



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

FIFTH SECTION

DECISION

Application no. 17707/10
Gráinne NIC GIBB
against Ireland

The European Court of Human Rights (Fifth Section), sitting on 25 March 2014 as a Chamber composed of:

Mark Villiger, *President*,

Ann Power-Forde,

Ganna Yudkivska,

Vincent A. De Gaetano,

André Potocki,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 12 March 2010,

Having regard to the unilateral declaration submitted by the respondent Government and the applicant's reply to that declaration,

Having deliberated, decides as follows:

FACTS AND PROCEDURE

The applicant, Ms. Gráinne Nic Gibb, is an Irish national, who was born in 1970 and lives in Dublin. She was represented before the Court by Mr J. MacGuill, a lawyer practising in Co. Louth, Ireland.

The Irish Government ("the Government") were represented by their Agent, Mr P. White of the Department of Foreign Affairs.

The application was communicated to the Government on 16 October 2012.

A. The circumstances of the case

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

The applicant is the partner and next-of-kin of the late Mr Ronan O’Lochlainn. He was shot and killed by An Garda Síochána (police) on 1 May 1998 as he and five other persons were involved in a raid, an armed robbery, on a security van in the vicinity of the town of Ashford, Co. Wicklow. He died of a single bullet wound to the chest, the shot having been fired by a police officer, referred to at the inquest as Officer A. This officer was himself killed in the course of duty some years later. The evidence before the inquest was that whilst the deceased was in possession of a revolver at the time of the raid no shots were fired by the robbers while a total of twelve shots were fired by three police officers.

The inquest into the death of Mr O’Lochlainn opened on 6 August 1998 and heard the evidence of the State Pathologist. It then adjourned. Thereafter, the process was subject to lengthy delays. The hearing eventually took place on 28-29 September 2009. A number of witnesses were heard, including three police officers who had been present at the scene, as well as police experts in forensics and ballistics. Six civilian witnesses testified, none of whom had witnessed the shooting. The applicant was legally represented throughout the process. She criticised it on a number of grounds: the Coroner’s refusal to order the disclosure of certain documents by the police; the absence from the hearing of a police officer who had been part of A’s unit; the coroner’s refusal to call A’s commanding officer; the refusal to allow questions about the car used by A; the production of many photographs at the hearing that had not been previously disclosed to her; the absence of a stenographer; the coroner’s refusal to allow her counsel address the jury on the evidence at the inquest.

The jury returned a verdict of death by misadventure.

In parallel to the proceedings described above, the applicant instituted civil proceedings against the State in 1999 seeking damages for unlawful, wrongful and intentional killing and assault and for negligence and breach of duty. There was misunderstanding and delay in relation to the discovery of police documents. In 2006, the High Court ordered extensive discovery, a decision that was appealed by the State. Subsequently, the State claimed privilege in relation to certain police documents. The matter was considered by the High Court which ruled on 16 May 2013 that the documents be disclosed to the applicant, subject to the redaction of certain passages. The Court understands that these proceedings remain pending.

B. Relevant domestic law

1. The Coroners Act 1962

A Coroner has a statutory duty to hold an inquest in the circumstances referred to in section 17 of the 1962 Act:

“Subject to the provisions of this Act, where a coroner is informed that the body of a deceased person is lying within his district, it shall be the duty of the coroner to hold an inquest in relation to the death of that person if he is of opinion that the death may have occurred in a violent or unnatural manner, or suddenly and from unknown causes or in a place or in circumstances which, under provisions in that behalf contained in any other enactment, require that an inquest should be held.”

The purpose of the inquest is to establish the relevant facts surrounding the death, to place those facts on the public record and to make the findings for which section 30 of the 1962 Act provides. Consideration of civil or criminal liability is expressly prohibited:

“Questions of civil or criminal liability shall not be considered or investigated at an inquest and accordingly every inquest shall be confined to ascertaining the identity of the person in relation to whose death the inquest is being held and how, when and where the death occurred.”

2. The European Convention on Human Rights Act 2003

Section 3(1) of the Act provides:

“Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State’s obligations under the Convention provisions.”

The Act entered into force with effect from 1 January 2003. In *Dublin City Council v. Fennel* ([2005] 1 IR 604), the Supreme Court found that the 2003 Act could not be seen as having retroactive effect or as affecting past events.

COMPLAINTS

The applicant complained that the investigation into her partner’s death had not satisfied the requirements of the Convention. She further complained that the non-retrospective effect of the European Convention on Human Rights Act 2003 constituted in itself a violation of her rights under Articles 2, 6, 8 and 13 of the Convention.

THE LAW

A. The applicant's complaint about the investigation

The applicant complained under Article 2 about the delay in holding the inquest as well as about its scope and the manner in which it was conducted. Article 2 provides:

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

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

Following the parties' unsuccessful attempt to reach a friendly settlement of the case, the Government submitted a unilateral declaration to the Court on 22 November 2013 and requested the Court to strike the application out of the list of cases. The text of the unilateral declaration reads as follows:

“1. The Government of Ireland (“the Respondent”) acknowledges that, to date, an effective official investigation into the death of Ronan MacLochlainn (“the deceased”) on 1 May 1998 has not occurred.

2. In particular:

(i) The investigation at that time was carried out by a Detective Chief Superintendent and a Chief Superintendent under the auspices of An Garda Síochána and fully complied with standards which then pertained. The report issuing on foot of said investigation, whilst comprehensive in scope and concluding that all Gardaí who discharged firearms during the incident on 1 May 1998 did so in accordance with the laws of the State and existing Garda Regulations, did not satisfy the requirements of the Court's case-law on the procedural obligation arising under Article 2 of the Convention;

(ii) Given the acknowledged deficiencies of the procedures at that time which led to the report described at (i) above, the review of the report by the Director of Public Prosecutions (who has no investigative function), which concluded on 13 November 1998 that no prosecutions should issue against any member of An Garda Síochána arising out of the incident of 1 May 1998, could not have remedied the deficiencies in the State's observance of its Article 2 obligation to conduct an effective official investigation into the death of the deceased;

(iii) The Coroner's inquest into the deceased's death, which opened on 6 August 1998 and concluded on 29 September 2009 with a verdict of death by misadventure (“the inquest”), was not an investigation which

was capable, in the circumstances, of leading to a determination as to whether the force used against the deceased was justified in the circumstances, and to the identification and punishment of those responsible as required by the Court's case-law on the procedural obligation arising under Article 2 of the Convention. The Respondent further accepts that the requirement of promptness and reasonable expedition implicit in this context was not met in the administration of this inquest.

- (iv) The (ongoing) civil proceedings initiated by the Applicant by way of plenary summons dated 16 July 1999 seeking damages for (inter alia) unlawful killing have been undertaken at the initiative of the Applicant herself and are not concerned necessarily with the identification or punishment of any perpetrator of the unlawful killing which is alleged in those proceedings. As such, these proceedings do not fulfil the criteria required for an effective official investigation into the death of the deceased.

3. In light of the foregoing, the Respondent accepts that an effective official investigation into the death of the deceased has not yet occurred and that this constitutes a violation by Ireland of the procedural obligation contained in Article 2 of the Convention.

4. With a view to ensuring that such an effective official investigation is now conducted in accordance with Article 2 of the Convention, the Respondent hereby undertakes to establish a Commission of Investigation charged with investigating the circumstances surrounding the death of the deceased ("the Commission of Investigation") in exercise of its powers pursuant to section 32 of the Commissions of Investigation Act 2004 ("the 2004 Act"). A copy of the 2004 Act is appended to this document. However, the Respondent wishes to highlight below certain features of the legislation underpinning the Commission of Investigation which it believes renders it a particularly suitable instrument for the resolution of the within application.

5. By way of background, the 2004 Act was enacted in order to create a swift and efficient independent statutory vehicle for the conduct of official State-sanctioned investigations into matters considered by the Government to be of significant public concern. As can be seen from the 2004 Act, a Commission of Investigation established under that legislation is given strong powers to take evidence on oath or affirmation from relevant persons and to procure and examine relevant documents with a view to establishing the facts in relation to the matters referred to it for investigation.

6. It is intended to lay before the Houses of the Oireachtas a draft order of Government purporting to establish a Commission of Investigation in this case, pursuant to section 3 of the 2004 Act. Draft terms of reference have been drawn up defining the investigatory scope of the Commission of Investigation. The draft terms of reference are appended to this document.

7. As can be seen from the draft terms of reference, the Commission of Investigation will be charged with investigating:

- (i) the circumstances surrounding the fatal shooting by An Garda Síochána of the deceased;
- (ii) all relevant Garda matters including the policies, practices and procedure of An Garda Síochána relating to the planning and control of the operation

which led to the fatal shooting, and relating to training provided to personnel who were detailed for the Garda operation concerned.

8. The terms of reference have been drafted to allow the Commission of Investigation to come to a determination as to whether the use of force which led to the death of the deceased in this case was justified or not in the circumstances, and to the identification of those individuals responsible in the event that a finding of unjustifiable force is made, as required by the Court's case-law.

9. As can be seen from the final paragraph of the draft terms of reference, the Commission of Investigation is specifically enjoined to involve the Applicant in the conduct of the investigation to the extent necessary to safeguard her legitimate interests, as required by the Court's case-law.

10. Pursuant to section 9 of the 2004 Act, the Commission of Investigation would be entirely independent in the exercise of its functions. In addition, the Commission of Investigation would have the status of an "organ of the State" within the meaning of the European Convention on Human Rights Act 2003 ("the 2003 Act"). Pursuant to section 3 of the 2003 Act, the Commission of Investigation would be bound by statute to perform its functions in a manner compatible with the State's obligations under the provisions of the Convention as interpreted by the Court. A copy of the 2003 Act is appended to this document.

11. Pursuant to section 10(4) of the 2004 Act, the Commission of Investigation will be required to conduct its investigation as expeditiously as a proper consideration of the matter referred to the Commission permits. Pursuant to section 32 of the 2004 Act, the Commission of Investigation will be required to produce a written report based on the evidence received by it, setting out the facts it has established in relation to the matters referred to it for investigation. Pursuant to section 38 of the 2004 Act and subject to certain considerations set out therein, the relevant Minister shall cause the Commission of Investigation's final report to be published as soon as possible after it has been submitted to the Minister.

12. The 2004 Act provides a framework for the payment of legal costs to the Applicant. The Respondent observes that, pursuant to section 24 of the 2004 Act, a witness before the Commission of Investigation may apply to have legal costs "necessarily incurred" in connection with the investigation reimbursed to him or her. Section 23(2) provides that such costs will be considered to have been necessarily incurred where the good name or conduct of the witness is called into question by any evidence received by the Commission of Investigation, or other personal or property rights of the witness are at risk of being jeopardised as a result of any evidence received by the Commission of Investigation. The Commission of Investigation is to be satisfied that the level and amount of those costs are reasonable prior to directing their discharge, and pursuant to section 23 of the 2004 Act the relevant Minister shall prepare general guidelines concerning the payment to witnesses of legal costs necessarily incurred by them in connection with the Commission of Investigation. Each witness before the Commission of Investigation receives a copy of these guidelines prior to giving evidence before the Commission of Investigation.

13. Having regard to section 7 of the 2004 Act, each member of a Commission is appointed either by the relevant Minister or by the Government. Before appointing a member of a Commission, the appointing authority (the specified Minister or the Government) is required by the statute to be satisfied as to the relevant person's appropriate experience, qualifications, training or expertise. Following due consideration, the Government intends to appoint Aileen Donnelly Senior Counsel as sole member of the Commission of the Investigation.

14. The Respondent submits that the case-law of the Court regarding the procedural obligation under Article 2 of the Convention is sufficiently well-established and that this application does not raise any novel issues which would require substantive adjudication by the Court.

15. In addition, the Respondent submits that there is nothing in the subject-matter of the within application which could be taken to suggest any systemic issue with Ireland's fulfilment of its procedural obligations under Article 2 of the Convention. The within application concerns an admitted, but isolated, violation of the Convention by Ireland.

16. The Respondent offers to pay to the Applicant, Ms Gráinne Nic Gibb, the amount of €23,000 in respect of the within application. This sum, which covers any pecuniary and non-pecuniary damage and costs and expenses, shall be paid in Euro into an account named by the Applicant and shall be free of any taxes which might otherwise be applicable. Should the Court agree to strike out the application pursuant to Article 37 § 1 the Respondent undertakes to abide by whatever conditions the Court may decide to attach as regards the payment of the sum.

17. Finally, the Respondent submits the within declaration in circumstances where it has engaged fully with the Applicant and her legal representatives in the friendly settlement process but an agreement could not be reached.

18. In light of all of the foregoing, the Respondent requests the Court to decide that it is no longer necessary to continue with an examination of this application and to strike same out of the Court's list of applications pursuant to Rule 62A of the Rules of Court and Article 37 § 1 of the Convention."

The proposed terms of reference read as follows:

"Proposed terms of reference for an investigation pursuant to the Commissions of Investigation Act 2004 into the shooting of Ronan MacLochlainn in 1998

The Minister for Justice and Equality, mindful of the State's obligation to conduct an effective official investigation into all deaths arising from the use of force by agents of the State (which obligation devolves from Article 2 of the European Convention on Human Rights as developed in the relevant case-law of the European Court of Human Rights), hereby appoints Aileen Donnelly Senior Counsel to undertake a thorough investigation and make a report within 6 months in accordance with the provisions of s. 32 of the 2004 Act on the following specific matters:

1. The circumstances surrounding the fatal shooting by the Garda Síochána of Ronan MacLochlainn on 1 May 1998 in Ashford, Co Wicklow.
2. All relevant Garda matters including the policies, practices and procedure of An Garda Síochána relating to the planning and control of the operation which led to the fatal shooting, and relating to training provided to personnel who were detailed for the Garda operation concerned.

The Commission shall keep the Applicant involved in the investigation to the extent necessary to safeguard her legitimate interests."

By a letter of 15 January 2014, the applicant indicated that she was not generally satisfied with the terms of the unilateral declaration. While she had no objection to the amount of compensation offered or to the person proposed as the sole member of the Commission, she considered that the terms of reference set out above were inadequately focused as they did not

mandate the Commission of Inquiry to make findings on those matters necessary to comply with Article 2. She also considered that assurances regarding her procedural rights were lacking. She proposed more detailed terms of reference to cure this and suggested that the Court put the case “on hold” until the Commission of Inquiry had reported.

The Court recalls that Article 37 of the Convention provides that it may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified under (a), (b) or (c) of paragraph 1 of that Article. Article 37 § 1 (c) enables the Court in particular to strike a case out of its list if:

“for any other reason established by the Court, it is no longer justified to continue the examination of the application”.

It also recalls that in certain circumstances, it may strike out an application, or part thereof, under Article 37 § 1(c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued.

As envisaged by Rule 62A of the Rules of Court, the Government’s request to strike the case out on the basis of its declaration came after the applicant’s refusal of the terms of a friendly-settlement proposal made pursuant to Rule 62. The Court will examine carefully the declaration in the light of the principles emerging from its case-law, in particular the *Tahsin Acar* judgment (*Tahsin Acar v. Turkey*, [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI); *WAZA Spółka z o.o. v. Poland* (dec.) no. 11602/02, 26 June 2007; and *Sulwińska v. Poland* (dec.) no. 28953/03).

The Court first observes that the declaration clearly acknowledges a violation of Article 2 by the respondent State for failure to conduct an effective investigation into the death (paragraph 2 of the declaration). The amount of compensation proposed, which the applicant did not criticise and which is consistent with the amounts awarded in similar cases, may be regarded as adequate.

As to the remedial measure proposed, the Court takes note of the statutory powers of a Commission of Inquiry. These powers and the relevant statutory provisions satisfy the requirements governing investigations required under Article 2. The criterion of independence is satisfied by express provision in the 2004 Act. The statutory requirement to conduct proceedings expeditiously is particularly relevant in the present circumstances, in view of the very lengthy delay to date. In their letter enclosing the declaration the Government gave examples of previous Commissions of Inquiry established under the 2004 Act to investigate matters of high public concern in Ireland, including at least one that examined a serious incident involving the police. The measure proposed is therefore not without precedent in the domestic system.

The Court considers that the applicant's criticisms of the proposed terms of reference find answers in the terms of the declaration. It notes in particular that, though drafted somewhat broadly, the proposed terms of reference have been formulated by the Government so as to allow the Commission of Inquiry to investigate the essential questions of justification and responsibility (see paragraph 8 of the declaration). It is likewise intended that the Commission of Inquiry shall safeguard the applicant's legitimate interests in the process (paragraph 9 of the declaration). Concerning legal costs, which the applicant will incur in the process, the Court notes the power of the Commission of Inquiry to order reimbursement. It further notes that this power has been exercised in favour of the next-of-kin in one of the previous inquiries mentioned by the Government (the *Dean Lyons* inquiry). There are therefore no grounds for believing that the inquiry proposed by the Government will or might be conducted in a manner at variance with the requirements of Article 2 of the Convention. Should this, nevertheless, occur, or should the State otherwise fail to comply with the terms of its declaration, the application can be restored to the list in accordance with Article 37 § 2 of the Convention (see, for instance, *Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008, and, *mutatis mutandis*, *McCaughey and Others v. the United Kingdom*, no. 43098/09, § 128, 16 July 2013).

On the basis of the above declaration, which admits unequivocally a violation of Article 2, offers adequate compensation to the applicant and undertakes to conduct forthwith an investigation in compliance with Article 2, the Court considers that it is no longer justified to continue the examination of the application (Article 37 § 1(c)).

Moreover, given the clear and extensive case-law on the procedural requirements of Article 2 (see among many others and with further references therein *Finucane v. the United Kingdom*, no. 29178/95, §§ 67-71, ECHR 2003-VIII, and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, §§ 298-306, ECHR 2011 (extracts)), the Court is satisfied that respect for human rights as defined in the Convention does not require it to continue the examination of this application (Article 37 § 1 *in fine*).

Regarding the compensation proposed, the Court takes note of the Government's undertaking to abide by whatever conditions it might set for payment and considers that the amount should be paid within three months from the date of notification of the Court's decision issued in accordance with Article 37 § 1 of the Convention. In the event of failure to do so, simple interest should be payable on the amount in question at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

B. The applicant's other complaint

The applicant argued that the non-retrospective nature of the European Convention on Human Rights Act constituted a violation of her rights under Articles 2, 6, 8 and 13 of the Convention.

However, having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that there is no appearance of a violation of the cited provisions. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Takes note of the terms of the respondent Government's declaration under Article 2 of the Convention and of the modalities for ensuring compliance with the undertakings referred to therein;

Decides to strike this part of the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention;

Declares the remainder of the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President