guaranteed by the European Convention on Human Rights ("ECHR") carries with it an obligation on subscribing states to carry out investigations into certain situations where persons may have been killed in circumstances potentially involving state agents. It is also argued on behalf of the appellant ("Mr. Fox") that the right to life guaranteed under the Constitution carries with it either the same or a similar obligation.
- 1.2 A Mr. Seamus Ludlow was murdered on the 2 May, 1976 near Dundalk, Co. Louth. It is suggested by the family of Mr. Ludlow that the murder was carried out by loyalist paramilitaries. More controversially it is also suggested that there may have been an involvement by security forces within the United Kingdom and, more controversially still, that members of An Garda Síochána might, in some way, have been ordered not to carry out an appropriate investigation.
- 1.3 Against that backdrop, Mr. Fox, who is a nephew of Mr. Ludlow, commenced these proceedings seeking initially that the defendants/respondents ("the Minister") establish two Commissions of Investigation under the Commission of Investigation Act 2004 ("the 2004 Act"), the first to investigate the Garda handling of the original investigation into Mr. Ludlow's murder and the second to investigate missing garda documents. Ultimately those proceedings failed in the High Court (see, *Fox v. The Minister for Justice and Equality & Ors*. [2017] IEHC 817). An appeal by Mr. Fox to the Court of Appeal was dismissed (see the judgment of Birmingham P., speaking for the Court – *Fox v. The Minister for Justice and Equality and Ors* [2020] IECA 141). Mr. Fox sought and obtained leave to appeal to this Court.

**2. The Grant of Leave to Appeal**

- 2.1 The basis on which this Court granted leave to appeal is set out in a determination of this Court, dated the 11 March, 2021 (see, *Fox v. the Minister for Justice and Law Reform & Anor.* [2021] IESCDT 30).
- 2.2 In substance, the Court concluded in its determination that there was a general public interest in clarifying the extent of the procedural obligations of the State under Article 2 of the ECHR, in particular whether that Article carries an obligation for the State to carry out an effective inquiry into the circumstances of a death or whether any such obligation is confined to the identification and punishment of the perpetrators of a crime. The Court also found that a question arose as to whether any obligation can arise under Article 2 in respect of a death that occurred before the effective date of application of the ECHR in Ireland, but where certain material facts came to light thereafter. It was also determined by the Court that the appeal was in the interests of justice, as it may bring some finality to the family of Mr. Ludlow. On these grounds, leave to appeal was granted.

### **3. The Issues**

- 3.1 At an initial case management hearing there was broad agreement as to the issues which arise. While such issues could be characterised in a number of different ways, one useful way of specifying the matters which the Court will have to determine is the following.
- 3.2 First, there is what has come to be termed the temporal issue. As a result of Art. 29.6 of the Constitution, international treaties do not form part of the domestic law of Ireland unless and until the Oireachtas so determines. While Ireland was an initial ratifying contracting party to the ECHR, it was only by means of the European Convention on Human Rights Act 2003 ("the 2003 Act"), that the Convention became part of the domestic law of Ireland. The extent to which the ECHR forms part of the domestic law of Ireland is as specified in the 2003 Act. Amongst other things, it has previously been held that the 2003 Act is not retrospective in its effect (see, for example, *Dublin City Council v. Fennell* [2005] IESC 33). It is obvious, therefore, that the murder of Mr. Ludlow occurred long before the ECHR had effect in domestic law.
- 3.3 However, it is argued that the obligations of the State under the ECHR are engaged in this case. It is first said that obligations under the ECHR arose from as early as 1953 (being the time when the Convention became binding on Ireland as a matter of international law) and that such obligations can continue to oblige the State to comply with obligations today. In addition, it is said that a fresh obligation arose on Ireland under the ECHR to carry out further investigations into aspects of the circumstances surrounding the death of Mr. Ludlow at a time subsequent to the coming into force of the 2003 Act. On that basis, it is contended that the 2003 Act applies in respect of any relevant obligation on the part of the State to investigate such circumstances, notwithstanding the fact that the initial event occurred well before the State had obligations in domestic law in that regard. In that context, there are questions surrounding both the circumstances in principle which might give right to obligations and whether, in light of the Court's decision on such principles, relevant obligations arise in the circumstances of this case.

- 3.4 Second, there is the question of whether a similar right to or obligation of investigation can be said to derive, under the Constitution, from the right to life guaranteed by Art. 40.3. A subsidiary, but potentially important, question arises as to whether, if such a derived right or obligation can be said to exist, it is co-extensive with the obligation derived from the ECHR, or whether there may be some differences in practice. The reason why this may be important is a particularly practical one in the circumstances of this case. Obviously one consequence of the recognition of a derived right and obligation of the type asserted might be that the temporal issue would fall away provided that there was no material relevant distinction between the rights and obligations under the Constitution, on the one hand, and under the ECHR, on the other. If a substantially identical set of rights and obligation are held to arise under the Constitution, then there may be questions as to the extent to which those rights and obligations apply to events which occurred a very long time ago but the specific cut-off date of the day when the 2003 Act came into force would not of itself be relevant.
- 3.5 In addition, it remains possible that the extent of any rights and obligations which might be found to be derived from the right to life guaranteed by the Constitution may not be taken to be identical to those guaranteed by the ECHR so that the consequences for the obligations of the State in the circumstances of a particular case such as this may, at least potentially, differ depending on whether the matter is being considered under, respectively, the Constitution or the ECHR.
- 3.6 Third, and subject to there being rights and obligations which are held to apply in general terms in the circumstances of this case (having regard to any temporal issues arising), then the extent of the obligations on the State, whether under the ECHR or under the Constitution or both, may need to be assessed insofar as such considerations may be relevant to the obligations asserted in these proceedings.
- 3.7 Fourth, and finally, it will be necessary to refer to certain investigations already carried out. To the extent that the Court may be persuaded that a particular obligation or obligations lies on the State in all the circumstances of this case, it then follows that it will be necessary to assess whether the investigations already carried out meet the obligations on the State or whether there remains an as yet unfulfilled obligation. It is also important to record that the case did develop materially so that it will be necessary to refer to that evolution in due course.
- 3.8 Before turning to the judgments of the High Court and the Court of Appeal, it is appropriate to set out a brief account of the facts as identified in the High Court judgment including an account of the investigations already carried out.

#### **4. The Facts and the Investigations**

- 4.1 Mr. Seamus Ludlow was murdered on the 2 May, 1976, when he was 45 years of age. Mr. Ludlow, who was a Catholic, was employed as a forestry worker at the time of his death and was living with his mother and his sister's family at Mount Pleasant, Dundalk, Co. Louth. On the 1 May, 1976, Mr Ludlow spent the evening socialising in the Dundalk area. He left the Lisdoo Arms and was last seen hitching a lift outside a garage, located

two miles from his home, shortly after midnight. Mr. Ludlow failed to return home that night and his sister began a search the following morning. Mr Ludlow's body was found at approximately 3 pm by a tourist at Culfore, in a lane half a mile from his home.

- 4.2 A post mortem examination found that Mr. Ludlow had died from shock and haemorrhage as a result of bullet wounds to his heart, right lung and liver. The murder investigation team at Dundalk Garda Station concluded that Mr. Ludlow had been murdered elsewhere and that his body had been dumped near his home.
- 4.3 The Garda investigation team established in the immediate aftermath of Mr Ludlow's murder was headed by a superintendent from Dublin Castle, together with a team of 30 detectives from Dublin and Dundalk. This investigation was suspended after three weeks. Mr. Fox contends that the Ludlow family were not given a formal explanation for the suspension of this investigation but that a local garda in Dundalk informed him that the orders to halt the investigation came from Dublin.
- 4.4 It is Mr. Fox's case that an important line of enquiry was not pursued by the Gardaí, being that Mr. Ludlow was murdered by loyalist paramilitaries, or by individuals connected to the British State Security Services, in a case of mistaken identity. According to this theory, the perpetrators mistook Mr. Ludlow, a forestry worker with no connection to any paramilitary groups, for a senior member of the IRA. Mr. Fox also avers that the Gardaí failed to question a group of eight SAS men who were discovered in the State shortly after Mr. Ludlow's murder. He contends that the Gardaí instead incorrectly blamed the IRA for the murder and that members of the Ludlow family were told by Gardaí that Mr. Ludlow had been killed by the IRA for being an informer and that other family members had knowledge of the planned killing in advance. The IRA has denied any involvement in the murder of Mr. Ludlow.
- 4.5 Nobody has ever been charged in relation to the murder of Mr Ludlow, either in this jurisdiction or elsewhere. Mr. Fox, along with other members of the Ludlow family, has campaigned for many years, seeking a public inquiry into the initial Garda investigation, which they argue was flawed.
- 4.6 In 1995/1996, a journalist provided information to the Ludlow family suggesting that named members of a loyalist paramilitary group were responsible for Mr. Ludlow's murder and that the Gardaí were aware of the identity of the alleged culprits. This prompted the Ludlow family to write to the then Garda Commissioner expressing their concerns about the Garda investigation into Mr. Ludlow's murder. On foot of this, the Garda authorities carried out a re-examination and review of the case, which brought to light the fact that the Gardaí had received information from the RUC in 1979 stating that the RUC had been reliably informed that loyalist paramilitaries were involved in the murder of Mr. Ludlow and naming four individuals as those responsible. This information had not been followed up by the Gardaí at the time it was received. In 1996, the Gardaí made contact with the RUC and the four named suspects were arrested in Northern Ireland where they were interviewed with the assistance of the Gardaí. In 1999, the DPP for Northern Ireland directed that no prosecutions should be taken.

- 4.7 In August 1999, a report of the Victims Commissioner, John Wilson, recommended that Mr. Ludlow's case should be subject to a private enquiry. The Ludlow family were not satisfied with this approach. Through correspondence sent on behalf of the Ludlow family by their then solicitors, MacGuill & Co., they suggested to both the Department of Justice and the Department of An Taoiseach that a public inquiry into Mr Ludlow's murder be established. Between December 1999 and June 2000, then Minister for Justice, Equality and Law Reform, Mr. John O'Donoghue T.D., as well as a representative of then Taoiseach, Mr. Bertie Ahern T.D., indicated to the Ludlow family that the Government's proposed course of action on the matter was to include Mr. Ludlow's case in the remit of the Commission of Inquiry into the Dublin/Monaghan and Dundalk bombings, which was at that stage presided over by the late Chief Justice, Mr. Justice Liam Hamilton, but later taken over by the late Mr. Justice Henry Barron. The Ludlow family again expressed their dissatisfaction with this proposed form of inquiry and repeated their call for a public inquiry with full judicial powers.
- 4.8 On the 23 February, 2002 the Ludlow family met with Mr. Justice Barron during which meeting he expressed the view that there might be a stronger case for a public inquiry in Mr. Ludlow's case than in the case of the Dublin/Monaghan bombings on the basis that he considered that there were more issues in Mr. Ludlow's case which might be followed up within this jurisdiction.
- 4.9 Mr. Justice Barron duly conducted his Inquiry ("the Barron Inquiry") and reported to the Taoiseach on the 19 October, 2004 ("the Barron Report"). In November 2005, both houses of the Oireachtas requested that the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights ("the Oireachtas Joint Committee"), or a sub-committee thereof would consider the Barron Report in public session. The Barron Report, along with the subsequent Final Report of the Oireachtas Joint Committee, concluded that the lack of follow up by the Gardaí on the information provided by the RUC in 1979 relating to the suspected involvement of loyalist paramilitaries in the murder of Mr. Ludlow was a serious failure on the part of An Garda Síochána. In the Barron Report, Mr. Justice Barron found that the only credible explanation for the failure to pursue this line of inquiry was that Garda management had directed the investigation team not to do so on the basis that it might lead to a demand for a forward reciprocal arrangement with the RUC in respect of interviews in this jurisdiction and that this outcome was perceived by Garda management as being contrary to Government policy.
- 4.10 Arising from its consideration of the Barron Report, the Oireachtas Sub-Committee went on to make a number of recommendations, which were duly adopted by the Oireachtas Joint Committee. The Sub-Committee concluded that "a further inquiry is essential in order to ensure justice is both done and seen to be done. It is also necessary to address the potential damage to the rule of law that would occur if the investigation into the murder of any citizen of the State is not treated in a thorough and professional manner as is the right of every citizen." Ultimately, it settled on recommending two Commissions of Investigation into, respectively, the conduct of the investigation by the Gardaí of Mr. Ludlow's murder and missing Garda documents.

- 4.11 On the 28 May, 2008, the Ludlow family were advised in the course of a meeting with Mr. Paul McGarry, of the Department of An Taoiseach, that the Attorney General had taken a strong view that there was no urgent public importance in relation to issues surrounding the murder of Mr. Ludlow and that therefore there was no need to have an inquiry.
- 4.12 Some years later, following sustained campaigning by the Ludlow family for the establishment of a Commission of Investigation into the initial Garda investigation of Mr. Ludlow's murder, the then Minister for Justice, Ms. Frances Fitzgerald T.D., in a letter dated 25 February 2015 and addressed to MacGuill & Co., indicated that she did not intend to establish a Commission of Investigation into the murder of Mr. Ludlow on the basis that it was "not apparent that more might be gained from the establishment of a Commission of Investigation in further resolving these issues nor (could she) conclude there is a significant public concern at issue sufficient to merit establishment of one." The Minister also stated that she did not intend to refer Mr Ludlow's case to an independent review panel, established in 2014 to review certain allegations of Garda misconduct, on the basis that it was not envisaged that this panel would be in a position to deal with specific issues arising in relation to historical or Troubles-related cases.
- 4.13 It was in this context that Mr. Fox commenced proceedings in the High Court challenging the decision and/or the ongoing failure or refusal of the Minister to establish two Commissions of Investigation into the Garda handling of his uncle's murder, pursuant to the Commission of Investigation Act 2004.
- 4.14 It is next appropriate to turn to the judgments of the High Court and of the Court of Appeal. It should be noted that those judgments, for obvious reasons, reflect the case made before those Courts and the evidence presented to the High Court.

## **5. The Judgments of the High Court and the Court of Appeal**

- 5.1 In her High Court judgment, the trial judge (Faherty J.) distilled Mr. Fox's challenge down to three broad headings, those being (i) Legitimate Expectation, (ii) Irrationality of the Decision and, most pertinently in the context of the present appeal, (iii) Issues Arising by Reference to Article 2 of the ECHR. Faherty J. dismissed the grounds of challenge advanced by Mr. Fox under all three headings.
- 5.2 In respect of Mr. Fox's submission that he had a legitimate expectation that the investigatory process into Mr Ludlow's death, once commenced, would be concluded, Faherty J. found that Mr. Fox had failed to meet the test for legitimate expectation set out in *Glencar Exploration plc v. Mayo County Council* [2002] 1 I.R. 84. This finding was upheld by the Court of Appeal.
- 5.3 In the High Court, Faherty J. also dismissed Mr. Fox's argument that the Minister's decision making process in deciding not to propose to the Government that the two Commissions of Investigation recommended by the Joint Oireachtas Committee be set up was unfair and irrational. This finding was also upheld by the Court of Appeal.

- 5.4 The grounds of Mr. Fox's challenge in the High Court which are most germane to the issues arising in the present appeal are those relating to whether Mr. Fox had a valid claim under Article 2 of the ECHR for the establishment of the two Commissions of Investigation recommended by the Oireachtas Joint Committee. Mr Fox submitted that the right to life guaranteed by Article 2 of the ECHR includes an obligation on the State to provide a legal and administrative framework which effectively protects life and to make available an effective means of investigating deaths and holding those responsible to account. He contended that Article 2 was engaged in Mr. Ludlow's case as, in his submission, the Barron Report and the Report of the Oireachtas Joint Committee had cast serious doubt on the effectiveness of the original investigations into the Mr. Ludlow's murder.
- 5.5 In the High Court it was Mr. Fox's case that, under Article 2 of the ECHR, the State has a procedural duty to investigate a death that occurred before the 2003 Act came into force where a significant proportion of the procedural steps to determine the cause of the death and to hold those responsible to account took place after the 2003 Act became law. In support of this submission, Mr. Fox relied on the judgments of the European Court of Human Rights ("ECtHR") in *Silih v. Slovenia* (App. No. 71463/01) (2009) 49 E.H.R.R. 996 GC and *Janowiec v. Russia* (App. Nos. 55508/07 & 20520/09) (2013) 58 E.H.R.R. 792 GC, as well as the judgment of the Supreme Court of the United Kingdom in *R (Keyu) v. Secretary of State* [2016] AC 1355. Mr. Fox contended that the Irish courts should mirror the approach adopted in this jurisprudence and conclude that there is an obligation on the State to hold an effective investigation into Mr. Ludlow's death under Article 2 of the ECHR.
- 5.6 Mr. Fox further submitted that the circumstances of Mr. Ludlow's death met the criteria set out by the ECtHR in its judgment in *Brecknell v. United Kingdom* (2008) E.H.R.R. 957. In *Brecknell*, the ECtHR held that, where only insignificant procedural steps had been taken prior to the date of application of ECHR, State authorities may have an obligation to take further investigative measures in circumstances where a plausible and credible allegation or piece of evidence comes to light, which is relevant to the identification and eventual prosecution or punishment of those responsible for an unlawful killing.
- 5.7 In considering Mr. Fox's submissions relating to any potential claim he might have under Article 2, Faherty J. first considered the concept of dualism, as set out in Art. 29.6 of the Constitution, and its effects on the justiciability of the ECHR in Irish law. She cited the judgment of Murray C.J. in *McD. v. P.L.* [2009] IESC 81, at para. 15 of which he stated that the dualist approach taken in Irish law means that international treaties to which the State is a party can only be given effect to in a national law to the extent that national law, rather than the international instrument itself, specifies. Faherty J. then considered the judgment of Laffoy J. in *Byrne v. An Taoiseach* [2011] I.R. 190, in which it was concluded that was no basis on which any provision of the ECHR was directly justiciable as a matter of domestic law, and that the ECHR was enforceable under domestic law only insofar as it was statutorily enforceable under the provisions of 2003 Act.

- 5.8 In respect of Mr. Fox's arguments relating to a procedural duty to investigate on the part of the State arising under Article 2, Faherty J. concluded that the establishment of the Commissions of Investigation recommended by the Oireachtas Joint Committee fell outside the scope of Article 2. She reached this finding on the basis that Article 2 is concerned with criminal investigations into unlawful deaths, rather than with the ascertainment of historical truths. Faherty J. further held that, even if the Commissions of Investigation sought by the Ludlow family could be said to be sufficiently connected to an investigation to establish the identification and prosecution of the perpetrators of Mr Ludlow's murder, it would be difficult for Mr. Fox's case to succeed before the ECtHR on Article 2 grounds given the lapse of time between the date of Mr. Ludlow's death in 1976 and the date at which the ECHR became applicable in Irish law, being the 31 December 2003. In light of this time lapse, Faherty J. held that it was questionable as to whether the circumstances of Mr. Ludlow's case would meet the "genuine connection" test, as set out by the ECtHR in *Janowiec*. Faherty J. was, however, prepared to find that a major part of the investigation into Mr. Ludlow's death was carried out after the 31 December 2003.
- 5.9 Finally, Faherty J. concluded that Mr. Fox's reliance on *Brecknell* was misconceived as, in her view, Mr. Ludlow's case did not meet the test set out in *Brecknell* for a revival of any international obligation the State may have to take further investigative steps. Faherty J. held that Mr. Fox had not successfully demonstrated that new evidence or information existed such as would warrant the re-opening of the criminal investigation into the killing of Mr. Ludlow. She remarked that if such information did exist, the Garda authorities would be bound to act on it. Faherty J. accepted that an effective Garda investigation had not taken place in the years following Mr. Ludlow's murder, by reason of the failure of the Garda authorities to follow up on information provided by the RUC. However, she held that it was worth noting that, when this information came into the public domain in 1995/96, the Garda investigation into Mr. Ludlow's death was re-ignited and that ultimately led to the arrest, albeit not the prosecution, of four named suspects in Northern Ireland.
- 5.10 In the Court of Appeal, Birmingham P. found himself in agreement with the findings of Faherty J. on these issues, as he concluded that the arguments made by Mr. Fox in relation to Article 2 could not be successful. Birmingham P. remarked that Article 2 carries with it a right to an effective investigation into a death, which he understood as referring to an identification of perpetrators, leading to prosecutions and punishment. Birmingham P. pointed out that the Ludlow family believe that they know the identity of the perpetrators of their uncle's murder and are resigned to the fact that, while a Garda investigation remains open, a prosecution at this stage is unlikely. He agreed with the conclusion of Faherty J. that Article 2 is not concerned with investigations into investigations and therefore, in his view, the Commissions of Investigation into the conduct of the original Garda investigation sought by Mr. Fox, fall outside the procedural limb of Article 2. Furthermore, Birmingham P. found that Mr. Fox's arguments relating to Article 2 must fail on the basis that the 2003 Act does not have any retroactive effects.

## **6. Some Late Developments**

- 6.1 As noted earlier, there were a number of late developments in the process before this Court which it is necessary to explain for they touch closely on the issues which this Court now has to decide. On the side of Mr. Fox, additional affidavit evidence was sought to be introduced. On the side of the Minister, additional legal authorities on the constitutional issue were put forward on the day before the hearing was due to take place on 3 June, 2021. Apart from the question of whether it would be appropriate to admit new evidence at such a late stage, the content of the affidavit sought to be introduced disclosed the fact that there was to be a form of inquiry conducted in Northern Ireland which might encompass events surrounding the murder of Mr. Ludlow. In addition, attention was drawn to the fact that the Programme for Government, entered into by the parties forming the present government of Ireland, includes a commitment to cooperate with any such matters.
- 6.2 By that time, it had also become clear that there were possible objections on the part of the Minister to the constitutional arguments sought to be raised on behalf of Mr. Fox before this Court on the basis, it was said, that such arguments had not been, or at least had not been to any material extent, advanced before both the High Court and the Court of Appeal.
- 6.3 Having regard to all of those developments, the Court indicated that it would first wish to hear the parties on the 3 June, 2021 on questions surrounding the admissibility of new evidence, whether Mr. Fox was entitled to raise the constitutional arguments set out in his written submissions, whether some or all of the issues arising in these proceedings might be said to be moot because of the investigations in Northern Ireland to which I have just referred and whether the appeal was fully ready for hearing in light of some or all of those matters. The Court indicated that it was also minded to hear the parties on the 3 June on the temporal issue but would defer further consideration of the other issues in the case until the 10 June.
- 6.4 Having heard the parties on such issues on the morning of the 3 June, the Court delivered a ruling at the beginning of the afternoon session. There had been some discussion during the morning session as to whether it was contended on behalf of Mr. Fox that the State had an obligation, whether under the ECHR or under the Constitution, to carry out further investigations into the death of Mr. Ludlow or whether the claim was now confined to issues arising out of Garda investigations which took place in both 1976 and 1979 into that murder. During the course of debate, it was helpfully clarified by counsel on behalf of Mr. Fox that the only declarations sought related to what were said to be the failures of Garda investigation at that time. In that context, the Court required Mr. Fox's advisors to set out precisely what declarations they would now urge that the Court should make.
- 6.5 In light of that clarification, the additional evidence sought to be relied on did not appear to the Court to be particularly relevant in that it concerned possible ongoing investigations into the death of Mr. Ludlow as opposed to ongoing inquiry into what were said to have been Garda failures. However, for completeness, the Court decided that it would ask counsel on behalf of the Minister to fulfil a suggestion made during the hearing to the

effect that certain additional information concerning those inquiries would be filed. The Court's intent in so directing was to ensure that it did not have an incomplete picture of facts which might be of some background relevance.

- 6.6 In response to this request from the Court, the Minister filed two documents. First, an affidavit of Ms. Deirdre Meenan, Principal Officer in the Northern Ireland Division of the Department of Justice and, second, a Witness Statement of a Mr. James McDonagh. The affidavit of Ms. Meenan outlines to the Court the State's understanding of the nature of the Barnard Review, which is currently underway in Northern Ireland. Ms. Meenan explains that the Barnard Review arose out of the judgment of the Court of Appeal of Northern Ireland in *Re Edward Barnard* [2019] NICA 38. The review is established in order to fulfil the legitimate expectation held to exist in that case to the effect that an independent police team would carry out an analytical report on collusion. The Barnard Review is, in Ms. Meenan's view, an analytical review into the activities of the so-called Glenanne Gang (a loyalist paramilitary-style group) and it will include the murder of Mr. Ludlow. Ms. Meenan suggests that, while the Barnard Review is not required by Article 2 of the ECHR, it is nonetheless compliant in its form with Article 2. The Barnard Review is not an investigation into the criminal activities of the Glenanne Gang as such, but rather a review of the original investigation which seeks to identify opportunities missed by the original investigators. Ms. Meenan states that, at the conclusion of the Barnard Review, it will be decided whether further lines of inquiry into the murder of Mr. Ludlow should be pursued. The Garda Commissioner, Mr. Drew Harris, has confirmed that An Garda Síochána is in regular contact with, and provides operation assistance to, the Barnard Review and that, if it is ultimately concluded by the Barnard Review that further investigations ought to take place into the murder of Mr. Ludlow, it will be decided at that stage whether such investigations should be conducted by An Garda Síochána or by the Police Service of Northern Ireland. Aside from the operational assistance provided by An Garda Síochána, Ms. Meenan avers that the State has no other direct involvement with the Barnard Review.
- 6.7 The Witness Statement of Mr. James McDonagh was made on the 6 October, 2020 in compliance with the Criminal Procedure Rules, r.16.2, under s. 9 of the Criminal Justice Act 1967. In his Statement, Mr. McDonagh claims that, at around 11 am on the 2 May, 1976, he was driving on the main road from Newry to Dundalk when he was overtaken by a fast moving car which then made a sharp turn and drove off in the other direction. He states that this occurred roughly three miles from the border with Northern Ireland. Mr. McDonagh claims that he slowed his car as he was alarmed by the erratic nature of the driving of the car that had overtaken him, but that he did not think much more of it at the time, nor did he immediately connect it with the murder of Mr. Ludlow, which he heard about later that evening. In his Witness Statement, Mr. McDonagh suggests that, at the time of the incident, he was on good terms with several local Gardaí and that, on the following day, he told one of them about the incident on the road while they were having lunch together. He claims that several days later this Garda, along with another detective, asked him to look at a car parked at the local Garda station, which, from the make, model and registration number, he was able to identify as the car that had

overtaken him on the morning of the 2 May. Mr. McDonagh identified the car from within a moving vehicle as it was not possible to stop at the Garda Station due to an incident taking place there at the time. Several weeks later Mr. McDonagh went to the Garda Station and offered to make a statement about the car, but ultimately he decided against doing so at that time out of fear that it might “ruffle the feathers” of the British Army who were present in the area. Mr. McDonagh states he decided to make his Witness Statement in 2020 having followed the campaign of the Ludlow family in the media and feeling that he should say something about the incident with the car.

- 6.8 It will be necessary to return to the significance, if any, of that additional information in due course. However it is appropriate to return to the position adopted by the State on the constitutional issues.
- 6.9 While maintaining the position that the constitutional issues now sought to be relied on (on behalf of Mr. Fox) had not been canvassed to any material extent in the courts below, counsel on behalf of the Minister did not oppose those matters now being considered by this Court. In light of the importance of dealing comprehensively with the legal issues raised and considering the lack of opposition on the part of the Minister, the Court indicated that it would hear argument on the constitutional issue when the hearing resumed on the 10 June.
- 6.10 Thereafter the Court proceeded to consider the temporal issues and heard submissions from both sides. In order to simplify the issues which might arise for debate on the second hearing day, the Court intimated to the parties that it was prepared to make a preliminary ruling defining the critical date for the purposes of the ECHR in the context of these proceedings as being the last day of 2003 which was, of course, the day on which the 2003 Act came into force. The Court indicated that it would inform the parties if it was, on fuller consideration, to be of a mind to potentially alter its view on that question so that the parties should be given a further opportunity to address the issue should such a situation arise. The Court did not, in the course of its subsequent deliberations, come to any different view and it is, therefore, appropriate to start by setting out the issues which arose under the temporal issue followed by the Court’s reasons for making the preliminary ruling to which I have referred.

## **7. The Temporal Issues**

- 7.1 The set of issues arising in the present appeal, which can be broadly described as the ‘temporal issues’, relate to the potential application of the 2003 Act, insofar as its provision may give rise to an investigative obligation on the part of the State under Article 2 of the ECHR. A number of sub-issues arise.
- (i) The “Critical Date”
- 7.2 The first aspect of the temporal issue which was disputed by the parties in this appeal is whether the ECHR had effect in Irish law at the time of Mr. Ludlow’s death and whether the ECtHR had temporal jurisdiction when Mr. Ludlow was murdered. It was Mr. Fox’s submission, placing reliance on the judgment of the ECtHR in *Chong & Ors. v. The United*

*Kingdom* (App. No. 29753/16) (2018) ECHR 802, that the correct critical date is the date at which a contracting State recognised the right of individual petition to the ECtHR. Mr. Fox therefore submitted that the critical date for the purpose of Article 2 in Ireland is the 25 February, 1953, the date at which Ireland ratified the ECHR and made its declaration.

- 7.3 Mr. Fox also submitted that Article 13 of the ECHR, which was incorporated into Irish law by the 2003 Act, imposes a duty on a state responsible for an ECHR violation to provide the victims of this violation with a domestic remedy. It was submitted by Mr. Fox that the effect of Article 13 is that every remedy available to an applicant to the ECtHR must be available domestically to an applicant before the Irish courts. Again relying on the judgment in *Chong*, Mr. Fox argued that, as the ECtHR fixes the critical date as being the date of individual petition (1953 in an Irish context), he would have a remedy before the ECtHR in the present case, thereby obliging the Irish courts under Article 13 to provide the same remedy and fix the critical date at February 1953.
- 7.4 The Minister, however, submitted that the correct critical date for the purpose of Article 2 in Irish law is the date at which the 2003 Act entered into force, giving effect to the provisions of the ECHR domestically. On this basis, the Minister argued that the critical date is the 31st of December 2003. In this regard, the Minister placed reliance on the judgment in *Byrne*, in which Laffoy J. held that the ECHR is not directly effective in Irish law, but rather that it is domestically effective only to the extent of the provisions of the 2003 Act. The Minister further submitted that the provisions of the 2003 Act are not retrospective in their effect and that the Act therefore does not apply to events occurring before the 31 December, 2003. On this basis it was submitted by the Minister that an application of the 2003 Act to an event which occurred before this date, in this case the murder of Mr. Ludlow, would be contrary to Art. 15 of the Constitution.
- (ii) New Procedural Investigation
- 7.5 Mr. Fox submitted that, irrespective of whether this Court determines the critical date to be in 1953 or 2003, the State nevertheless has a procedural obligation to investigate an unlawful death that occurred prior to the critical date, so long as there is a temporal connection and that a significant portion of the procedural investigative steps have taken place **after** the critical date. In support of this submission, Mr. Fox relied on the ECtHR judgment in *Silih*. It was initially submitted that, in the present case, the State having, in Mr. Fox's submission, failed to effectively investigate Mr. Ludlow's murder, the procedural obligation set out by the ECtHR in *Silih* has been engaged, but not yet discharged. However, it was ultimately accepted that the Court was not being invited to require that an Article 2 compliant investigation into Mr. Ludlow's murder should now be conducted. Rather, it was said, the Court should require a further investigation into the reasons for the established failings in the original Garda investigation.
- 7.6 Mr. Fox accepted that the Article 2 procedural duty to investigate a death that occurred before the critical date arises in principle in the following three circumstances:-

- (a) where the death had occurred before the critical date, the court's temporal jurisdiction would extend only to the procedural acts or omissions in the period subsequent to that date;
- (b) the procedural obligation would come into effect only if there had been a 'genuine connection' between the death as the triggering event and the entry into force of the ECHR, and the lapse of time between the triggering event and the critical date had to remain reasonably short; or
- (c) a connection which was not 'genuine' might nonetheless be sufficient to establish the court's jurisdiction if it was needed to ensure that the guarantees and underlying values of the ECHR were protected in a real and effective way.

However, this 'Convention values' argument was not pursued on this appeal.

- 7.7 Having regard to the requirements of the genuine connection test as set out by the ECtHR in its judgment in *Janowiec*, Mr. Fox acknowledged that it is only in exceptional circumstances that the ECtHR will regard a lapse of time of more than 10 years between the death in question and the critical date as satisfying the genuine connection test. However, he submitted that the Supreme Court of the United Kingdom and the Court of Appeal in Northern Ireland have recently taken a more flexible approach to the test and have found that, while the time elapsed between events is an important factor to be taken into consideration, a time lapse of 10 years or less is not an essential requirement to establish a genuine connection. In this regard, Mr. Fox submitted that, in circumstances where a major part of the investigation into an unlawful death has taken place after the critical date, this may compensate for a longer time lapse.
- 7.8 Mr. Fox argued that, in the circumstances of the present case, irrespective of whether this Court determines that the ECHR entered into force in Irish law on the 25 February, 1953 or the 31 December, 2003, it remains the case that a significant portion of the procedural steps of the investigation into the death of Mr Ludlow took place after both of these dates. In Mr. Fox's view, the investigative steps taken by both the Barron Inquiry and the Justice Committee between 2002 and 2006 were significantly more profound and detailed than the original Garda investigations in 1976 and 1979. As such, it was Mr. Fox's case that a majority of the investigative steps took place after the later potential critical date (the 31 December, 2003) and that the 27 year time lapse between Mr. Ludlow's death in 1976 and the 2003 critical date can be compensated for by the fact of the majority of the investigation having taken place after this later date.
- 7.9 It was further submitted by Mr. Fox that there are still procedural steps that need to be undertaken in the investigation into his uncle's murder or, as the case developed, Garda failings in respect of the initial investigation, notably the two Commissions of Investigation recommended by the Oireachtas Joint Committee. He submits that this is a further factor which should be regarded as compensating for the long lapse of time between Mr. Ludlow's death and the later potential critical date in 2003. He also argues that it is open to this Court to accept the 27 year time lapse in this case as satisfying the

genuine connection test in order to give an effective domestic remedy, as required by Article 13 of the ECHR.

- 7.10 In the event that this Court finds, as Mr. Fox contends, that the correct critical date is the 25 February, 1953, he submits that the genuine connection test is not required and the Court can move to determine if the Article 2 procedural obligation has been engaged and discharged.
- 7.11 For her part, the Minister accepted that there are procedural investigative obligations which may arise on the part of a subscribing state under Article 2 of the ECHR. However, it was the Minister's case that these procedural obligations have not arisen in Irish law under the 2003 Act at any stage in the investigation into Mr. Ludlow's murder. The Minister submitted that, in *Silih*, the ECtHR found that a state is only bound by the procedural obligation to carry out an effective investigation for as long as the authorities in that state can reasonably be expected to take measures aimed at uncovering the circumstances of a death and establishing responsibility for it. It was the Minister's submission that any expectation on the Irish authorities to take further investigative steps into the murder of Mr. Ludlow ended well in advance of the commencement of the 2003 Act.
- 7.12 In respect of the genuine connection test outlined in *Janowiec*, the Minister argued that the test does not apply in Irish law before the critical date in December 2003. The Minister further submitted that, given that the genuine connection test requires a major part of the investigation to have been carried out after the critical date, Mr. Ludlow's case cannot satisfy the test as, in her submission, the majority of the investigative steps into his murder took place before the 2003 Act entered into force. As such, it was the Minister's case that the procedural obligation to investigate a death occurring before the critical date set out in *Silih* does not apply in the circumstances of this litigation.
- 7.13 The Minister further submitted that, even if the genuine connection test was applicable in the present appeal, it would not be satisfied on the basis that, the time lapse of 27 years between Mr. Ludlow's death and the critical date is too long to satisfy the test.

(iii) Is Revival Possible?

- 7.14 Mr. Fox also sought to make the case that the procedural duty to investigate arising under Article 2 can be 'revived' under the test established by the ECtHR in its decision in *Brecknell v. United Kingdom* (App. No. 32457/04) (2007) 46 E.H.R.R. 957, in which the Court concluded that a further investigation into a death that occurred before the critical date will be required where sufficiently weighty fresh evidence comes to light after that date. Mr. Fox argued that a *Brecknell* revival does not necessarily require that the identification and/or punishment of perpetrators is the only circumstance in which a revival of the procedural duty can occur. It was submitted by Mr. Fox that, in the present case, fresh evidence has come to light in respect of the Gardaí failings, collusion between UK state agents and loyalist terrorists to commit murder in Ireland, and ultimately the identification of suspects. He argued that this information coming into the public domain

triggers the *Brecknell* revival. Furthermore, it was argued that this fresh evidence, having been accepted by the Justice Committee, is sufficiently weighty to allow the procedural duty to be triggered on this basis alone, consistent with, it is said, *Brecknell*.

7.15 The Minister, on the other hand, argued that no new evidence or information exists at the present time such as would warrant the re-opening of the criminal investigation into Mr. Ludlow's death. The Minister contended that the domestic effect of the *Brecknell* revival cannot operate retrospectively before the ECHR came into effect in Irish law by virtue of the 2003 Act. As such, it was the Minister's case that there is no domestic *Brecknell* obligation arising from the investigation into Mr. Ludlow's death because, in her view, this investigation was conducted before 31 December, 2003. It was further submitted by the Minister that any obligation on the State arising from the judgment in *Brecknell* can only be triggered by new evidence which came to light after the critical date and, in the Minister's view, there is no such new evidence in this case.

## **8. The Critical Date**

- 8.1 As noted earlier, the Court gave a preliminary ruling on the 3 June, 2021 to the effect that the critical date was the 31 December, 2003, being the date when the 2003 Act came into force. As also noted earlier, the Court has not seen any reason to alter its view on that question. It follows that it is important to start by setting out the reasons why the Court came to that view.
- 8.2 The underlying foundations of the law in this area are clear. The ECHR was not part of the domestic law of the State until the 2003 Act came into force. The Constitution itself precluded the ECHR, as an international treaty, from having such effect. It is equally clear that, as a matter of international law, the obligations of Ireland under the ECHR date back to 1953. There is obviously no reason in principle, therefore, why Ireland could not be found to be in breach of its obligations under the ECHR by virtue of acts or omissions which occurred prior to 2003 but after 1953. Indeed, the ECtHR found Ireland in breach on occasion during that period. The question of whether the ECHR formed part of the domestic law of Ireland was not, in reality, of any relevance to the question of whether, in the view of the ECtHR, Ireland, as a signatory to the ECHR, could be held to be in breach of its obligations under that Convention.
- 8.3 However, as was pointed out by counsel for the Minister, it does not necessarily follow from the fact that Ireland might be said to have been in breach of its obligations under the ECHR at a date prior to 2003, that the coming into force of the 2003 Act gave, in domestic law, rights and an entitlement to remedies in respect of any such breaches.
- 8.4 It does appear that the courts of the United Kingdom have taken the view that the UK Human Rights Act 1998 ("the 1998 Act") only applies prospectively from the date when that Act came into force, being the 2 October 2000. Undoubtedly, there are cases where, in the UK jurisprudence, circumstances may be such that events occurring prior to the 1998 Act coming into force can be relevant. The "new investigation" and "revival" issues, which need to be considered in the context of this case, are good examples. However, for the purposes of determining the critical date itself, the position in the United Kingdom

now seems clear and it is the date on which the 1998 Act came into force which is considered to be the critical date (see, among other cases, *Re McKerr* [2004] 2 All E.R. 409, *Re McCaughey* [2011] UKSC 20, 3 All E.R. 607, *Kontic v. Ministry of Defence* [2016] EWHC 2034 (QB), and *Re Finucane* [2019] UKSC 7, 3 All E.R. 191).

- 8.5 That approach does not, of course, bind this Court. However, in my view the underlying position in that regard is even stronger in Ireland having regard to the constitutional prohibition on international treaties having force of law domestically without Oireachtas approval. As the Constitution itself puts it, it is only to the extent that the Oireachtas may choose to make international treaties part of our domestic law that the law of Ireland can be said to have been altered by such treaties. The undoubted obligations on Ireland under the ECHR can only be enforced in the courts of Ireland to the extent that the Oireachtas has chosen to allow. The only basis, it follows, on which the critical date could be considered to be 1953 is if, on a proper construction of the 2003 Act, it could be said that the Oireachtas had required that pre-existing breaches of the ECHR, pre-dating 2003, were nonetheless to be taken to be the subject of the regime for the recognition of the ECHR set out in the 2003 Act. It would, of course, have been possible for the Oireachtas to impose such obligations on the State had it chosen. However, it would, in my view, require clear wording in an Act such as the 2003 Act for it to be interpreted as imposing such wide-ranging retrospective obligations.
- 8.6 The principal argument put forward on behalf of Mr. Fox for suggesting that the 2003 Act should be interpreted as imposing such obligations, and also as a basis for distinguishing the position in Ireland from that in the United Kingdom, stems from the fact that Art. 13 of the ECHR is incorporated into domestic law, within the terms of the 2003 Act, in Ireland, but no similar incorporation has occurred in the United Kingdom. Article 13 requires the State to provide for remedies for breach of the ECHR. Mr. Fox argues that this obligation applies not just in respect of breaches which occur after the 2003 Act came into force, but also in respect of any pre-existing breach which had occurred prior to the 31 December, 2003.
- 8.7 Again, there is no doubt as to what the position is in international law. If there was a breach by Ireland of the ECHR after 1953 but before 2003, then Ireland was obliged, under Art. 13 of the ECHR, to remedy that breach. It is equally clear that Ireland had no obligation, in domestic law, to remedy the same breach precisely because of the terms of the Constitution and the fact that the Oireachtas had not, up that time, chosen to give effect in domestic law to the ECHR.
- 8.8 On the basis of that analysis, the question seems to me to still come down to one of retrospectivity. By incorporating the ECHR, in the manner in which the 2003 Act does, did the Oireachtas intend and provide that the obligation to ensure the availability of remedies under Art. 13 was to be considered retrospective in relation to all pre-existing breaches of the ECHR which had occurred between 1953 and 2003. I consider that it would have required clear wording in the 2003 Act before it could be interpreted in such a manner as to provide such a significant degree of retrospection. I cannot find anything in

the language of the 2003 Act which would justify a conclusion that, as a matter of proper interpretation, the Oireachtas must be taken to have approved a significant retrospective effect of the type argued for. In the absence of the required legislation by the Oireachtas, the overriding constitutional provision prohibits the ECHR from having direct effect in Ireland. As a matter for the proper construction of the 2003 Act, no retrospective effect was, in my view, intended or authorised. It was for that reason that I supported the Court's preliminary view, which is to the effect that the critical date is 31 December, 2003.

8.9 As already noted, the Court went on, on the second day of the oral hearing, to consider the other issues raised. In that context it is appropriate to set out the position of the parties on those issues. It is also relevant to note that there was, in my view, a material evolution in the argument between that put forward in the written submissions on behalf of Mr. Fox and the case as it developed at the oral hearing. Such an evolution is not, of course, either impermissible or inappropriate. Indeed, it is one of the reasons why a robust debate at an oral hearing can bring even greater clarity to the real issues which the Court has to decide. In setting out the position of the parties I will, therefore, where appropriate, indicate where there seems to have been a material evolution in the case made for it is ultimately the task of the Court to determine the case as ultimately presented. With that being said, I turn to the position of the parties on the second to fourth issues.

## **9. Obligation to Investigate Arising Under Art. 40.3 of the Constitution**

9.1 For the reasons set out earlier, the Court ruled on the first day of the hearing that it would consider the question of whether an obligation of investigation can be derived from the constitutional right to life under Art. 40.3 of the Constitution and, if such a derived right is found to exist, it would also consider to what extent that right might be determined to be co-extensive with any obligation to investigate found to exist under Article 2 of the ECHR.

9.2 Mr. Fox accepted that, per the long title of the 2003 Act, the rights guaranteed by the ECHR are to be protected in Irish law 'subject to the Constitution' and that, therefore, where there is a constitutional remedy available, there is no requirement for a domestic court to make a finding of a breach of an ECHR right. However, Mr. Fox argued that the sub-constitutional status of ECHR rights in Irish law does not preclude constitutional rights being developed in a manner harmonious with the ECtHR interpretation of those rights or by the approach of the courts of other ECHR member states. In his written submissions, it was suggested that there is a requirement to "read down" constitutional rights with ECHR rights where the constitutional right in question is silent, provided that, in doing so, there is no conflict with the Constitution. By "read down" I understood counsel to argue that equivalent provisions in the Irish Constitution should, where possible, be interpreted in the same way as like provisions to be found in the ECHR. Mr. Fox also submitted that, where an Irish court departs from an ECtHR decision, it must fully address that there is a good reason for doing so.

- 9.3 In respect of the interaction between Article 2 of the ECHR and Art. 40.3 of the Constitution, Mr. Fox submitted that Article 2 provides no greater protection of the right to life than Art. 40.3.2°. He therefore submitted that any decisions of the ECtHR outlining a state's obligation to hold an effective investigation into an unlawful death perpetrated by the state or state agents should be regarded as being representative of Irish law. Furthermore, it is submitted by Mr. Fox that, in light of the unprecedented nature of the present appeal insofar as it raises issues pertaining to Article 2, it is open to this Court to interpret the constitutional right to life pursuant to Article 40.3.2° as being consistent and coterminous with the rights and duties imposed by Article 2 ECHR.
- 9.4 The Minister, for her part, submitted that Mr. Fox's arguments in relation to the interaction between Article 2 of the ECHR and Art. 40.3 of the Constitution amount to a request for this Court, without any supporting authority, to subordinate its interpretation of the Constitution to the provisions of the ECHR, provided that doing so does not conflict with the Constitution. The Minister also contended that this argument was not advanced by Mr. Fox before the courts below.
- 9.5 It is argued by the Minister that the effect of "reading down" the provisions of the Constitution with the ECHR, as sought by Mr. Fox, would be to make the ECHR part of the domestic law of the state by requiring the highest source of Irish law, the Constitution, to be read in accordance with it. This would, she submitted, be incompatible with both the dualism enshrined in Art. 29.6 of the Constitution and with Art. 15.2.1°, which vests the sole law-making power of the State in the Oireachtas, meaning that this Court cannot give effect to the ECHR in domestic law to a greater extent than that determined by the Oireachtas in the 2003 Act.
- 9.6 The Minister further submitted that there is no authority in Irish case law after the entry into force of the 2003 Act which suggests that Article 2 of the ECHR and Art. 40.3.2° of the Constitution are coterminous and further suggests that the respective provisions are, at best, merely comparable. As such the Minister contended that there is no basis for this Court to expand the role of the ECHR into domestic law by finding it to be coterminous with the Constitution.
- 9.7 There are, in essence, therefore, two questions which arise under this heading. The first is as to whether it is appropriate, as is asserted on behalf of Mr. Fox, to "read down" the Constitution so as to bring it in conformity with the ECHR. Clearly it would be difficult to argue for such a proposition in circumstances where there were material differences between the text of the Constitution and the text of the ECHR. However, here, the issue is more subtle for the rights asserted on this appeal both stem from the right to life which is, of course, guaranteed both by the Constitution and by the ECHR. The issue really turns on whether there is any basis for "reading down" into the Constitution the jurisprudence of the ECHR in respect of identical rights guaranteed by both relevant instruments.
- 9.8 Independent of that question is, however, the issue of whether the proper construction of the Irish Constitution does carry with it a derived right and obligation to investigate

certain deaths. Leaving aside any question of “reading down”, it is necessary to consider the extent to which the reasoning of the ECtHR in its jurisprudence in this area might prove persuasive in interpreting any rights or obligations which might be said to derive from the right to life as guaranteed in the Constitution.

- 9.9 It is also important to note that the argument did materially develop at the oral hearing. It would be fair to say that much greater emphasis was then placed by counsel on behalf of Mr. Fox on the position under the Constitution rather than on Article 2 rights. Counsel accepted that the primary port of call in rights-based litigation in Ireland must remain the Constitution so that it is only necessary to rely on Convention rights where it may be said that the Constitution does not confer relevant rights or at least does not do so in the same way or to the same extent as provided by the ECHR.
- 9.10 In a similar context, it would also, in my view, be fair to characterise the argument as having moved somewhat away from the “reading down” submission so as to concentrate more on the question of whether the right to life guaranteed by Art. 40.3 should have derived from it similar obligations of investigation to those which have been identified in the jurisprudence of the ECtHR as deriving from the right to life guaranteed by Art. 2 of the ECHR. In that way counsel sought to suggest that an appropriate interpretation of Art. 40.3 should carry with it such a derived right as a matter of Irish constitutional law and not simply because similar obligations had been identified as arising under Art. 2 of the ECHR. It might be said, in that context, that the argument under the constitutional heading moved more towards a debate as to the extent to which the jurisprudence of the ECtHR might be regarded as persuasive authority in respect of the proper interpretation of the relevant provisions of the Constitution rather than being of more direct or of greater effect.
- 9.11 Obviously, in so arguing, counsel continued to advance Mr. Fox’s case under the ECHR to the extent that the Court might not be persuaded to consider that relevant rights and obligations derived from Art. 40.3 of the Constitution which are similar to those derived from Art. 2 of the ECHR.

## **10. Nature and Extent of any Obligation to Investigate**

- 10.1 Subject to the issues already identified under the heading of the temporal questions and as to whether any relevant rights arise under the Constitution, it was accepted by both parties that obligations can and do arise on the State to investigate deaths in certain circumstances. There appears to be relative agreement between the parties as to the broad principles which apply. However, there are material differences of detail which are potentially relevant to the connected question of whether any continuing unfulfilled obligations lie on Ireland in the context of this case. In order to understand those important points of difference, it is perhaps appropriate to start by setting out Mr. Fox’s argument and then the Minister’s response.
- 10.2 In circumstances where an obligation to investigate is found to exist on the part of the State, either under Article 2 of the ECHR, Art. 40.3 of the Constitution, or both, the question then arises, first, as to the extent of this obligation and, second, whether the

investigations which have been conducted into the death of Mr. Ludlow up until this point have been sufficient to meet any such obligation. These questions form the third and fourth issues respectively arising on this appeal.

- 10.3 Mr. Fox's initial case was that an Article 2 procedural duty to investigate the death of Mr. Ludlow arises in two ways. First, it was said that such an obligation arises from what is said to be the breach of a positive duty on the part of the State to have an effective initial Garda investigation and, second, from what is asserted as a separate and autonomous procedural obligation, said to have been outlined by the ECtHR in *Silih*, to investigate Mr. Ludlow's murder and the surrounding circumstances and failings. Mr. Fox initially submitted that his Article 2 right to an effective investigation will only be vindicated by the commencement of the two Commissions of Investigation, or by another Article 2 compliant investigation.
- 10.4 First, in respect of the alleged positive obligation to carry out an effective investigation, Mr. Fox submitted that the primary positive obligation on the State is to put in place effective criminal law provisions to deter the commission of offences against the person, supported by law-enforcement machinery for the investigation and punishment of breaches of such provisions. It was further submitted by Mr. Fox that effective protection of the right to life under this positive obligation includes a procedural element, which requires the State to set up a judicial system enabling citizens to access an independent, practical and effective investigation of the facts of any death. Mr. Fox argued that this procedural element must include the availability of an effective means of redress and of determining civil liability and that the investigation must be capable of establishing the cause of death as well as identifying and punishing the perpetrators.
- 10.5 The positive obligation to investigate should, in Mr. Fox's submission, arise in circumstances where the authorities have been informed of a death, even in cases where no State agents are thought to have been involved. He submitted that the positive obligation is breached by failings or inadequacies in the investigation, such as a failure to expose inconsistencies in evidence.
- 10.6 Mr. Fox submitted that, when investigating violent incidents, State authorities have an additional duty to take all reasonable steps to unmask any motive based in racism or ethnic prejudice. Where such a motive is established, Mr. Fox argued that the authorities have a particular duty to pursue the investigation with vigour and impartiality.
- 10.7 In light of the forgoing submissions, it was Mr. Fox's case that the positive duty referred to has been breached in Mr. Ludlow's case. He argued that there has been no effective investigation into Mr Ludlow's death and that there were serious failings in the initial Garda investigation, notably a loss of evidence and documentation and a failure to extradite named suspects from Northern Ireland. He initially submitted that, in light of the findings of the Barron Report and the Report of the Oireachtas Joint Committee, a further investigation into Mr. Ludlow's death is necessary.

10.8 However, as already noted, on the first day of the oral hearing, counsel for Mr. Fox accepted that the Court was not being invited to make orders which would have the effect of requiring the State to ensure a further Article 2 compliant investigation into the circumstances surrounding Mr. Ludlow's murder. In that context, it may be seen that the analysis of the obligation on the State to ensure an Article 2 compliant investigation into Mr. Ludlow's murder formed part of the reasoning behind the suggestion that the State must now carry out a further investigation into the reasons for the inadequacy of aspects of the original garda investigation. That latter obligation is said to derive in part from the initial obligation which lay on the State, but also in part from what might be considered to be a secondary obligation to ensure that there is a so-called "investigation into an investigation" where it can be shown that an initial investigation failed to comply with the Article 2 obligations of the State.

10.9 In that context, it is also appropriate to record the response given on behalf of Mr. Fox to the request made by the Court, in the ruling delivered on the afternoon of the first day of the hearing, that the precise relief now being sought should be specified. In that response it was suggested that the appropriate order which the Court might make was one which declared:-

'There has not been an inquiry into the death of Seamus Ludlow as required by the right to life pursuant to Article 40.3 of the Constitution and/or Article 2 ECHR.'

It was said that it was appropriate to make a declaration in this form, as such a declaration had been granted in *Re Finucane* [2019] 3 All E.R. 191. It will be necessary in due course to turn to the question of whether, even if it were the view of the Court that there should be an "investigation into an investigation", such a declaration would be an appropriate means of enforcing such an obligation.

10.10 In any event, Mr. Fox also submitted that his uncle's murder had a sectarian motive, meaning that the asserted additional duty on the Gardaí to pursue the investigation with vigour and impartiality is engaged. He submitted that the original Garda investigation, the outcome of which, it was argued, amounted to the Gardaí blaming the IRA for Mr. Ludlow's murder, was in breach of this additional duty and thus constitutes an additional factor favouring the existence of an obligation to investigate the investigation.

10.11 In the context of the fact that the focus of Mr. Fox's case became the contention that such an obligation to investigate the investigation arose in the circumstances of this case, Mr. Fox averred the Article 2 procedural duty has a broader purpose than just identifying and apprehending suspects. Rather, he submitted that this obligation extends to ensuring that the administrative framework set up to protect the right to life is properly implemented and that any shortcomings are ascertained so that lessons may be learned for the future. Mr. Fox therefore claimed that, while any investigation arising from the procedural obligation to investigate should, in principle, be capable of leading to the identification and punishment of those responsible for an unlawful death, achieving a prosecution is not an absolute requirement. In that context, it is important to emphasise that Mr. Fox's former solicitors had acknowledged in correspondence that it was unlikely

that there would ever be a criminal prosecution or that there was a case that “the energies of a public inquiry ought properly be directed to establishing by whose hand Seamus Ludlow was murdered” (see letter of 23 January, 2008 from MacGuill & Co. to the then Attorney General).

- 10.12 Furthermore, Mr. Fox submitted that the nature of the procedural duty arising under Article 2 requires that an investigation into a murder perpetrated by agents of a state must be broad enough to permit the Gardaí to take into consideration not only the actions of the state agents who directly used lethal force, but also all the surrounding circumstances, including the planning and control of the operations in question. It was submitted that these obligations exist even if the state agents are those of another state.
- 10.13 It was Mr. Fox’s case that the Minister, having refused to establish the Commissions of Investigation recommended by Oireachtas Joint Committee, or some other Article 2 compliant mechanism, is in breach of the Article 2 procedural obligation.
- 10.14 For her part, the Minister did not dispute that there is a procedural right under Article 2 of the ECHR to an effective investigation into an unlawful death and that, in circumstances where state authorities know of an unlawful killing, this right can impose on them a duty to carry out an effective investigation into the circumstances of that death. It was further accepted by the Minister that, in light of the decision of the ECtHR in *Silih*, there is also a separate procedural duty to carry out an effective investigation when there is reason to believe that an individual dies in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a state agent. However, it was the Minister’s case that the various investigations already conducted into the death of Mr. Ludlow by the Gardaí have satisfied any Article 2 or constitutionally mandated requirement for an investigation.
- 10.15 The Minister accepted that, for the purpose of the ECHR, an effective investigation must be independent, adequate, and prompt, and that there must be public scrutiny and involvement of the next of kin. In the Minister’s view, all of these requirements have been satisfied in the course of the investigations already carried out into Mr. Ludlow’s murder. The Minister argued that an effective investigation for the purpose of Article 2 is one capable of identifying the perpetrators of an unlawful death and potentially holding them responsible. In this regard, the Minister accepted that an investigation need not necessarily end in punishment of those responsible in order to be effective. In the context of Mr. Ludlow’s case, it was the Minister’s case that the investigations carried out following the original investigation, which the Minister acknowledged was defective, amount to an effective investigation as they led to the probable identification, albeit not the prosecution, of those who murdered Mr. Ludlow. As such, the Minister claimed that the investigative obligation under Article 2 has been satisfied and that there has been no breach of duty under Article 2.
- 10.16 Given the increased concentration on the obligation to investigate the investigation which occurred at the oral hearing, it is important to record that the Minister does not accept that any such obligation arose. In that context, it may well be that there can be two

separate reasons why it might be appropriate to revisit a previous investigation into a death where Article 2 obligations were engaged. In some circumstances, the identification of inadequacies in a previous investigation may give rise to the possibility of a further investigation being actually able to identify the circumstances surrounding the death in question and, potentially, may facilitate the bringing of appropriate action against those concerned. In other words, it may be possible to remedy, at least in part, a defect in a previous investigation and thus progress the underlying investigation into the death. I did not understand the Minister to disagree that, in an appropriate case, such an obligation may lie on the State. In such a case there remains a real prospect that any inadequacies in the original investigation may be remedied and thus the underlying investigative obligation on the State under Article 2 further complied with.

10.17 On the other hand, it was argued by the Minister that an investigation into the inadequacies of any previous investigation into a death, which did not appear likely to lead to any further information arising concerning the circumstances of the death in question, was not mandated by Article 2. Thus, there was a clear difference of position between the parties on whether there was any obligation to investigate a potentially defective initial investigation at least in circumstances where there was no real prospect of any such secondary investigation leading to a likelihood of advancing the original investigation into the death in question.

10.18 It is, therefore, necessary to turn to the issues which arise both under the Constitution and under the ECHR. However, for reasons which I hope will become clear, it seems to me to be appropriate to turn first to a consideration of the precise form of declaration sought on behalf of Mr. Fox.

## **11. The Form of Declaration**

11.1 As noted earlier, when asked to formulate the declaration now sought, it was indicated on behalf of Mr. Fox that what was sought was a simple declaration to the effect that there had not been an investigation which complied either with such rights as might be established under the Constitution or with the procedural rights which have been identified by the ECtHR.

11.2 It is of some relevance at this stage to consider the proper approach to the grant of declarations. It seems to me that, while a court enjoys a significant jurisdiction to grant declarations, nonetheless there are two potential limitations on the appropriateness or otherwise of making a declaration in a particular case.

11.3 The first limitation is a jurisdictional one. Courts are ultimately concerned with legal rights and obligations together with fashioning appropriate remedies where rights have been breached or obligations have not been met. Declarations can often be a useful way of clarifying disputed rights and obligations. However, it does seem to me that the jurisdiction to grant such declarations is dependent on there being at least an indirect connection between the matter in respect of which a declaration might be granted and some form of legal entitlement or obligation.

- 11.4 It may well matter quite a lot to many to determine whether the striker was offside when scoring the winning goal, the full forward was in the small parallelogram before the ball which she fisted into the net arrived, or the flanker had managed to keep his hand between the ball and the ground as the wing sought to score a try. However, no-one would think that a court should make declarations on such issues even where hotly disputed. The reason, of course, is that they do not have a legal element to them.
- 11.5 I am happy to accept that it may be possible that the necessary legal involvement can be indirect. For example, in *Transport Salaried Staffs' Association and Others v. Córas Iompair Éireann* [1965] I.R. 180 Walsh J. was prepared to grant a declaration concerning a contract to which the plaintiffs were not a party but where there was a realistic basis for believing that the plaintiffs' interests might be advanced by an appropriate declaration. The jurisdiction to grant declarations is, therefore, wide but it is far from unlimited.
- 11.6 In that context, I would accept that this Court has a jurisdiction to grant a declaration concerning the failure of the State to comply with its obligations under the ECHR and/or a failure to comply with any obligations which might be established under the Constitution.
- 11.7 However, beyond the question of jurisdiction, there are also circumstances where I would suggest that a court should not exercise its power to grant a declaration for a range of practical reasons. The purpose of a declaration should be to clarify a disputed legal position in the hope that such clarification may enhance the ability of parties to secure their rights together with making it more likely that identified obligations will be complied with. Declarations are, for example, frequently made in cases involving State authorities on the not unreasonable assumption that a State authority will comply with any obligations which a court of competent jurisdiction determines apply to the authority concerned. However, it would be unusual for it to be considered appropriate for a court to grant a declaration concerning legal rights and obligations which were not in dispute. It would require particular circumstances for there to be any utility in such a course of action. Different considerations may, of course, apply where a party seeks a remedy, such as damages or an injunction, which is capable of enforcement. In such a case the possibility of enforcement measures being involved may confer a benefit even where liability is not disputed.
- 11.8 However, in any case where a declaration is considered appropriate, it seems to me that the declaration concerned would need to be formulated in a way which brings the maximum clarity to the rights and obligations which the Court has identified. If a declaration does not achieve this end, then it might well be considered to be pointless and in breach of the maxim that a court should not act in vain. If, as a result of the grant of a particular declaration, the Court has not clarified legal issues concerning rights and obligations which were disputed and has not indicated what further enforcement of rights or requirement to meet obligations have been identified, then a declaration will not have served a useful purpose.
- 11.9 It is in that context that it is appropriate to consider the declaration now sought on behalf of Mr. Fox. There is an acceptance by the State that aspects of the 1979 investigation

failed to comply with the State's obligations. Having regard to the temporal issue, there are questions as to whether any enforceable rights or obligations exist under the ECHR. However, as a matter of fact, two separate official bodies have acknowledged the inadequacies of that investigation. An official inquiry under a senior and respected retired judge and a parliamentary committee have both said as much. On that basis I do not see that adding a third official acknowledgement changes anything.

11.10 However, and perhaps more importantly, a declaration in the form now sought would not clarify the precise obligations, if any, which the State continues to be required to meet. As already noted, a central issue between the parties concerns the question of whether there can be any obligation on the State, either under the Constitution or under the ECHR, to conduct what has been described as an investigation into an investigation. The form of declaration sought would not clarify that vital question.

11.11 It seems to me to follow, therefore, that there would be no utility in the Court making a declaration of the type sought. It would simply confirm what two official bodies have already determined and would not clarify the important and disputed question about whether there are any continuing obligations on the State. That is particularly so having regard to the fact that it was made clear in the course of the hearing that Mr. Fox was no longer seeking a further inquiry into the circumstances of Mr. Ludlow's murder but rather was only seeking an inquiry into the shortcomings of the 1979 investigation. A declaration of the type now sought would not, in fact, clarify whether the State was under any such obligation. It follows, in my view, that the only form of declaration which would have any utility would be one which made clear that the State has a continuing obligation to "investigate the investigation". If the State does not have such an obligation, then the declaration sought will do no more than confirm that which has already been twice officially acknowledged. If the State does have such an obligation, whether under the Constitution or under the ECHR, then any declaration granted should make that clear. I, therefore, propose to consider the issues which arise both under the Constitution and under the ECHR on the basis that it is necessary to determine whether the Court should grant a form of declaration which would make clear that there is a legal obligation on the State to conduct a further investigation into the accepted inadequacies of what occurred in 1979. On that basis I turn first to the constitutional issue.

## **12. The Constitution**

12.1 I would propose to start by indicating the need to exercise some caution in the use of terminology. In the constitutional context, the word "derive" might potentially have two meanings. In *Friends of the Irish Environment v. The Government of Ireland & Ors* [2020] IESC 49, this Court suggested that it would be more appropriate to use the term "derived rights" in place of the term "unenumerated rights" which had previously formed part of the legal language in this area. In so doing, the Court indicated that any right not expressly identified in the Constitution might nonetheless be found to be recognised by the Constitution having regard to the express provisions of the text itself together with the structure (for example, the democratic nature of the State) and values (for example, dignity) which the express terms of the Constitution recognise.

- 12.2 This methodology has now been identified as the appropriate method to determine whether rights, which are not to be found in express terms in the text, may nonetheless be recognised as existing in our constitutional regime.
- 12.3 However, there is a second way in which the term “derive” might be used. It is almost inevitable that rights in constitutional instruments are described in very general terms. Precisely how far those rights go will be a matter to be considered on a case by case basis. There can, of course, be important issues when rights come into conflict and a court has to determine which right is to prevail. In addition, in many cases the obligation on the State is to vindicate rights insofar as that might be practicable. In that context, there can, again, be issues as to how far the obligation of the State goes. However, beyond those matters, there can be questions of just how far a right under consideration may go. To avoid confusion, it may be better to speak of such debates as being ones which centre on the scope of an undoubted right rather than a consideration of what can be derived from such a right.
- 12.4 For example, while a right to work had often been identified in the case law, this Court clarified in *N.V.H. v. Minister for Justice and Equality* [2017] IESC 35, [2018] 1 I.R. 246 that the true characterisation of the right concerned was a right not to be unreasonably prevented from working. The distinction was important. If the scope of the right extended to a right to work, then it might be arguable that the State was obliged to provide work, at least insofar as it was practicable, to those that did not have it. Obviously the definition of the scope of the right in *N.V.H.* was sufficient for the plaintiff to succeed. However, the definition of the scope of the right was nonetheless important.
- 12.5 There is undoubtedly a right to life guaranteed by the Constitution. It is almost trite to say that it is one of the most important rights, for without life many other rights are incapable of being enjoyed. However, there is a question about just how far that right goes. Does it extend to an obligation to prolong life in all circumstances or does it, as this Court determined in *Re a Ward of Court (No. 2)* [1996] 2 I.R. 79 also permit a course of action which allows a person to have a dignified and comfortable end of life even if that may mean, in practice, a somewhat shortened lifespan. The scope of the right to life is not, therefore, completely unlimited although it has to be said that it remains, nonetheless, very extensive.
- 12.6 The issue which falls for consideration in this case is as to whether the scope of the right to life under the Constitution extends to placing an obligation on the State to investigate deaths in certain circumstances and, for the reasons identified in the previous section of this judgment, to go further and investigate any failure of an appropriate initial investigation. That is the narrow constitutional question which arises.
- 12.7 I am prepared, for the purposes of the argument, to accept that the State may have constitutional obligations to the victims of crime and also in respect of those whose deaths may have been caused by criminal or other wrongful activity. There can be little doubt but that the existence of appropriate mechanisms to investigate certain types of deaths may reduce the likelihood of further deaths of a similar type occurring in the

future. It is most unlikely that a robust system for the investigation and prosecution of murder, for example, would prevent all further murders in the future. However, such a robust system must act as at least a partial deterrent and must, therefore, have a material capacity to preserve the lives of others.

- 12.8 I am prepared to accept, therefore, that there may be circumstances where the State bears a constitutional obligation to have in place appropriate mechanisms to investigate certain types of deaths precisely because the express constitutional right to life may be enhanced by such measures. However, this case is not about whether the scope of the right to life identified in the Irish Constitution may carry with it some investigative and enforcement obligations on the part of the State but rather whether the precise obligation to “investigate the investigation”, which lies at the heart of the dispute between the parties, can be said to fall within the scope of the right to life identified in the Constitution.
- 12.9 As noted earlier, the initial argument put forward on behalf of Mr. Fox, in the written submissions filed, was to the effect that the Constitution should be “read down” to incorporate the procedural rights identified by the ECtHR as coming within the scope of the right to life guaranteed by the ECHR. However, at the oral hearing, that position was materially altered to one in which it was simply said that this Court should regard the jurisprudence of the ECtHR as being persuasive in analysing the scope of the right to life under the Irish Constitution.
- 12.10 I should say that I consider that this shift in the argument was entirely appropriate. Given the sub-constitutional status of the ECHR in Irish constitutional law and given the prohibition on international treaties forming part of the domestic law of the State save to the extent that the Oireachtas ordains, the suggestion that the Constitution was required to be interpreted in line with the ECHR to the greatest extent possible, is simply not tenable.
- 12.11 On the other hand, this Court has, frequently, had regard to the jurisprudence of the ECtHR in interpreting the same or similar rights and obligations arising under, respectively, the Constitution and the Convention. However, important though it may be, the ECHR has rarely been the sole source of persuasive authority relied on by this Court in identifying the scope of rights guaranteed under the Constitution.
- 12.12 A good recent example is *DPP v. Gormley & White* [2014] IESC 17, [2014] 2 I.R. 591. In that case this Court had to consider whether the right to a trial in due course of law, as expressly guaranteed by the Constitution, had contained within its scope an entitlement to have access to a requested lawyer prior to the requesting suspect being interviewed by An Garda Síochána. In considering that question, this Court did pay significant regard to the relevant jurisprudence of the ECtHR but also considered the case law of apex courts in other jurisdictions with similar legal systems to our own. The jurisprudence of the United States Supreme Court and the position in countries such as New Zealand and Canada, which have enforceable rights based instruments within a common law system, were also given detailed consideration.

12.13 While it may well be explicable by the significant change in emphasis between the written submissions and the oral hearing (with the constitutional argument coming into much greater focus during the latter), there was no exploration in the case made on behalf of Mr. Fox of the extent to which the right to life guaranteed by other constitutional instruments, in states with a similar legal system to that of Ireland, has been interpreted as extending to imposing an investigative obligation on the State in the case of certain types of deaths less still to whether an obligation to “investigate the investigation” has been identified in any of those jurisdictions. It will be necessary to turn to the case law of the courts within the United Kingdom in due course for that case law can be of assistance in dealing with issues arising under the ECHR. However, it must be recalled that the principal focus of the courts of the United Kingdom in rights based litigation is on the ECHR rather than on a national rights conferring instrument.

12.14 The Court has not, therefore, been referred to any jurisprudence from a state with a similar legal system to our own in which the scope of the right to life has been held to include an investigative obligation such as that identified under the ECHR let alone an obligation to “investigate an investigation”. No previous decision of the courts of Ireland was cited which suggests that such obligations fall within the scope of the right to life or which even point towards the jurisprudence moving in such a direction. Extending the scope of the right to life as guaranteed by the Constitution in such a manner would, in my view, warrant a most careful review of the position adopted in other respected jurisdictions and not just a consideration of the case law of the ECtHR together with some decisions of the courts of the United Kingdom made in the context of the ECHR. In reality the argument put forward on behalf of Mr. Fox did not go much further than to say that this Court should interpret the Irish Constitution in exactly the same way as the ECtHR has interpreted the Convention. I am not persuaded that that is an appropriate approach to adopt in defining the scope of rights conferred by the Irish Constitution which is, after all, an autonomous human rights instrument with its own provisions, its own values and its own established jurisprudential methodologies.

12.15 That being said, it is also important to observe that there may well be cases where, following an appropriate analysis, it can properly be concluded that the scope of a right guaranteed by the Constitution is substantially the same as that of an identical right guaranteed by the ECHR or, indeed, by other human rights instruments such as the constitutions of other respected states. The point which I wish to emphasise is simply that this is not necessarily so. In addition, it is also worth observing that there may be some merit in the future in Irish judgments using similar language and structure to that adopted by the ECtHR in analysing rights guaranteed by both the Constitution and the ECHR. The appropriate dialogue between a national court and the ECtHR can only be enhanced if judgments are expressed in terms which minimise the risk of misinterpretation by supranational courts where there may be a real possibility that such courts will be required to consider the national judgments in question.

12.16 In any event, I am prepared to leave over until a case in which it directly arises, a consideration of whether some level of investigative obligation may lie on the State in

respect of certain deaths. I do not rule out such a possibility. However, I am not satisfied that the ground has been laid for pushing the scope of the right to life under the Irish Constitution to the extent of not only requiring the State to investigate certain deaths but going further and imposing an obligation to investigate what is said to have been an inadequate initial investigation.

- 12.17 Before leaving this topic, I should comment on one of the arguments put forward on behalf of the State. Attention was drawn to the fact that there are many structures already in place to investigate deaths. Coroners are required to consider the circumstances surrounding a wide range of deaths. While there have been many recent suggestions to the effect that the coronal system could and should be improved and enhanced, nonetheless such a system does exist. In addition, reliance is placed on the fact that we have, in An Garda Síochána, an independent police force.
- 12.18 The Department of Justice develops policy towards and oversees the provision of resources towards An Garda Síochána. The Department's Policing Division is responsible for overseeing the implementation of reform and investment in An Garda Síochána and for securing resources for that organisation as well as for its various oversight bodies. Garda management reports to the Department on matters relating to the use of Garda resources and matters relating to performance and governance. However, importantly insofar as operational matters are concerned, the performance of An Garda Síochána is overseen by the Policing Authority, which is an independent body charged with shaping policing services and promoting public trust and confidence in policing. The Policing Authority works with An Garda Síochána to set yearly objectives in the annual Policing Plan. An Garda Síochána regularly reports to the Policing Authority, which includes submitting reports on its progress against the Policing Plan objectives for assessment by the Policing Authority. Furthermore, An Garda Síochána works with the Garda Inspectorate to ensure that the policing it delivers is of a high quality. The Garda Inspectorate publishes reports which make recommendations for possible improvements in the policing delivered by An Garda Síochána, and these reports are addressed by the Garda Renewal and Modernisation Programme.
- 12.19 In addition, a further independent body, in the shape of the Garda Síochána Ombudsman Commission, has been established to investigate various matters involving An Garda Síochána itself. That body investigates any death which occurs after contact with a member of An Garda Síochána. Thus, there is an independent body to carry out appropriate investigations into deaths where the police force itself may have an involvement, however tangential, in the events leading to the death concerned.
- 12.20 There is no doubt but that these, and other, measures provide for a significant level of investigation into deaths which occur in potentially unexplained circumstances. However, it does not seem to me that the existence of these measures necessarily fulfils any obligation which might be held to exist, whether under the Constitution or, more particularly, under the ECHR. It is, of course, true that, in Irish constitutional jurisprudence, it only becomes necessary to provide a specific remedy for breach of

constitutional rights where it has been demonstrated that the law generally does not provide an appropriate remedy for breach of any rights involved. Where the law, whether that be found in statute or in the common law, provides a sustainable regime, consistent with balancing any rights involved, for the vindication of any matters which may have a constitutional dimension to them, then it is unnecessary to invoke the Constitution to vindicate the rights concerned. However, there may be cases where the existing law does not go far enough to ensure the appropriate vindication of constitutional rights in all circumstances. In such cases, it follows that there can be direct reliance on the Constitution.

12.21 To invoke a constitutional right, nonetheless, requires identifying with some precision the scope of the constitutional right concerned so as to enable an appropriate analysis to be conducted as to whether existing law adequately and appropriately vindicates that right. That analysis provides a further reason why the identification of the precise scope of any state obligation of investigation would be vital to the question of whether that constitutional right can be invoked. If existing measures are sufficient to vindicate the right as determined by its proper scope, then there is no room for the invocation of the Constitution. Without a precise identification of the scope of the right concerned, it follows that it is impossible to determine that existing measures do not adequately vindicate the relevant right.

12.22 In summary, I confine myself to determining that it has not been established on behalf of Mr. Fox that the so-called right to an "investigation into an investigation" comes in the scope of the right to life as guaranteed under the Irish Constitution. I would leave over any other issues concerning state obligations in this area to a case in which those issues might prove decisive. It follows in turn that that it is necessary to consider the position under the ECHR. However, before so doing, it is appropriate to set out in a little detail the factual material which provides the background to an analysis of the obligations on Ireland under the ECHR in the context of this case.

### **13. The Facts**

13.1 The Barron Inquiry found that the original Garda investigation in 1976 was carried out competently and diligently. Gardaí conducted a forensic examination of the scene, made house-to-house inquiries, stationed vehicle checkpoints seeking information from motorists and followed up on a list of car registrations taken at a checkpoint that had been operating on the 2 May. However, the investigation did not result in any leads and no reliable intelligence was received at that time. Mr. Justice Barron found that the Gardaí were in no way to blame for this. It was in that context that the investigation was suspended after some three weeks. A Garda witness before the Joint Oireachtas Sub-Committee denied that the investigation had been closed down, stating that it was rather downsized so that fewer personnel were involved.

13.2 The Ludlow family did not accept that a proper investigation was carried out by the Gardaí in 1976. They contended before the Oireachtas Joint Committee that the failings of the Gardaí lay in that the 1976 investigation and that it would be a mistake to focus solely on the events of 1979. It was the family's case that the Gardaí were aware that loyalists

were active in the Dundalk area at that time, but that, for their own reasons, they continued to blame the IRA for Mr. Ludlow's murder.

- 13.3 In any event, in June 1976, the then Garda Commissioner, Mr. Edmund Garvey, instructed the Security and Intelligence Branch to keep in contact with the RUC on the basis that something useful might be forthcoming in time. In December 1976, the RUC passed on the information that a low-grade source had reported that Mr. Ludlow was murdered by the IRA, with the implication being that he or his family had some prior connection with that organisation. This suggestion does not seem to have been regarded by either an Garda Síochána or the RUC as credible. Nonetheless, the Ludlow family argue that they were continually led to believe that this theory was widely accepted by the Gardaí during the original investigation into Mr. Ludlow's murder. Mr. Justice Barron stated "clearly and categorically" that there was no evidence of any connections between the family and subversive organisations. Certain other theories were referred to in the Barron Report, each of which had been found to lack any evidential basis. Speculation that Mr. Ludlow had been mistaken for a particular senior member of the IRA was discounted as unlikely, given the man's physical appearance.
- 13.4 Another possible line of inquiry arose as a result of an incident on the night of the 5 May 1976, when six armed SAS members were arrested in County Louth. They were questioned about the murder of Mr. Ludlow, however, their weapons did not match the calibre of the bullets that killed Mr. Ludlow and there was, at that time, no evidence to indicate that they had been in the area on the 2 May. As already noted, Mr. McDonagh has now come forward (in 2020) and identified one of the cars used by the SAS men as being a car that he saw near the area where Mr. Ludlow was killed on the 2 May.
- 13.5 In referring to those theories, Mr. Justice Barron noted that, at the relevant time, loyalist responsibility would have been considered a remote possibility. It was generally believed that loyalist paramilitaries rarely left their own areas and were fearful of travelling across the border, particularly to areas such as Dundalk.
- 13.6 For the purposes of this case, the most significant development came in January 1979. The RUC informed the Gardaí that they had information from a reliable source which stated that Mr. Ludlow had been murdered by a loyalist paramilitary group. The RUC gave the names of four suspects. It is the failure to act on this information, which appears to have been in the possession of the RUC for some eighteen months before it was passed on, that lies at the heart of the Ludlow family's concerns. It was likewise seen by Mr. Justice Barron as the key question for consideration in his Inquiry.
- 13.7 In or around 1995 or 1996, the Ludlow family was contacted by a journalist who provided them with the names of a number of men who he believed to be implicated in Mr. Ludlow's murder. As a result, the Gardaí reviewed the file and, in so doing, discovered the information that had been passed on by the RUC in 1979. It should perhaps be noted that none of the four names furnished by the RUC were among those advanced by the journalist.

- 13.8 The Gardaí then renewed their contact with the RUC in relation to the matter and provided copies of the original investigation to the RUC. The list of names provided by the journalist was investigated, but nothing significant emerged in that respect. The four suspects first identified by the RUC in 1979 were arrested and questioned by the RUC in 1998. Before this occurred, Gardaí consulted with a senior official in the office of the Director of Public Prosecutions, who indicated that there would be no objection to any prosecution proceeding in Northern Ireland given that there was no evidence on which charges could be preferred in this jurisdiction. It is worth mentioning at this point that there would not have been any basis in law for seeking extradition of the suspects to this jurisdiction for the purpose of questioning.
- 13.9 Two of the four men arrested admitted to having been in a car that drove across the border from Northern Ireland and picked up Mr. Ludlow. Both of these men also named the man who they say shot Mr. Ludlow. That man denied all knowledge of the matter, as did the fourth man. There were also significant discrepancies between the statements of the two men who admitted being present and there was no forensic evidence to support either account. In October 1999, the Director of Public Prosecutions in Northern Ireland directed that there should be no prosecutions.
- 13.10 As mentioned, Mr. Justice Barron considered that the key question for his consideration was the failure to follow up on the information received by an Garda Síochána from the RUC in 1979. He heard from several retired senior officers who had been involved in the investigation, one of whom (retired Chief Superintendent John Courtney) stated that he had been informed by a detective sergeant that a superior officer had directed that the inquiry should not proceed further. The superior officer alleged to have given this direction (retired Commissioner Laurence Wren) attended before the Oireachtas Joint Committee and denied having done any such thing. He said that he was never approached for permission to go to Northern Ireland. Mr. Wren further stated that, in any event, the law was clear and he could not have authorised a member of the Gardaí to question suspects outside the jurisdiction. There was no record in writing of any direction having been given one way or the other.
- 13.11 Mr. Justice Barron also sought the opinion of Mr. Patrick Byrne, retired Commissioner of the Garda Síochána. Mr. Byrne stated that it was not acceptable that the “basics” of a serious crime investigation had not, without comprehensive and fully supported reasoning, been pursued to the limit. He said that it was difficult, with the information available, to reach any firm conclusion other than that what should have happened did not happen. However, he concluded that the main responsibility lay with senior Garda Management. Deputy Commissioners, Assistant Commissioners, Chief Superintendents and Superintendents had been aware of this information, yet this vital aspect of the investigation was not pursued. Mr. Byrne did not find Mr. Courtney’s account particularly persuasive, as he seems to have felt it unlikely that an officer of Mr. Courtney’s rank would have accepted an oral instruction from a junior officer without raising it with his superiors. However, the only explanation he could offer was that the information had

been "lost sight of". He acknowledged that this explanation was not adequate and would be of little consolation to the family and friends of Mr. Ludlow. However, he stated that,

*"With the passage of time, the loss of memory of some, the questionable memory of others and the unavailability of certain people, I don't see how, in any forum, the questions you ask can be answered adequately."*

13.12 Mr. Justice Barron did not accept the view that the matter had simply been "lost sight of". His conclusion was, rather, that the failure to pursue the questioning of the suspects was due to a perception that it was contrary to government policy at the time, as requesting assistance from the RUC might have led to requests for reciprocal facilities at a time of significant tensions between the communities and governments of the two jurisdictions. He believed that the decision was most probably made by Mr. Wren and that, whether or not this was discussed with the Department of Justice, it would have been something of which departmental officials were aware.

13.13 Mr. Justice Barron delivered his Report in 2004. He noted in his conclusions that the Inquiry had faced considerable difficulties in attempting to establish the truth of what had happened, stating as follows:-

*"Filing records were incomplete; documents had been lost, destroyed or misplaced; key witnesses were deceased, others were gravely ill, and still others were unable to remember anything about the case."*

*"Even when witnesses did provide information based on their own memories, the Inquiry was hampered in its efforts to confirm or refute such claims by the fact that some documents were missing or, in the case of the Northern Ireland authorities, not supplied."*

Nonetheless, the Barron Inquiry found that certain information was credible, and had reached its conclusions on that basis.

13.14 The Final Report of the Oireachtas Joint Committee ("the Joint Committee Report"), published in March 2006, contains acknowledgments of responsibility on the part of State authorities for the failings of the investigation into Mr. Ludlow's murder. Chapter 2 of the Joint Committee Report notes that apologies and acceptances of failings were made to the Ludlow family on behalf of the State. The then Garda Commissioner, Mr. Patrick Byrne, acknowledged that it was a failure of the Garda Síochána not to have had the murder thoroughly investigated and brought to a satisfactory conclusion. He stated that "we (An Garda Síochána), as an organisation, failed in terms of following through the next step in this investigation". Mr. Byrne continued to believe that the failure was due to human error or systems failure. Furthermore, the then Minister for Justice, Mr. Michael McDowell T.D., said that while the 1976 investigation had been professional, "what happened in 1979 cannot be stood over".

- 13.15 The Joint Committee Report also comments on shortcomings in the extent of the evidence available to the Barron Inquiry and to the Joint Committee itself. The Report notes that certain "crucial" witnesses who were invited to come before the Sub-Committee refused to attend. These included the detective sergeant alleged to have passed on the instruction to Mr. Courtney, who wrote to the Sub-Committee indicating that he had no recollection of having any such conversation. The four named suspects were also invited to attend but did not respond.
- 13.16 The Joint Committee considered that Mr. Justice Barron had received a "bare minimum" of information from the authorities in Northern Ireland and noted that it had not received any further cooperation from that source.
- 13.17 The Committee did hear from a number of retired senior officers, as well as from former Minister for Justice, Mr. Gerry Collins, and the then Minister for Justice, Mr. Michael McDowell T.D., the latter of whom stated there was no way that he could say whether the Department was consulted about the questioning of the suspects. However, Mr. McDowell stated that his "educated guess", in the absence of anything to the contrary in departmental files, was that there was no communication.
- 13.18 The Report of the Joint Oireachtas Committee did bring certain new information to light, including the fact that Gardaí had conducted interviews with suspects in Northern Ireland on three occasions in 1972 and 1973, while one person in Garda custody was interviewed by RUC officers in Dundalk in 1975. Furthermore, there had in fact been some formal arrangements in relation to cooperation between an Garda Síochána and the RUC, which were put in place in 1974, but the extent of these arrangements and the reasons for non-implementation in this case could not be ascertained. The Joint Committee's Report also revealed that, at some time prior to Mr. Ludlow's murder, the Gardaí had requested information from the RUC about the UDF, the UDA and the Red Hand Commando. A response, delivered in April 1976, named seven individuals and gave significant detail in respect of a man who was to become a suspect in the murder of Mr. Ludlow.
- 13.19 The Joint Committee Report recommended that a public inquiry into the investigation of Mr. Ludlow's murder be established for the following reasons. First, the Oireachtas Sub-Committee was unable to resolve the conflict of evidence as to whether retired Commissioner Wren had given an instruction to Mr. Courtney not to proceed with the investigation into Mr. Ludlow's death. The Sub-Committee was also unable to determine whether Mr. Wren was correct in saying that no decision was made because the law was clear and there was nothing to decide.
- 13.20 Second, the Joint Committee concluded that a public inquiry was necessary on the grounds that there was a possibility of collusion as two of the four men identified by the RUC in 1979 were members of the UDR. Mr. Michael Donegan, a brother-in-law of Mr. Ludlow, had been kidnapped and questioned about the progress of the investigation by the British Army the day after Mr. Ludlow's funeral. The Joint Committee felt that this gave rise to a serious concern about the precise knowledge of the British Army at the time of the murder and in its aftermath. The Joint Committee noted that no information

had been received in this regard from the Northern Ireland authorities, nor had the Barron Inquiry been able to satisfactorily explain the eighteen month time lapse between the RUC receiving the information pertaining to the four named suspects, and this information being passed to the Gardaí.

13.21 The first recommendation of the Joint Committee Report was for a Commission of Investigation to be established focusing on the initial Garda investigation in 1976, and on what occurred in 1979 when the RUC passed the information on the four identified suspects to the Gardaí.

13.22 Having outlined those facts, it is appropriate to turn next to the investigative obligations on the State under the ECHR. It will then be necessary to consider the question of whether, and if so to what extent, there remains, in practice, continuing investigative obligations on the State.

#### **14. The Investigative Obligations of the State Under the ECHR**

14.1 The obligation to hold an effective investigation into a death first arose in *McCann v. The United Kingdom* (App. No. 18984/91) (1996) 21 E.H.R.R. 97. That case, of course, arose out of killings by United Kingdom personnel in Gibraltar. The ECtHR noted (at para. 161):

*"[161] ... [T]hat a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2 + 1) of the Convention to 'secure to everyone within their 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 by, inter alios, agents of the State."*

14.2 Thus it can be seen that the ECtHR came to the view that the scope of the right to life guaranteed by Article 2 of the ECHR extends, at least in certain circumstances, to imposing an investigative obligation on relevant states. This obligation has come to be referred to as the procedural obligation.

14.3 It can also be seen that, as initially formulated in *McCann*, the obligation was relatively confined in its scale. However, subsequent case law has expanded that scope.

14.4 In both *Salman v. Turkey* (App. No. 21986/93) (2000) 34 E.H.R.R. 425 and in *Öneryıldız v. Turkey* (App. No. 48939/99) (2005) 41 E.H.R.R. 20, the ECtHR confirmed that the obligation originally identified in *McCann* was not confined to cases where it was apparent that the killing was caused by an agent of the State. For example, at para. 71 of its judgement in *Öneryıldız*, the Court noted that the obligation was one which involved requiring states to take "appropriate steps to safeguard the lives of those within their jurisdiction".

- 14.5 The ECtHR has also addressed the purpose of an Article 2 compliant investigation. In both *Jordan v. The United Kingdom* (App. No. 24746/94) [2001] ECHR 327 and *Rantsev v. Cyprus and Russia* (App. No. 25965/04) 51 E.H.R.R. 1, the Court confirmed that the essential purpose of such an investigation was 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”.
- 14.6 However in both *Jordan* and in *Al-Skeini v. The United Kingdom* (App. No. 55725/07) (2011) 53 E.H.R.R. 18, the ECtHR confirmed that the form of investigation which will achieve those purposes may vary depending on the circumstances. However, it is clear that, whatever mode is employed, State authorities must act of their own motion once the matter comes to their attention. It was also made clear in *Al-Skeini* that the relevant obligations could not be met by the availability of civil proceedings, commenced by next of kin, in which the identification or punishment of alleged perpetrators is not involved.
- 14.7 Returning briefly to *Öneryildiz*, it is important to identify a dispute between the parties as to the proper interpretation of the judgment of the ECtHR in that case. The circumstances of the case in question involved an explosion. The ECtHR was satisfied that the State’s investigative obligation arose where the explosion concerned had caused death. The Court said, at para. 94, that:
- “The competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue”.*
- 14.8 Mr. Fox places reliance on the reference in that judgment to regulatory shortcomings. However, the Minister argues that the reference relates to shortcomings in the regulatory regime which may have contributed to the accident itself, rather than shortcomings in any investigation which subsequently followed. On that basis, the Minister argues that the case in question does not provide any authority for the proposition that the ECtHR has recognised an obligation to investigate a defective previous investigation.
- 14.9 The ECtHR has also emphasised that there is no right to obtain a prosecution (see *Oğur v. Turkey* (App. No. 21594/93) (2001) 31 E.H.R.R. 40 and *Szula v. United Kingdom* (App. No. 18727/06) (2007) 44 E.H.R.R. SE19).
- 14.10 *Oğur* and *Miller v. The United Kingdom* (App No. 32001/18) [2019] ECHR 286, provide examples of investigations which were, respectively, found wanting and found acceptable. In *Oğur* the investigation in question was found not to be independent because the principal investigating officer was subordinate to the chain of command he was investigating. In *Miller*, the investigation in question involved a coroner’s inquest which returned a verdict of unlawful killing. In *Oğur* it was established that no post-mortem was carried out, no forensic examination had taken place and no questioning had been

carried out of those members of the relevant security forces which took part in the operation as a result of which the deceased died. In addition, it was determined that no serious attempts had been made to find the person who fired the fatal shot, despite the availability of witness evidence which suggested that the shot concerned came from a member of the security forces.

14.11 However, in *Miller*, the ECtHR held that the relevant UK authorities had investigated the death of the applicant's son, (which occurred while he was serving in the British Army in Iraq) to the degree of scrutiny required by Article 2. The investigations had begun promptly and had included interviews with over 100 people. The Court was also satisfied that the failure to grant authorisation for a fresh inquest was not, in all the circumstances of the case, sufficient to demonstrate a failure to follow a reasonable line of inquiry or to take reasonable steps to ensure an effective and independent investigation.

14.12 Before turning to the United Kingdom case law which seeks to apply the Article 2 procedural obligation, it is appropriate to say something briefly about the Irish case law concerning the interpretation or expansion of rights guaranteed under the ECHR. These matters were recently briefly touched on by this Court in *Friends of the Irish Environment*.

14.13 In *McD (J) v L (P) & M (B)* [2009] IESC 81, this Court held that it was not the role of a domestic court to declare rights under the ECHR, but rather that this was a matter for the ECtHR. In that case, Fennelly J. suggested that an Irish court should not anticipate further developments in the interpretation of the Convention by the ECtHR in a direction not yet taken by that Court. It may be that there is a possibility that the line should not, as was argued in *Friends of the Irish Environment*, be drawn quite so strictly. There may be situations where the precise boundaries of a right arising under the ECHR have not been fully defined by the ECtHR but where the jurisprudence points reasonably clearly in a particular direction. A rigid approach which suggested that the Irish courts should not apply the ECHR save in circumstances which have been expressly dealt with by the ECtHR would, in my view, be unduly narrow. However, at the same time, it does not appear to me that it is appropriate, having regard to the jurisprudence in this jurisdiction, to seek to significantly expand on the jurisprudence of the ECtHR without there at least being a material indication in that jurisprudence as to the direction in which it is heading. Some degree of anticipation may be permitted where the signposts are clear but it is not for an Irish Court to unduly expand the scope of the ECHR into places or areas where the ECtHR has not itself ventured.

14.14 It may be that the jurisprudence of the courts of the United Kingdom in this regard is somewhat different and it is possible that this divergence stems, at least in part, from the absence of a formal rights based written constitutional regime in that jurisdiction. In addition, there are differences between the relevant provisions of the UK legislation and those of the 2003 Act. The prime focus of the 2003 Act is to determine if Ireland is in breach of its international obligations under the ECHR and provide appropriate remedies when that is so. This adds weight to the view that the obligation on the Irish courts is

concerned with giving effect to what the ECtHR has determined to be the obligations on contracting states and not to interpret the ECHR in a novel way.

14.15 That being said there can be considerable assistance to be obtained by the Irish courts in considering the jurisprudence of the courts of the United Kingdom in applying the ECHR in circumstances which have not arisen in this jurisdiction. That is particularly so because the practical application of the Convention can at least in part be dependent on the legal system to which it is applied. In those circumstances, the experience of the courts of a common law jurisdiction in applying the ECHR within such a regime can be particularly persuasive. Thus, decisions concerning the application of the established case law of the ECtHR within a common law jurisdiction, which emanate from the courts of the United Kingdom, can be particularly persuasive in an Irish context. However, that does not mean that decisions which may go materially beyond the established boundaries of the case law of the ECtHR are of the same relevance within this jurisdiction.

14.16 In oral argument, Counsel for Mr. Fox placed particular reliance on a number of decisions of the courts of the United Kingdom. In *R. (Amin) v. Secretary of State for the Home Department* [2004] 1 AC 653, Lord Bingham analysed the case law of the ECtHR up to the time of that case. There is a useful summary of the principal features which must be present in order that an investigation be compliant with Article 2 of the ECHR. Lord Bingham suggested that the jurisprudence established that such an investigation must be: -

- (a) independent;
- (b) effective;
- (c) reasonably prompt;
- (d) involve a sufficient element of public scrutiny; and
- (e) must involve the next of kin to an appropriate extent.

It seems to me that this synopsis fully reflects the jurisprudence of the ECtHR to which reference has already been made. Where an obligation to investigate a death arises under Article 2 of the ECHR, then it follows that the investigation concerned will not meet the obligations of the State unless it complies with those principles.

14.17 The specific facts of *Amin* related to a death in custody. Some of the comments to be found in *Amin* are, therefore, related to the particular application of the obligation to investigate in such circumstances. It is also clear that one of the issues which arose stemmed from the submission made to the effect that any further inquiry was unlikely to unearth new and significant facts. At para. 39, Lord Bingham indicated that the fact of the killing itself and the cause of death had already been fully explored so that little or no further examination was required. However, on the evidence, Lord Bingham was not satisfied that there would be little utility in further investigating the circumstances leading to the death in question. *Re. Dalton* [2020] NICA 26, arose out of the deaths of three

persons (including Mr. Dalton) in a bomb explosion. At para. 102 of the judgment, the Court of Appeal of Northern Ireland did indicate that the obligation of investigation may arise not only where the object is to identify and/or punish perpetrators but also where that object is to consider State responsibility more broadly.

14.18 In addition, at para. 120, the following was said: -

*"[120] An effective investigation, it might be thought, will entail a picture of the investigative process which leads to particular conclusions so that the extent of the investigation can be seen together with the investigator's reasoning to his or her conclusions. This enables those affected to arrive at a balanced view of the quality of the process which has been undertaken. Such would expose or be likely to expose failings or omissions or shortcomings."*

14.19 On one view it might be said that the passage cited from para. 120 of the judgment suggests an obligation to conduct an investigation into an investigation, for it refers to the exposure of shortcomings in the investigation itself. On the other hand, the passage is open to being read as indicating that the results of the original investigation need to specify the process followed and the investigator's reasoning so as to enable an analysis to be conducted as to whether the investigation was sufficiently thorough to meet the requirements of Article 2 of the ECHR.

14.20 I have no doubt but that the latter interpretation is mandated by the jurisprudence of the ECtHR. It is clear that interested parties, such as the next of kin, must be entitled to invite the courts to review whether an investigation, which is mandated by Article 2 of the ECHR, has in fact met the necessary standard. If the published account of the results of the investigation does not allow a sufficient analysis of the quality of the investigation to determine whether or not it was compliant with Article 2, then the right to challenge the compliance of the investigation with that Article will be significantly reduced. I am, therefore, satisfied that the conclusions of an Article 2 compliant investigation must be put forward in such a way that would permit a court to analyse whether the process and the reasoning of the investigation was Article 2 compliant.

14.21 To that broad statement I would add one important caveat. Some of the cases, both before the ECtHR and before the courts of the United Kingdom, involved investigations which did not lead to criminal or other relevant court proceedings. The end of the process was a conclusion to an investigation but not a court process. An investigation might, for example, lead to the conclusion that a death occurred due to the wrongful actions of a State agent but where that State agent had acted alone and was now deceased so that no criminal proceedings could follow. It is to such an investigation, being one which does not ultimately lead to court proceedings, to which my earlier comments were directed. Clearly, if the conclusion of any investigation is that criminal or other enforcement proceedings should be brought, then it will be a matter for the courts to consider the issues raised by the proceedings in question. An Garda Síochána and the Director of Public Prosecutions do not determine guilt or responsibility. The investigations of An Garda Síochána and the consideration of the relevant file by the Director of Public

Prosecutions, may lead to a conclusion that there is a sufficient basis to bring criminal proceedings. It will then be a matter for the courts of competent jurisdiction to determine guilt or otherwise. In such a case the investigation itself does not reach conclusions but forms part of the process leading to litigation. Finally, it might be said, there could in principle be a case where there was a criminal prosecution but where it might be argued that the investigation which led to that prosecution did not meet the requirements of Article 2 ECHR. However, as no such circumstances arise in this case given that there has been no criminal prosecution, I would leave to another case a consideration of the impact of Article 2 in such circumstances.

14.22 However, returning to *Dalton*, it seems to me that if that case is to be interpreted, as is argued on behalf of Mr. Fox, as providing authority for the proposition that there is an obligation to conduct an investigation into a defective previous investigation, then it seems to me that it goes beyond, in that regard, the established jurisprudence of the ECtHR. I would, in that context, reiterate the point made earlier. There is a difference between looking at the way in which a previous investigation was carried out as an end in itself, on the one hand, or as a means of identifying whether there are any further aspects of the original investigation that could and should be reopened, on the other. It does not seem to me to be appropriate to characterise the latter as involving an investigation into an investigation as such but rather a continuation of the original investigation including an analysis of the process to date for the purposes of identifying whether there are any further steps which can be taken.

14.23 In summary, therefore, I am not satisfied that it has been established that the jurisprudence of the ECtHR imposes an obligation on contracting states to investigate, as an end in itself, a defective previous investigation. Insofar as it may be argued that the courts of the United Kingdom have gone beyond the jurisprudence of the ECtHR, and I express no view on that matter, then it is not, in accordance with the established Irish jurisprudence, appropriate to impose obligations in Irish law which follow that lead. In Irish law, in this context, the lead is to be taken by the ECtHR. In reaching that conclusion I do not rule out the possibility that identified inadequacies in an original investigation can, in appropriate cases, lead to an obligation to reopen that original investigation where there is a realistic basis for believing that further material information concerning the circumstances of the original death may be capable of being uncovered having regard to the identified deficiencies concerned. However, such an obligation does not involve a requirement to investigate those deficiencies in themselves but rather involves a requirement to consider whether there is anything that now can be done to remedy the deficiencies in the original investigation and thereby potentially obtain further material information about the circumstances surrounding the death.

14.24 It is also necessary to consider one further aspect of the extent of the procedural obligation arising under Article 2 of the ECHR. As noted earlier, the ECtHR has confirmed that the obligation originally identified in *McCann* is not confined to cases where it was apparent that the killing in question was caused by agents of the State. It is appropriate to note again the language used by the ECtHR in both *Jordan* and *Rantzev*. Two aims are

suggested as being fulfilled by the procedural or investigative obligation. One is to ensure accountability of state agents or bodies for deaths occurring under their responsibility. It is clear, from subsequent cases, that this is not confined to situations where the actual killing appeared to have been carried out by state agents. The death in *Amin*, for example, occurred while the person in question was in police custody but it was clear that police officers were not directly involved in the killing. Nonetheless it is obvious that there could be state responsibility and culpability in permitting a person, in the custody of the state, to be killed. Likewise, in *Öneryildiz*, the ECtHR made clear that the obligation to investigate extended to circumstances where there might be a failure on the part of regulatory authorities within the state. Again, in *Dalton*, the relevant deaths were not directly caused by state agents but there were questions as to whether more should have been done by state agents or bodies to prevent or reduce the risks which led to the deaths in question.

14.25 It follows that there can be little doubt but that the obligation to investigate under Article 2 of the ECHR extends to cases where the State, through its agents and bodies, is not directly responsible for the death in question but where there may be concerns that the State was culpable through failing to take appropriate measures to protect the life or lives of those who died. It is certainly open to the view that this obligation exists even where there may not be a realistic prospect of bringing a prosecution in respect of the death concerned. In the passage already cited from *Öneryildiz*, the investigation is stated to be required to look at both shortcomings in the operation of the relevant regulatory system but also to separately consider the identification of individuals or authorities potentially involved.

14.26 However, cases such as *Jordan* and *Rantzev* also indicate that one of the objectives of an Article 2 compliant investigation is to "secure the effective implementation of the domestic laws which protect the right to life". That object appears to be separate from the requirement to investigate State responsibility. Such an obligation can, therefore, potentially arise in circumstances where there is no suggestion that acts or omissions on the part of State agents or bodies had contributed to the death in question. As already noted, the existence of a robust system for investigating crimes involving death and, where there is sufficient evidence gathered, bringing appropriate prosecutions, can enhance the right to life by deterring those who might take it. It does not seem to me, however, to be clear from the case law of the ECtHR as to the extent to which the investigative or procedural obligation applies in cases where there was no State involvement, direct or indirect, in the death in question and, in addition, where there is no practical prospect of prosecutions following. It is certainly arguable that the scope of the obligation to investigate is more extensive where there is an involvement on the part of State agents or bodies. However if, as is suggested in both *Jordan* and in *Rantzev*, an alternative purpose of an Article 2 compliant investigation may be to secure the effective implementation of domestic laws which protect the right to life, it does not necessarily follow that the obligation extends to cases, not involving State agents or bodies, where no prosecution is realistically possible. In that context, it is important to emphasise that the

circumstances surrounding the murder of Mr. Ludlow have already been the subject of extensive judicial and parliamentary scrutiny.

14.27 In light of that analysis, it does not seem to me that the Court of Appeal was fully correct when it indicated that the investigative obligation only arose with a view to a possible prosecution. The obligation clearly goes beyond that in the context of potential regulatory failure or other State action or inaction which may have contributed to the death in question. It would appear that the realistic possibility of bringing a prosecution may be a more significant factor in cases where there is no suggestion that State actors or State agencies had contributed in any way, directly or indirectly, to the death concerned.

14.28 Having identified what seemed to me to be the obligations of Ireland, as a contracting state to the ECHR, to investigate deaths in certain circumstances, it is next necessary to turn to the application of those principles to the circumstances of this case.

## **15. Application to the Circumstances of This Case**

15.1 The starting point has to be an acknowledgement of the undoubted deficiencies in the Garda investigation, at least insofar the events of 1979 are concerned. It is, perhaps, appropriate to respect and emphasise the words of former Commissioner Byrne who is recorded as having said that it was clear that that which should have been done had not been done at the time in question. It remains unclear as to whether greater progress could have been made in pursuing a potential prosecution (or at least achieving greater clarity about the events surrounding the death of Mr. Ludlow) had the matter been progressed as it should have been in 1979. Some of the difficulties encountered, including the inability to extradite persons for questioning and the fact that there were at least doubts as to whether An Garda Síochána could question suspects in Northern Ireland, would have been present just as much at that time as at any later stage. That being said, however, it must be the case that the prospect of making material progress in the investigation into the murder of Mr. Ludlow would have been much greater had the clear lead communicated by the RUC to An Garda Síochána in 1979 been fully followed up at the time.

15.2 For the reasons already analysed, the ECHR imposes an obligation to investigate deaths for, amongst other reasons, the purposes of ensuring that national laws designed to protect the right to life are fully complied with. Amongst the laws which are so designed are those which give rise to the possibility that, where sufficient evidence is unearthed, persons may be prosecuted for murder. An Article 2 compliant investigation is required to be thorough. It cannot be said that the investigation carried out in 1979 went anywhere close to meeting that standard. In addition, the fact that there were at least indications that sectarian motives might have been involved and also the possibility of some form of UK Security Force involvement would undoubtedly have added to the investigative obligation at the time.

15.3 It will be necessary to turn shortly to what we know about the reasons for the inadequacy of the investigation at that time but, whatever those reasons, it is necessary to strongly deprecate the fact that important leads in the investigation of the murder of a person

within the State were, it would appear deliberately, not followed up. This is not a case where, despite a thorough investigation, insufficient evidence or information was forthcoming. This is a case where all the evidence points to the fact that there was a deliberate decision not to pursue an important lead.

- 15.4 However the real question now facing this Court is whether there is anything further that must now, as a matter of law, be done about the established inadequacies in the original investigation. For the reasons already discussed, the Court has determined that the 2003 Act is not retrospective in its effect so that, as a matter of Irish law, no obligations under the ECHR arise in respect of events which occurred in 1976 or, indeed, 1979. It is, of course, the case, as analysed earlier, that there are bases on which a continuing investigative obligation can be held to exist by reason of investigations occurring after the critical date or for any of the other reasons identified earlier in this judgment. It is undoubtedly the case that the fact that the death of Mr. Ludlow occurred before the coming into force of the 2003 Act does not operate as an absolute bar on the State having continuing obligations which are unmet.
- 15.5 However even accepting, for the purposes of the argument, that one or other of the bases put forward for suggesting a continuing investigative obligation is present, notwithstanding the fact that the death of Mr. Ludlow occurred before the critical date, the question arises as to whether it would be appropriate or required, at this stage, for the court to intervene.
- 15.6 As has previously been emphasised there have already been two public bodies which have confirmed the inadequacies in the original investigation. Nothing would, in my view, be gained by a third statement to the same effect. It has been publicly acknowledged by relevant State authorities that the initial investigation fell short of the standard that could reasonably have been required of it. However, for the reasons already discussed, I am not persuaded that there is any obligation under the ECHR on State authorities to conduct a further investigation where the sole purpose of that investigation is to identify why an initial defective investigation may have fallen short of the standards required. A continuing investigative obligation only arises where there is some realistic basis for suggesting that the identification of the inadequacies in the original investigation might lead to further information becoming available concerning the circumstances of the death in question. The real question for decision, it seems to me, therefore, comes down to a consideration of whether there is any such realistic prospect. The Court's declaratory jurisdiction should not be utilised to simply confirm matters which are not in dispute but rather should be designed to resolve disputed legal questions in the hope that by so doing rights determined may be vindicated or obligations established may be complied with. Simply recording, yet again, that the investigation in 1979 fell short of the required threshold would achieve neither of those objects. It is only if it could be demonstrated that there was some continuing utility in making a relevant declaration that it would be appropriate for the court to exercise its jurisdiction in that regard.

- 15.7 It is necessary, when considering the facts, to have regard to the reasons why both the Barron Inquiry and the Oireachtas Sub-Committee were unable to obtain a complete picture as to why the original investigation was, in substance, placed on ice. One important reason given was the inability to resolve the conflict of evidence concerning whether former Garda Commissioner Wren had given instructions which had the effect of, in practice, bringing an active investigation to an end. The reason why it was impossible to resolve that conflict of fact was that neither the Barron Inquiry nor the Oireachtas Sub-Committee had the power to summon witnesses and reach conclusions of contested fact based on hearings which complied with the rules which have developed since in *Re Haughey* [1971] I.R. 217. However, 17 years have now elapsed since the Barron Report and 15 years since the Oireachtas Joint Committee Report. In that time, unfortunately, former Commissioner Wren has died. There is no longer any prospect of attempting realistically to resolve the conflict of fact which emerged in both of those reports.
- 15.8 In addition, Mr. Justice Barron indicated that he had encountered problems with the fact that other potential witnesses were no longer available, even at that time, and that memories had faded in light of the fact that he was considering matters even then over 20 years after the event. Far from being capable of being remedied, those problems can only have grown significantly more acute in the intervening period. A further matter touched on was the inability to obtain full cooperation from relevant authorities in Northern Ireland. The ability to compel witnesses who are outside the jurisdiction of the Irish courts remains as true today as it did in the early years of this century. Thus, far from an inquiry with compellability powers having the ability to obtain greater clarity today, the very reasons which led both the Barron Inquiry and the Oireachtas Sub-Committee to explain the difficulties which they had with obtaining a full picture, are even more pronounced today than they were at the time when both of those bodies were considering the matter.
- 15.9 On that basis it is, frankly, difficult to see how any greater light could be shone today on the deficiencies in the original investigation beyond that achieved at the time of the Barron Inquiry and the Oireachtas Joint Committee Report. Thus, even if there were to be an investigation into an investigation, it is open to very considerable doubt indeed as to whether such an investigation could achieve anything at this great remove. The problems which gave rise to difficulty for both of the inquiries would be significantly more pronounced today than they were at that time and would not be significantly reduced by the establishment of an inquiry with compellability powers. If that is so in respect of an investigation into an investigation, the same can be said to be the position with even greater force in respect of the possibility of now unearthing anything additional about the circumstances surrounding the murder of Mr. Ludlow. The only piece of new information in that regard is to be found in the witness statement of Mr. McDonagh to which reference has already been made. That statement does provide some evidence potentially connecting United Kingdom security forces with the area of Mr. Ludlow's murder on the night in question. However it is difficult to see how anything which could happen within this jurisdiction could cast any greater light on those issues. In those circumstances, I do not consider that it has been demonstrated that any inquiry which focused on the

inadequacies of the investigation in 1979, at least within this jurisdiction, carries with it any realistic prospect of casting further light on the circumstances surrounding Mr. Ludlow's murder.

15.10 Even were it to prove possible, and I very much doubt that it would, to gain some further insight into the circumstances surrounding the way in which the information which emerged in 1979 was treated, there does not seem to be any realistic basis for believing that this could cast any further light on the circumstances surrounding the death of Mr. Ludlow. The Barron Inquiry expressed the view that the probable reason for the information emanating from the RUC not being followed up at the time in question was because of concerns about cooperation with Northern authorities at a time of some tension. The Oireachtas sub-committee considered that it was not possible to determine the reasons. As already stated, I do not consider that there is any likelihood of achieving greater clarity on that question at this remove. If the events of 1979 were motivated by concerns about cooperation with Northern authorities then, determining whether those concerns emanated from local senior officers, central Garda Síochána personnel or the Department of Justice, would not affect the fact that those leads were not followed up at the time, had become, by the time of the Barron Inquiry and the hearings before the Oireachtas Sub-Committee, incapable of significant further exploration so that no further useful information concerning the circumstances surrounding the death of Mr. Ludlow could reasonably be expected to emerge.

15.11 I am, therefore, satisfied that it would not be appropriate to make a declaration in this case. It is accepted that Mr. Fox is not seeking a further inquiry into the murder of Mr. Ludlow as such. On that basis, for the reasons already discussed, I do not consider that it would be appropriate to make a declaration in the form suggested on his behalf. To do so would be simply to repeat that which has already been acknowledged and would not give any guidance as to whether, and to what extent, any continuing obligations lie on the State.15.12. Insofar as it might be suggested that it would be appropriate to grant a declaration which would have the effect of requiring the State to conduct an investigation into the deficiencies of the 1979 investigation, I am not, for the reasons already analysed, satisfied that any such obligation arises under the ECHR unless it can be demonstrated that there is a realistic possibility that identifying the reasons for such deficiencies might itself lead to a realistic possibility of further material information emerging concerning the circumstances surrounding Mr. Ludlow's murder. For the reasons set out in this section of this judgment, I am not satisfied that it has been established that any such realistic possibility exists on the basis of current information.

15.12 The evidence presently available points to the conclusion that Seamus Ludlow was the victim of a sectarian murder carried out by ruthless men. It should hardly need emphasising that Mr Ludlow was an entirely innocent man who had no paramilitary involvement whatsoever. The fact that the case was not effectively investigated was established by Mr. Justice Barron. Things happened in the course of the investigation and afterwards which should never have occurred. Those close to Mr Ludlow will not forget what was done to his memory. The culprits for the murder have never been brought to

justice. It is entirely understandable that those who brought this case should feel anger at the shameful matters which emerged as a result of the Barron Inquiry and the Oireachtas Sub-Committee hearings. However, these proceedings seek orders from a court as a matter of law. For the reasons set out in this judgment, the legal claim made in these proceedings cannot succeed.

15.13 To the findings set out in this judgment I would add one important observation. In the circumstances identified earlier in this judgment, the Court has been made aware of the Barnard Review. The Court understands the nature of that review and the fact that Irish authorities have agreed to cooperate with it in relation to matters concerning Mr. Ludlow's murder. The cooperation of An Garda Síochána in that regard is an example of how good policing policy may lead to measures being adopted even though such measures are not required by law as such.

15.14 There must remain a possibility that something will emerge from that review that may change the overall picture. Should that happen, it may be necessary to consider the difficult questions which were canvassed in argument before this Court as to the extent to which there is, at the level of principle, a continuing obligation on the State to ensure a further investigation into the circumstances surrounding the death of Mr. Ludlow. However unless and until materials emerge to alter the analysis set out in this section of this judgment, it does not seem to me that those questions arise for it has not, in my view, been established that there is currently any realistic prospect of obtaining greater clarity concerning the circumstances surrounding Mr. Ludlow's murder in the context of any further investigation which might be carried out in this jurisdiction. The possibility, and it is at this stage no more than that, of significant information emerging from the Barnard Review which is relevant to casting material further light on the circumstances surrounding the murder of Mr. Ludlow, cannot provide a basis for establishing the existence of a current legal obligation on the authorities in this jurisdiction to carry out a further investigation. In addition, it is worth noting that the ability to enquire into the matters with which the Barnard Review is charged is one which can be conducted with much greater facility by the authorities in Northern Ireland so that there remains a possibility of information emerging in that context which would be beyond the scope of any authorities in Ireland to obtain.

## **16. Conclusions**

16.1 In order to understand the decision which I propose should be adopted by this Court, it is necessary to understand the evolution of the case made on behalf of Mr. Fox as outlined in this judgment. The focus of that case had altered materially from the time when this matter was before both the High Court and the Court of Appeal. As the case evolved, significant argument was put forward as to whether the Constitution imposed an obligation on the State to carry out investigations into certain deaths. To the extent that any such obligations might be established as arising under the Constitution, then the parameters of the obligation concerned would also be of particular importance for the purposes of determining whether there were any unmet requirements still remaining on the State.

- 16.2 However, as the argument developed, it also became clear that what was sought on behalf of Mr. Fox was not so much an inquiry into the circumstances surrounding the murder of Mr. Ludlow but rather a further inquiry into the established inadequacies of the original investigation into his murder by An Garda Síochána involving a failure to follow up, in 1979, on important intelligence received from the RUC. For the reasons set out earlier in this judgment, I do not consider that any constitutional obligation which may lay on the State in the context of investigating the circumstances surrounding a death can go so far as to impose an obligation to conduct such an “investigation into an investigation”. This is, in my view, certainly so in cases where there does not appear to be any realistic possibility of further light being cast on the circumstances surrounding the death in question by the identification of the reasons for any failings in a previous investigation. The position of the family of Mr. Ludlow concerning the type of investigation sought, being, in substance, an investigation into an investigation, had been set out as long ago as 2008 in correspondence from their former solicitors to the then Attorney General. For the reasons set out earlier in this judgment, I am not satisfied that any constitutional obligation to conduct such an investigation has been established.
- 16.3 The case originally made on behalf of Mr. Fox was focused much more closely on obligations arising under the ECHR. The Court had already confirmed, in an interim ruling, that the critical date, from which obligations may fall on the State under the ECHR, as a matter of domestic Irish law, is the 31 December, 2003, being the date when the 2003 Act came into force. There are, however, circumstances, outlined in this judgment, in which it may be possible that continuing obligations arise, in domestic law, to investigate matters which occurred prior to that date. However, for the reasons again set out in this judgment, I am not satisfied that the ECHR imposes an obligation on the State to conduct an “investigation into an investigation”, at least where it has not been shown that there is a realistic possibility that the conclusions reached by such an investigation may in fact cast further light on the circumstances surrounding the death in question and/or increase the possibility of a credible prosecution being capable of being brought. In that context, I would not, as noted earlier, go so far as the Court of Appeal in indicating that the procedural or investigative obligation on the State is confined to circumstances which might lead to a prosecution. However, that being said, I am not satisfied that it has been established that there is any meaningful likelihood of further light being cast on the circumstances surrounding the murder of Mr. Ludlow by further investigating the circumstances surrounding the position adopted by An Garda Síochána in 1979.
- 16.4 It should finally be noted that the form of declaration sought on behalf of Mr. Fox was one which would have declared, in a form similar to that adopted by the courts of Northern Ireland in *Finucane*, that there had not been an appropriate investigation into the murder of Mr. Ludlow which conformed with either or both of the Constitution and the ECHR. However, it is accepted that the failings identified in respect of the actions of An Garda Síochána in 1979 mean that there has not been an investigation which complies with the obligations, in international law, on Ireland under Art. 2 of the ECHR. No utility would be achieved by repeating that fact which has already been acknowledged by the Barron

Inquiry, being an inquiry conducted by a distinguished former judge, and as a result of hearings by an Oireachtas sub-committee. Those inquiries established either that a direction was likely to have come from senior gardaí not to follow up on the information received from the RUC in 1979 (being the view of the Barron Inquiry) or that there was an inexplicable failure in the same regard (as per the Oireachtas sub-committee). Either way it has been acknowledged by important public bodies that what happened fell well short of that which was required.

- 16.5 The real issue of controversy between the parties is as to whether there is a continuing obligation, either under the Constitution or under the ECHR as applied in the domestic law of the State, to conduct further inquiries. If there was a realistic basis for believing that more could now be learned about the circumstances surrounding the death of Mr. Ludlow, then such obligations might potentially arise. However, not being satisfied that there is any obligation, either under the Constitution or under the ECHR, to conduct a so-called "investigation into an investigation", I do not consider that it has been established that there are continuing obligations on the State to conduct further inquiries at this stage.
- 16.6 In those circumstances I would propose that the appeal be dismissed but on slightly different grounds to those adopted by the Court of Appeal.