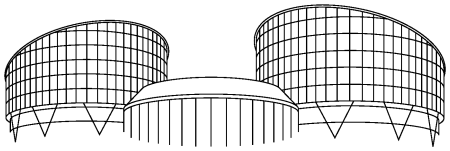

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MCDONNELL v. THE UNITED KINGDOM

(Application no. 19563/11)

JUDGMENT

STRASBOURG

9 December 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of McDonnell v. the United Kingdom,

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

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Paul Mahoney,
Krzysztof Wojtyczek, *judges*,
and Françoise Elens-Passos, *Section Registrar*,

Having deliberated in private on 18 November 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19563/11) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish national, Ms Elizabeth McDonnell ("the applicant"), on 15 March 2011.

2. The applicant was represented by Mr P. Ó Muirigh, a solicitor practising in Belfast. The United Kingdom Government ("the Government") were represented by their Agent, Ms A. McLeod, of the Foreign and Commonwealth Office.

3. The applicant complained in particular under Article 2 that the State had not fulfilled its procedural, investigative obligation in respect of the death in custody of her son in that there had been an excessive delay in the inquest proceedings.

4. On 22 October 2013 the application was communicated to the Government.

5. The Irish Government did not exercise their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1939 and lives in County Antrim.

A. The background facts

7. On 6 January 1996 the applicant's son, Mr James McDonnell, was remanded in custody to Crumlin Road Prison in Belfast. Since that prison had to close, all prisoners were to be transferred on 30 March 1996 to HMP Maghaberry.

8. On the morning of 30 March and prior to his transfer, Mr McDonnell was informed that his father had died suddenly during the night. Upon hearing the news, the applicant asked to be moved to a single cell. At 10.50 a.m. he was transferred to HMP Maghaberry. His cell was not ready on arrival so he waited in the recreation area. When a prisoner officer informed him that he would share a cell, Mr McDonnell said that he would wreck it. A principal officer was informed.

9. At 12.15 p.m. Mr McDonnell was informed his cell was ready and he said that he would hit the first prisoner who came into it. The principal officer was informed.

10. At 2.10 p.m. another prisoner, with two prison officers, arrived to share the cell. Mr McDonnell said that he wanted to be left alone. He left the cell and announced that he was going to the Punishment and Segregation Unit ("PSU"). There was then a scuffle between several prison officers and Mr McDonnell, which resulted in his being wrestled to the ground and physically restrained. He was brought to a standing position and, while still restrained, was taken to the PSU at approximately 2.20 p.m. A body search was carried out at the PSU with his consent. He was also examined by a medical officer, who noted that he had suffered bruising and grazing and was experiencing discomfort in his chest. The medical officer left at approximately 2.30 p.m. Statements later taken from prison officers and prisoners diverged as regards, *inter alia*, the circumstances of the incident, the level of restraint used and whether Mr McDonnell had been beaten.

11. At 3.45 p.m. on the same day Mr McDonnell was found unconscious in his cell in the PSU having suffered a heart attack. A number of unsuccessful attempts were made to resuscitate him. He was declared dead at 4.15 p.m.

B. The domestic proceedings

1. The autopsies and the medical evidence

(a) Professor Crane

12. On 30 March 1996 the first autopsy was conducted by Professor Crane, the State Pathologist for Northern Ireland. Professor Crane noted that Mr McDonnell had suffered a fracture to the hyoid bone in the neck, consistent with being grasped by a hand, and that it appeared that

Mr McDonnell had suffered a heart attack some 12-24 hours prior to his death. He found that:

> "[the earlier heart attack] ... could ... have precipitated a fatal upset in the heart rhythm at any time ... [T]he possibility that the stress of the incident shortly before his death played some part in the fatal outcome cannot be completely excluded."

13. Professor Crane's report was sent to the Coroner in April 1997.

(b) Professor Vanezis

14. A further autopsy was carried out on 2 April 1996 by Professor Vanezis. Professor Vanezis reported that Mr McDonnell's thyroid cartilage was also fractured and that there was bruising to the area. He could not exclude that stress suffered while being restrained had contributed to the cause of death.

15. An initial copy of the report was provided to the Coroner in March 1997. A copy was sent by the Coroner to Professor Crane for consideration in April 1997. Having considered Professor Crane's autopsy, Professor Vanezis produced, on 26 June 1997, a supplemental report confirming his own previous findings.

(c) Dr Kirschner

16. The Northern Ireland Civil Liberties Council requested a report from Dr Kirschner of the International Forensic Programme, Chicago. Dr Kirschner considered the reports of Professors Crane and Vanezis as well as other material including statements from prisoners in the deceased's cell block. Dr Kischner's report of 7 September 1997 concluded:

> "[I]t is my opinion within a reasonable degree of medical and scientific certainty that the injuries that James McDonnell suffered approximately one hour prior to his death were a direct and proximate cause of his death. It is furthermore my opinion that the cause of death should be recorded as: Myocardial Ischaemia due to Multiple Blunt Trauma Injuries and Near-Asphyxiation."

17. He was of the view that Mr McDonnell's death should be classed as a homicide.

18. A copy of Dr Kirschner's report was provided to the Coroner, together with a final copy of the report of Dr Vanezis, on 17 May 1999. In view of its controversial nature, the Coroner sent Dr Kirschner's report to Professor Crane and to the police for their consideration. The police referred the matter to the Director of Public Prosecutions ("DPP") and the DPP requested a further report from Professor Crane. The latter recommended that a second opinion on Mr McDonnell's cardiology history be requested from Professor Knight. The Coroner requested a report from Professor Knight in June 1999.

(d) Professor Knight

19. Professor Knight reviewed the above three reports as well as primary autopsy data. On 30 June 1999 he completed his report in which he agreed with the reports of Professor Crane and Vanezis. Professor Knight concluded that the immediate cause of death was a fatal heart attack, but he considered that the emotional and physical effects of the prior restraint could have been a contributory or precipitating factor. He considered the report of Dr Kirschner to be flawed in both fact and opinion.

20. A copy of Professor Knight's report was provided to the Coroner in July 1999 and sent immediately to the police, the DPP, Professor Crane and the applicant's solicitors.

2. The police investigation and the DPP decisions not to prosecute

21. Meanwhile, an investigation into Mr McDonnell's death was commenced by the Royal Ulster Constabulary ("RUC"). Twenty-one statements were taken from prisoners in March and May 1996. Eighteen prison officers were interviewed and statements were taken from eight of them in March 1996. Following the first autopsy, the eight officers were again interviewed under caution about, *inter alia*, the injuries noted on the deceased's body.

22. On January 1997 a file was presented to the DPP. On 16 May 1997 the DPP gave a "no prosecution" direction.

23. The DPP reviewed his decision in 1999 on receipt of the report of Professor Knight (see paragraphs 18 and 20 above), but on 4 August 1999 gave a further "no prosecution" direction.

24. Following an inquiry from the applicant's solicitor in May 2002, the DPP informed her by letter of 5 August 2002 of his decisions of 1997 and 1999.

3. The lodging of civil proceedings

25. On 8 November 2000 the applicant issued civil proceedings against the Prison Service of Northern Ireland. It appears that the writ has never been served.

4. The 2001 police review of the investigation

26. The Police Service Northern Ireland ("PSNI") replaced the RUC in 2001. In 2004 the Serious Crime Review Team reviewed the original investigation and concluded that extensive research into the case had not uncovered any new evidential material or investigative opportunities.

5. The complaint to the Office of the Police Ombudsman

27. In 2001 the applicant made a complaint to the Police Ombudsman about the investigation into her son's death. In February 2002 investigators from the Ombudsman's office met with Professor Vanezis to discuss certain prisoners' statements. On 2 May 2003 Professor Vanezis provided a further report to the Ombudsman confirming his view that Mr McDonnell had died from a heart attack but that stress relating to the restraint had contributed to his death.

28. The subsequent conclusions of the Ombudsman were as follows:

> "The Police Ombudsman has reviewed all the police documentation relating to the investigation into James McDonnell's death. This includes the subsequent reviews undertaken by PSNI.
>
> The investigation into the death of James McDonnell was thorough and complete. The family of Mr McDonnell were not kept up-to-date with the investigation. This was not uncommon in 1996. However, with the advent of the emphasis on Family Liaison in any investigation into a sudden death, it is hoped that different standards would be applied today.
>
> Whilst the investigation was thorough and the DPP directed no prosecution against any of the prison officers involved in the restraint of James McDonnell prior to his death, some of the injuries suffered by James McDonnell have never been satisfactorily explained. This is particularly true of the injuries to Mr McDonnell's throat. The police investigation was not able to properly deduce which of the prison guards, if any, may have inflicted the injuries, primarily the fracture of the hyoid bone. It is hoped that the inquest will allow the family of Mr McDonnell the opportunity to seek the answers to the questions that they have had since 1996."

6. The inquest

(a) January 1998 – May 1999

29. Meanwhile, following the decision of the DPP in 1997 not to bring any criminal prosecutions (see paragraph 22 above), the inquest was listed for a hearing on 2 February 1998. By letter dated 7 January 1998 the applicant's solicitor sought an adjournment to await the outcome of pending judicial review proceedings concerning entitlement of family members of a deceased to legal aid at inquests (*Sharon Lavery v. Secretary of State and Legal Aid Department*). The Coroner adjourned the inquest until May 1999.

30. In October 1998 the Coroner wrote to the Court Service to inform them that inquests, including the inquest into the death of the applicant's son, were delayed by reason of the pending judicial review proceedings.

31. On 16 March 1999 the High Court handed down its judgment in *Sharon Lavery* ([1999] NIQB; p. 6 and p. 1905), finding that there was no entitlement to legal aid at inquests.

(b) May 1999 – February 2001

32. As noted above (see paragraph 18), in May 1999 the Coroner was provided with a copy of the report of Dr Kirschner. He adjourned the inquest to obtain another report from Professor Knight, which was completed in June 1999 (see paragraph 20 above). In July, the inquest was re-scheduled for November 1999.

33. In the meantime, in September 1999, the Crown Solicitor's Office advised that it would apply to maintain the anonymity of the prison officer witnesses. The hearing date of November 1999 was vacated because of that application but also to facilitate the attendance of Dr Kirschner.

34. In 2000 the inquest was further adjourned to allow the applicant to seek disclosure on the basis of a new Home Office Circular (issued in April 1999). The applicant also indicated to the Coroner that she intended to issue a judicial review challenge in relation to the pre-inquest disclosure by the PSNI. In August 2000 the applicant informed the Coroner that she no longer intended to issue judicial review proceedings and wished a hearing date to be set.

35. In December 2000 the applicant informed the Coroner that her expert, Dr Kirschner, would not be available until March 2001. The inquest was accordingly listed to commence on 5 March 2001.

(c) February 2001 – January 2002

36. In February 2001, with the applicant's acquiescence, the inquest was again adjourned pending this Court's judgment in *Hugh Jordan v. the United Kingdom* (no. 24746/94, ECHR 2001-III (extracts)). Judgment in the case was delivered on 4 May 2001.

37. Following delivery of the judgment, no inquests were listed from September 2001 to February 2002 pending the amendment of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("the 1963 Rules").

(d) January 2002 – March 2007

38. Between January 2002 and March 2007 inquests which gave rise to Article 2 issues were adjourned pending judicial review actions concerning the scope of the inquest (*Regina v. Secretary of State for the Home Department ex parte Amin* ([2003] UKHL 51; and *R (Middleton) v. West Somerset Coroner* ([2004] 2 A.C. 182)) and the application of Article 2 to deaths which pre-dated the Human Rights Act 2000 (*In re McKerr* ([2004] UKHL 12; and *Jordan v. Lord Chancellor and Another* and *McCaughey v. Chief Constable of the Police Service Northern Ireland* [2007] UKHL 14).

39. The latter judgments, delivered by the House of Lords on 11 March 2004 and 28 March 2007 respectively, confirmed that Article 2 did not apply to cases where the deaths in question pre-dated the Act.

(e) March 2007 – April 2013

40. In August 2007 the Coroner wrote to the applicant informing her that nineteen inquests had been adjourned pending the outcome of proceedings before the House of Lords and were now ready to proceed.

41. A preliminary hearing took place on 2 April 2008. On that date, an inquest hearing date was fixed for October 2008. The Coroner subsequently sought copies of the interviews and statements of prison officers taken by the police and of the statements taken from certain prisoners. He gave directions on any anonymity claims that might be made on behalf of any of the witnesses.

42. On 16 May 2008 the Crown Solicitor's Office confirmed that it acted for eight prison officers who were seeking anonymity and screening. A further preliminary hearing was listed for 10 October 2008 to address the matter.

43. On 10 October 2008 the Coroner was informed that individual threat assessments would have to be conducted in respect of each officer seeking anonymity and screening and no timescale for the completion of this process was available.

44. A preliminary hearing took place on 6 November 2008 at which the Coroner issued a ruling on applications for anonymity and directed that any applications for anonymity be filed and served by 1 December 2008. The inquest was provisionally listed to commence on 3 February 2009.

45. In December 2008 the Coroner was advised that it would take up to three months for the threat assessments to be completed. It was therefore necessary to postpone the February 2009 inquest start date. The applicant's solicitor was notified by letter dated 15 December 2008.

46. In May 2009 the Coroner received the threat assessments in respect of the prison officers seeking anonymity. He was, at that time, involved in another complex inquest.

47. In October 2009 the applicant instructed new legal representation. The Coroner sought confirmation from the newly-appointed solicitors that legal funding was in place. The solicitors responded that they were in discussions concerning legal funding and would provide an update in due course.

48. On 24 February 2010 the applicant's new solicitors made detailed status enquiries of the Coroner's Office and emphasised that to date the applicant had received no disclosure. On 22 March 2010 the Coroner replied that he had received some documents from the PSNI. On the same date, he again wrote to the PSNI requesting that full disclosure with any proposed redactions be provided for his consideration by 14 May 2010. New risk assessments for the prison officers seeking anonymity were also requested.

49. No disclosure was made by the deadline set. Reminders were issued on 10 June, 26 June, 21 July and 12 August 2010.

50. The updated risk assessments were received by the Coroner on 21 July 2010.

51. A preliminary hearing was listed on 8 September 2010 in order for the Chief Constable of the PSNI to explain the delay in providing disclosure. The hearing was rescheduled for 8 October 2010 owing to the unavailability of counsel.

52. At the hearing on 8 October 2010, the anonymity of prison officer witnesses and PSNI disclosure were debated. The Coroner ordered the PSNI to make disclosure by 19 November 2010 and scheduled a hearing for 3 December 2010. Disclosure was not made as ordered and that hearing date was vacated.

53. On 23 March 2011 disclosure was received by the applicants from the PSNI. All prison officer details were removed from the statements and no initials were retained, so that it was impossible to understand which officer was referred to at any given point in the statements. The applicant requested initials ("ciphers"). The Coroner requested the PSNI to provide the disclosure again, with ciphers. By letter dated 28 April 2011 the Coroner confirmed to the applicant that the statements would be provided with ciphers and allowed twenty-one days from receipt of those statements with ciphers for the applicant to make submissions on anonymity and screening.

54. On 18 May 2011, and in light of this Court's judgment in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009, the Supreme Court overruled the judgments of the House of Lords concerning the applicability of Article 2 to pre-Human Rights Act deaths (see paragraphs 38-39 above) and accepted that such inquests should be compliant with Article 2 (*McCaughey and Another, Re Application for Judicial Review* [2011] UKSC 20).

55. Following reminders by the applicant to the Coroner in April, July, August and September 2011, on 6 September 2011 the statements with ciphers were provided to the applicant.

56. The applicant subsequently instructed a forensic pathologist, Dr Carey, to address the disputed issue of causation. Dr Carey requested access to primary data concerning the autopsy (post-mortem photographs, histology slides and the pathologist contemporary notes) and in April 2011 the applicant requested the Coroner to provide the material. The Coroner wrote to Professor Crane on 28 April 2011 asking that he make the material available to Dr Carey. In July 2011 Professor Crane replied querying the authority for the disclosure of his notes. By letter dated 1 September 2011 to the Coroner, the applicant contested Professor Crane's refusal to provide access. Professor Crane subsequently agreed to provide the histological slides, and they were furnished in October 2011. In November 2011 the Coroner received Professor Crane's notes and copies were provided to the applicant.

57. The Coroner received a copy of Dr Carey's report in late November 2011. A preliminary hearing was listed on 10 January 2012.

58. At the hearing in January 2012, a revised timetable for the anonymity applications was put in place and the inquest was listed to commence on 26 November 2012, the first available date taking into account the Coroner's existing commitments and the need for a suitable courtroom bearing in mind the estimated length of the inquest and its circumstances. A provisional witness list and timetable were circulated in February 2012.

59. In May 2012 Professor Crane provided his response to the report of Dr Carey. Additional comments from cardiac pathologist Dr Sheppard were circulated to the other legal representatives. The applicant sought disclosure of all correspondence between Professor Crane and Dr Sheppard.

60. An issue arose in May 2012 in respect of the threat assessments for the prison officers. After protracted correspondence, the issue was resolved by July 2012 and the threat assessment process commenced. By October 2012 some of the assessments remained outstanding. The Coroner decided that the inquest could not proceed in November 2012 and adjourned it until February 2013.

61. In December 2012 the applicant sought further disclosure of any other incidents which resulted in harm to a prisoner in which the prison officer witnesses had been involved, as well as details of any disciplinary proceedings against them.

62. The four pathology experts were not available in February 2013 and the Coroner was also unavailable as a result of illness. The Senior Coroner took over the case and listed the inquest to commence on 17 April 2013.

63. The correspondence between Professor Crane and Dr Sheppard was disclosed in March 2013.

(f) April – May 2013

64. The inquest commenced before the Senior Coroner on 17 April 2013. At the start of the inquest, the Coroner made a decision to grant anonymity to the prisoner officer witnesses.

65. The inquest ended on 16 May 2013. The narrative of the jury's verdict explained:

> "The Northern Ireland Prison Service has explained the majority of the injuries sustained by Mr McDonnell. However, it has not explained the injuries to Mr McDonnell's neck and lumbar region.
>
> The Northern Ireland Prison Service failed to carry out best practice in regard to bereavement of a prisoner."

66. The jury's answers to the specific questions posed can be summarised as follows:

(i) Mr McDonnell was subject to a control and restraint procedure and a relocation procedure on 30 March 1996 as a result of his violent behaviour.

(ii) The use of the procedure was necessary but it was not carried out correctly.
(iii) The use of the procedure was not carried out only in so far as necessary.
(iv) The neck injuries recorded in Mr McDonnell's post mortem appeared to have been sustained during the initial restraint when he was grabbed by the neck.
(v) The factors contributing to Mr McDonnell suffering a fatal heart attack were: the initial restraint; neck compression; the control and restraint procedure as carried out in this instance; underlying heart conditions; and emotional stress.
(vi) The Northern Ireland Prison Service has not explained how he sustained the injuries found in the post mortem.
(vii) There were defects in the procedures used that caused or contributed to the death of Mr McDonnell. There were: excessive force; prison officers not being trained in the application of aspects of Prison Guidelines, such as discretion on releasing control and restraint, and failures in the duty of care towards prisoners.

67. At the conclusion of the case the Senior Coroner referred the case to the DPP pursuant to section 35(3) of the Justice (Northern Ireland) Act 2002. The DPP was notified by letter dated 30 May 2013.

7. The DPP decision on prosecution

68. A decision by the DPP on whether to commence any criminal prosecutions is awaited.

8. Judicial review of the anonymity order made during the inquest

69. The applicant commenced judicial review proceedings regarding the anonymity order made in respect of the prison officer witnesses at the inquest. She contended that this aspect of the inquest failed to comply with Article 2 of the Convention because it denied the inquest the requisite degree of transparency and accountability since the identities of those concerned were withheld from the next of kin and their conduct was not subject to public scrutiny. She did not seek the quashing of the jury's verdict.

70. The judicial review hearing took place on 24 and 25 February and a decision was issued on 15 May 2014. The court rejected the applicant's challenge. According to the latest information available to the Court, the applicant was considering whether to lodge an appeal against the decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

71. The relevant domestic law and practice is set out in the Court's judgments in *McCaughey and Others v. the United Kingdom*, no. 43098/09, §§ 68-89, 16 July 2013, and *Collette and Michael Hemsworth v. the United Kingdom*, no. 58559/09, §§ 33-42, 16 July 2013.

THE LAW

I. ADMISSIBILITY

72. In her original application, the applicant complained of substantive and procedural violations of Article 2 and a violation of Article 13.

73. Article 35 § 1 of the Convention provides:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

A. The parties' submissions

74. The Government contended that, with the exception of the Article 2 complaint concerning investigative delay, the application should be declared inadmissible as premature given that domestic proceedings were pending. There was an unresolved judicial review claim concerning the compatibility of one aspect of the inquest procedure with Article 2; the DPP was currently considering whether to institute criminal proceedings against any officer; and civil proceedings had not been completed. The Government pointed out that in *Hemsworth* and *McCaughey*, both cited above, the applicants' civil actions had not been concluded and the Court did not accept that there was any demonstrated factor that could be considered to have deprived the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of death.

75. The applicant accepted that in light of the fact that her civil claim was pending, that the DPP had not yet decided whether to initiate prosecutions and that she was entitled to appeal the judicial review decision, the majority of her complaints were premature. However, she maintained that there had been a breach of the promptness requirement inherent in the procedural aspect of Article 2 and insisted that this aspect of her application ought to be declared admissible.

B. The Court's assessment

76. In light of the applicant's concession and the Court's judgments in *McCaughey*, cited above, §§121-127, and *Hemsworth*, cited above, §§ 60-67, the Court is satisfied that save in relation to the complaint about investigative delay, it is not in a position to consider the merits of the complaints under the substantive and procedural aspects of Article 2 because the applicant's judicial review proceedings and civil action remain pending (see paragraphs 25-70 above) and because, following the referral by the Coroner to the DPP in 2013 (see paragraph 67 above), the initiation of further relevant investigative procedures, including of a criminal and/or disciplinary nature, remains possible.

77. The complaints under Article 2, other than the complaint about investigative delay of itself, are therefore inadmissible as premature and/or on the ground that domestic remedies have not yet been exhausted within the meaning of Article 35 § 1 of the Convention. The associated complaint under Article 13 must also therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. Should the applicant be dissatisfied in the future with the progress or outcome of those domestic procedures, it would be open to her to re-introduce these complaints under the substantive and procedural aspects of Article 2 of the Convention (see *McCaughey*, cited above, § 130; and *Hemsworth*, cited above, § 67).

78. The consequence of the referral of the case to the DPP in 2013, with the potential that entails for, *inter alia*, further proceedings of a criminal and/or disciplinary nature, is that the investigative process into the death of Mr McDonnell has still not finished eighteen years after his death. The Court considers that the complaint under Article 2 about investigative delay of itself is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other ground. It must therefore be declared admissible, along with the related complaint under Article 13 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 2 IN RESPECT OF DELAY, ALONE AND IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION

79. The applicant complained about the delay in the commencement of the inquest and the fact that the investigation was still not completed eighteen years after her son's death. She relied on Article 2 of the Convention, which 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."

80. The Government contested that argument.

A. The parties' submissions

1. The applicant

81. The applicant argued that the delay in her case was, to use the language of the Court in *Hemsworth*, cited above, § 70, "striking". There had been a delay of seventeen years between the death and the commencement of the inquest, and further investigative measures – namely, the contemplation of criminal proceedings by the DPP – were still underway.

82. She further contended that the delays encountered were not justified. She referred, in particular, to the following periods of delay:

- while the post mortem was conducted on 30 March 1996, the report was not forwarded to the Coroner until April 1997 and no explanation had been given for the delay;

- the inquest had been listed for February 1998 and the subsequent adjournment pending judgment in the *Sharon Lavery* proceedings concerning entitlement to legal aid, which the applicant had requested, did not dispense the authorities from complying with the requirement for reasonable expedition;

- the delay caused by developments in respect of disclosure and the pre-inquest disclosure by the RUC/PSNI raised questions whether the inquest system at the relevant time was capable of providing speedy and effective access to the applicant;

- the delay between May 2001 and March 2008, caused by legal actions seeking to clarify certain aspects of coronial law, was not justified, for the reasons given by the Court in *McCaughey* and *Hemsworth*, both cited above;

- following the completion of relevant domestic litigation a preliminary hearing was not listed in the inquest for a further year, in April 2008, at which point the Coroner also sought further disclosure despite the fact that a year earlier, in March 2007, the House of Lords in *McCaughey* had given judgment clarifying the obligations of the PSNI in respect of disclosure, and no explanation had been given for this delay;

- delay was caused by the issue of the prison officers' anonymity and no sense of expedition had been applied to the process, with threat assessments being applied for only in December 2008 and taking a further six months to produce;

- by March 2010 the Coroner had still not obtained full disclosure from PSNI, some three years after the clarification of PSNI's legal obligations by the House of Lords in *McCaughey*;

- disclosure to the applicant was not completed until September 2011, some four years after the House of Lords judgment;

- further delays were caused by Professor Crane's failure to make his notes and records available to Dr Carey.

2. The Government

83. The Government argued that there had been no violation of the procedural obligation under Article 2 of the Convention by reason of the delay. They were of the view that the inquest process which had now taken place showed that even if the inquest had taken place earlier, the result would have been no different. The jury at the inquest heard evidence on all matters pertinent to Mr McDonnell's death from prison officers, other prisoners, prison medical staff and expert witnesses. The passage of time had not in any way diminished the capacity of the inquest to resolve all of the issues required for it to comply with Article 2.

84. As to the reasons for the delay, it was notable that for several years the inquest proceedings were delayed pending the outcome of litigation relevant to the inquest, both domestically and before this Court. The litigation had an impact on coronial law and practice generally and was of benefit to the applicant. In particular, the applicant had applied to adjourn the inquest listed to begin in February 1998 pending the outcome of a legal aid judicial review challenge in which judgment was ultimately given a year later in March 1999; there was a delay of just under two years from 1999 to 2001 while issues concerning the inquest, including disclosure, were in the process of resolution between the Coroner and other parties to the inquest; the inquest was listed in March 2001 but was adjourned awaiting the judgment of this Court in *Hugh Jordan*, cited above; and between 2000 and 2007 the delay was attributable to the decision to await a number of decisions of the House of Lords.

85. The Government further argued that the applications for anonymity had had no material impact on the length of the proceedings. Any delay occasioned by the preparation of the threat assessments was minimal, in the context of the overall progress of proceedings. Further, it was incurred for the legitimate purpose of conducting a thorough and careful exploration of whether the applications were justified.

B. The Court's assessment

1. General principles

86. It is well-established that Article 2 requires an investigation to begin promptly and to proceed with reasonable expedition, and that this is required quite apart from any question of whether the delay actually impacted on the effectiveness of the investigation. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating an alleged use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see

Hugh Jordan, cited above, §§ 108 and 136-140; *McCaughey*, cited above, § 130; and *Hemsworth*, cited above, § 69).

2. The application of the general principles to the facts of the case

87. The Court considers it striking that Mr McDonnell died in March 1996 and that the inquest proper did not begin until April 2013, more than seventeen years later.

88. During this period there were a number of delays which the Court considers attributable to the authorities and which are not justified. The decision of the DPP not to prosecute was not taken until over a year after the death of the applicant's son in March 1996, even though the autopsy by Professor Crane was carried out on the day of Mr McDonnell's death and the RUC had interviewed relevant witnesses in March and May 1996 (see paragraphs 12 and 21-22 above). The applicant was not notified of the DPP decision until she made specific inquiries, via her solicitor, in 2002 (see paragraph 24 above). Following the decision of the DPP in May 1997 not to prosecute, an inquest hearing was set for a date nine months later (see paragraph 29 above). Thereafter the inquest was adjourned pending domestic litigation and litigation before this Court (see paragraphs 29, 36 and 38 above). The first preliminary hearing in the inquest did not take place until April 2008 (see paragraph 41 above), some twelve years after the death of Mr McDonnell and over a year after the final House of Lords judgment which was the reason for the adjournment had been handed down (see paragraph 39 above). Thereafter, further delays were encountered as a result of applications for anonymity made on behalf of the prison officer witnesses and a failure to disclose by the PSNI, for which no explanation has been provided. There is no evidence in the documents before this Court that steps were taken, in recognition of the delay to date, to expedite proceedings and resolve the outstanding preliminary issues. In the event, full disclosure was not finally made until September 2011 (see paragraph 55 above) and a decision in the anonymity applications was not taken until the commencement of the inquest itself in spring 2013 (see paragraph 64 above).

89. As regards the delay between May 2001 to March 2008 on account of legal actions in other cases, as the Court has already explained, while these proceedings were highly relevant, the manner of proceeding inevitably extended significantly the length of investigations and inquests in Northern Ireland. The fact that it was necessary to postpone the inquest so frequently and for such long periods pending clarifying litigation demonstrates that the inquest process itself was not structurally capable at the relevant time of providing the applicant with access to an effective investigation which would commence promptly and be conducted with due expedition (see *McCaughey*, cited above, § 138; and *Hemsworth*, cited above, § 73).

90. In conclusion, whatever the individual responsibility, or lack of responsibility, of those public officials involved in the investigation process, these delays cannot be regarded as compatible with the State's obligation under Article 2 to ensure the effectiveness of investigations into suspicious deaths, in the sense that the investigative process, however, it be organised under national law, must be commenced promptly and carried out with reasonable expedition. To this extent, the foregoing finding of excessive investigative delay, of itself, entails the conclusion that the investigation was ineffective for the purposes of Article 2 of the Convention. There has, accordingly, been a violation of Article 2 under its procedural aspect by reason of excessive investigative delay. The Court also concludes that no separate issue arises under Article 13 of the Convention in that respect (*McCaughey*, cited above, § 140; and *Hemsworth*, cited above, § 74).

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

91. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

92. The Court has found that the investigative delay in the present case breached the procedural guarantees of Article 2 of the Convention. In so doing, it considered the inquest process itself was not structurally capable throughout the relevant period of time of providing the applicants with access to an investigation which would commence promptly and be conducted with due expedition. The Court recalls its findings under Article 46 as regards investigative delay in its above-cited *McCaughey* and *Hemsworth* judgments. The present inquest delay was excessive and its root causes were similar to those in *McCaughey* and *Hemsworth*.

93. As the Court has previously emphasised, it falls to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – may be required of the respondent Government by way of compliance However, this compliance must involve the State taking, as a matter of some priority, all necessary and appropriate measures to ensure, in the present case and in similar cases concerning killings by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously (see *McCaughey*, cited above, § 145; and *Hemsworth*, cited above, § 77).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

95. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

96. The Government argued that, unlike the applicants in *Hemsworth*, cited above, § 79, the present applicant had not established any suffering and distress meriting an award of non-pecuniary damage. In particular, she had failed to provide any evidence or details in support of her claim.

97. The Court is satisfied that the applicant has undoubtedly suffered distress on account of the lengthy delay in the case. It awards her the full amount claimed, namely EUR 10,000, in respect of non-pecuniary damage.

B. Costs and expenses

98. The applicant also claimed 12,700 pounds sterling, inclusive of VAT, for the costs and expenses incurred before the Court.

99. The Government submitted that the applicant had not shown that the costs sought had been actually and necessarily incurred. First, they argued that the amounts were excessive, given that the legal issues identified were similar to those raised in other cases involving Northern Ireland and the applicant's written pleadings were not of a length or complexity to justify the amounts claimed. Second, the Government contended that the applicant's counsel and her solicitor appeared to have duplicated work.

100. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 8,000, plus any tax that may be chargeable to the applicant on this sum, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable at the date of settlement.

C. Default interest

101. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the complaints under Articles 2 and 13 concerning investigative delay admissible;

2. *Declares*, by a majority, the remainder of the application inadmissible;

3. *Holds*, unanimously, that there has been a violation of the procedural requirements of Article 2 of the Convention by reason of excessive investigative delay;

4. *Holds*, by six votes to one, that no separate issues arises under Article 13 of the Convention in conjunction with Article 2 of the Convention as regards investigative delay;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into pounds sterling at the rate applicable at the date of settlement:
      (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and
      (ii) EUR 8,000 (eight thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 December 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Kalaydjieva is annexed to this judgment.

I.Z.
F.E.P.

DISSENTING OPINION OF JUDGE KALAYDJIEVA

The present case concerns the death of the applicant's son in a prison in 1996. It is not contested that, 18 years later, the investigative process concerning this death is still not concluded and that the instituted civil proceedings are not being processed. This is the first follow-up case to be examined after the judgments of this Court in the cases of *McCaughey and Others v. the United Kingdom* (no. 43098/09, 16 July 2013) and *Collette and Michael Hemsworth v. the United Kingdom* (no. 58559/09, 16 July 2013) and in my opinion it seems to illustrate some problematic consequences of the Court's conclusions in those two cases.

In responding to the Court's questions, the applicant's representative in the present case referred to those judgments and "accepted on the applicant's behalf that in view of the fact that: the applicant's civil action [was] pending; the DPP ha[d] not concluded whether or not to initiate prosecutions; and, the applicant [was] entitled to appeal the recent decision of the High Court, there [was] no basis for the Court's adopting a different approach to the applicant in this case" as compared to the cases of *Hemsworth* and *McCaughey* (see § 24 of the applicant's observations). The applicant furthermore "accept[ed] that ... the Court [would] conclude that [her] claim [was] premature, but that [like in *Hemsworth*, § 67], it would be open to [her] to re-introduce [her] complaints under the substantive and procedural aspects of Article 2 of the Convention, should [she] be dissatisfied with the progress, or outcome of those domestic procedures" (ibid., § 25). The applicant was thus "content that the Court adopts the approach adopted in *McCaughey* and *Hemsworth*" on the condition that she "will be at liberty to re-introduce her complaints under the substantive and procedural aspects of Articles 2 and 3 in the future" (ibid., § 26).

It seems to me that in addition to the concerns expressed in my separate opinion in the two earlier judgments mentioned and to which I have also referred here, the present case appears to highlight the dilemma with which the Court will be confronted as a result of its own self-limited scope of examination in respect of similar complaints. Given the accumulated and potential future delays, this approach may logically pose the question whether and at what point the Court might deem such complaints mature for examination, or in the alternative might find itself pressed to carry out periodic examination of the same complaints at certain intervals in the course of potential additional delays. As for the applicant's concession that she might re-introduce her complaints at a later point of her dissatisfaction, the Court will at least have to specify the moment as of which it might consider the introduction of such new complaints to be compliant with the six-month time-limit, etc.

Whichever option the Court chooses for its future approach, this cannot change the obvious fact that the present case does not concern armed conflicts or mass disappearances, where investigative delays and failures may be seen as explicable or justifiable, nor does it concern situations in which the authorities are capable of demonstrating that in the many years after the incident they have taken every opportunity to clarify the circumstances and to identify those involved with a view to their appropriate accountability, as required by Articles 2 and 3 of the Convention.