Northern Ireland
Legal Quarterly
Spring Vol. 74 No. 1 (2023) 192–208
Commentaries and Notes DOI: 10.53386/nilq.v74i1.1028

Human rights and the righting of 'historical' wrongs: the Supreme Court's judgment in *Re McQuillan, McGuigan, and McKenna*

Natasa Mavronicola*
University of Birmingham
Correspondence email: n.mavronicola@bham.ac.uk

ABSTRACT

This comment examines particular aspects of the Supreme Court's judgment in *McQuillan, McGuigan and McKenna*, notably its reasoning and findings in respect of the investigative obligation emanating from the right not to be subjected to torture or inhuman or degrading treatment or punishment as it related to the case of the 'Hooded Men'. Although the Supreme Court acknowledged that the subjection of the Hooded Men to the so-called 'five techniques' of interrogation in 1971 would, today, be characterised as 'torture', and in spite of new evidence linking named members of the United Kingdom (UK) Government to the authorisation of the 'five techniques', the court found that there was no basis for recognising the applicability or revival of UK authorities' obligation to investigate under article 3 of the European Convention on Human Rights. In this case commentary, I consider the court's analysis and conclusions and reflect briefly on their significance in the context of an uninterrupted 'history' of British involvement in torture.

Keywords: right not to be subjected to torture or to inhuman or degrading treatment; investigative obligations; dealing with the past.

BACKGROUND

The case – which I will refer to as *McQuillan, McGuigan and McKenna*[1] – relates to appeals from the Court of Appeal in Northern Ireland regarding what the Supreme Court referred to as 'distressing events' which took place in 1971 and 1972, during the

* I am grateful to Gordon Anthony, Anurag Deb and the anonymous referee for their invaluable feedback on an earlier draft. Any errors remain my own.

1 *In the matter of an application by Margaret McQuillan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3); In the matter of an application by Francis McGuigan for Judicial Review (Northern Ireland) (Nos 1, 2 and 3); In the matter of an application by Mary McKenna for Judicial Review (Northern Ireland) (Nos 1 and 2)* [2022] UKSC 55, [2022] AC 1063 (*McQuillan, McGuigan and McKenna*).

height of 'the Troubles' in Northern Ireland. The key question at issue in the case was whether the United Kingdom (UK) Government was under a duty to conduct human rights-compliant investigations in relation to these events. This investigative duty would derive from the right to life and the right not to be subjected to torture or inhuman or degrading treatment or punishment, found in article 2 and article 3 of the European Convention on Human Rights (ECHR) respectively.

The appeal in *McQuillan* concerned the fatal shooting of Jean Smyth while she was a passenger in a car in Belfast on 8 June 1972. Military logs discovered later suggested that she had been shot by a member of the British Army's Military Reaction Force, and on the basis of this information the Chief Constable of the Police Service of Northern Ireland (PSNI) proposed to conduct a further investigation into her death. Ms Smyth's sister, Margaret McQuillan, sought a declaration that the Legacy Investigation Branch (LIB) of the PSNI was insufficiently independent to conduct an investigation in line with the independence requirement under the investigative duty of article 2 of the ECHR.

The appeal in *McGuigan and McKenna* concerned the duty to investigate the subjection to the 'five techniques' of interrogation – consisting of hooding as a means of creating disorientation, subjection to noise, deprivation of food and sleep, and stress positions – of 14 detained persons who came to be known as the 'Hooded Men'. This abuse was inflicted on the Hooded Men, including Francis McGuigan and Séan McKenna, by members of the Royal Ulster Constabulary (RUC) during the detention of the Hooded Men by security forces in August 1971. The 'techniques' had been taught to members of the RUC by officers of the British Military Intelligence Centre in the same year. Mr McGuigan and the daughter of the late Séan McKenna were seeking judicial review of the PSNI's decision that there was not sufficient evidence to warrant an investigation compliant with the right to life and the right not to be subjected to torture or ill-treatment (under articles 2 and 3 of the ECHR) into the allegation that the Hooded Men had been subjected to torture authorised by ministerial members of the UK Government. This comment chiefly examines the *McGuigan and McKenna* appeal, though I will be touching on broader issues pertaining also to the appeal in *McQuillan*.

The abuse suffered by the Hooded Men had been the subject of an inter-state case addressed by the European Court of Human Rights (ECtHR) in 1978. In what is by now a deeply contested finding, in *Ireland v UK* the ECtHR departed from an earlier finding of torture by the European Commission of Human Rights,[2] and held that the

2 *Ireland v United Kingdom* App no 5310/71 (Report of the Commission, 25 January 1976).

'five techniques' of interrogation to which the Hooded Men had been subjected amounted to inhuman and degrading treatment but not torture.[3] The ECtHR's finding hinged primarily on its assessment of the intensity of suffering experienced by the Hooded Men – it said:

> Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.[4]

In 2014, a documentary broadcast by RTÉ made reference to documents discovered through the National Archives, which had not been before the ECtHR prior to the 1978 judgment. These documents included medical reports that had been seen by relevant officials and that contradicted the evidence given in the course of the inter-state case on behalf of the UK that the psychological effects of the five techniques were not likely to be long-lasting or severe. They also contained information about those responsible for the authorisation and use of the five techniques, including evidence of the involvement of Cabinet Ministers.[5] Following the documentary, the PSNI concluded that there was not sufficient evidence to warrant a further investigation into the allegation. Mr McGuigan and Ms McKenna applied for judicial review of the PSNI's decision. Separately, the Government of Ireland also applied to the ECtHR seeking a revision of the ECtHR's 1978 judgment, requesting in particular that the finding of inhuman and degrading treatment be substituted by a finding of torture. The ECtHR issued a decision in 2018 refusing this request, on the basis that the alleged new facts would not have had a 'decisive influence' on the findings made in the original (1978) judgment.[6]

KEY FINDINGS

Before the Supreme Court were three broad questions:

a. whether the UK authorities' domestic investigative obligations under articles 2 and 3 ECHR could be engaged in relation to

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3 *Ireland v United Kingdom* (1979–80) 2 EHRR 25, para 167.

4 *Ireland v UK* [1978 ECtHR Judgment] (n 3) para 167.

5 See RTÉ Investigates: *The Torture Files*. See further 'British Government authorised use of torture methods in NI in early 1970s' (*BBC News* 5 June 2014).

6 *Ireland v United Kingdom* (2018) 67 EHRR SE1. Note the Dissenting Opinion of Judge Síofra O'Leary. The criterion of 'decisive influence' is found in r 80(1) of the Rules of Court. See the critical analysis of the revision judgment in Michelle Farrell, 'The marks of civilisation: the special stigma of torture' (2022) 22(1) Human Rights Law Review 1.

events occurring before the coming into effect of the Human Rights Act 1998 (HRA) in 2000;

b. whether new evidence had 'revived' the investigative obligations; and
c. whether the requirement of independence within the investigative obligations at issue had been, or was capable of being, fulfilled through the investigations provided.

The Supreme Court, in brief, considered:

a. that the investigative obligations under articles 2 and 3 were not engaged on the basis of the events which had occurred in 1971 and 1972;
b. that the new evidence available was enough to revive the UK authorities' investigative obligation under article 2 in respect of Ms Smyth's killing (as was common ground in the appeal), but was not enough to revive the UK authorities' investigative obligation under article 3 ECHR in respect of the Hooded Men's subjection to the five techniques;[7] and
c. that the requirement of independence would not have been fulfilled on the facts in relation to Ms Smyth's killing, but that there were no particular grounds on which to consider that the LIB would lack independence in investigating the *Hooded Men*'s case.

The Supreme Court also dismissed arguments that there was an equivalent obligation to the article 2 and 3 ECHR investigative duty at common law,[8] and arguments concerning the creation of a legitimate expectation that there would be an investigation into the treatment of Mr McGuigan and Mr McKenna.[9]

Nonetheless, the Supreme Court ultimately turned to consider the rationality of the PSNI's decision not to investigate further the allegations emerging from the RTÉ documentary on collusion in the torture of the Hooded Men. Finding that the PSNI's decision had been based on a seriously flawed report and was therefore irrational, it quashed the decision.[10]

Although other elements of the Supreme Court's judgment, notably its finding that 'it has not been established that the LIB is not capable of carrying out an effective investigation on the basis either of institutional or hierarchical connection or that it is not capable of conducting

7 *McQuillan, McGuigan and McKenna* (n 1 above) [119].
8 Ibid [215]–[217].
9 Ibid [218]–[222].
10 Ibid [223]–[252].

an investigation with practical independence',[11] are significant in relation to redress processes within Northern Ireland, the comment below focuses on the Supreme Court's consideration of the question of the existence of an investigative obligation in respect of the subjection of Mr McGuigan and Mr McKenna to the 'five techniques'. I will take each element of the Supreme Court's assessment of this question in the order in which the court addressed it.

THE REVIVAL QUESTION

Had there been a possibility of the relevant obligations applying in respect of events which had occurred in the early 1970s,[12] the question for the Supreme Court would have been whether the investigative obligation could be said to be 'revived' in light of the new evidence. Even though the temporal applicability of these obligations is a prerequisite to their potential 'revival', the Supreme Court nonetheless chose to consider the 'revival' question first, before analysing the temporal 'boundaries' of the investigative obligation. The basis for such a 'revival' is found in the *Brecknell* case, which was an article 2 case before the Strasbourg Court, where the ECtHR indicated that 'events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued'.[13] The ECtHR outlined the revival 'test' as follows:

> where there is a plausible, or credible, allegation, piece of evidence or item of information *relevant to the identification, and eventual prosecution or punishment* of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution …[14]

11 Ibid [214]. See the thorough analysis of this and other aspects of the case in this recently published comment: Anurag Deb and Colin Murray, 'Sealing the past: McQuillan and the future of legacy litigation' (2022) 4 European Human Rights Law Review 395–411.

12 The principle that this is a condition for 'revival' of the investigative obligation was underlined by the Supreme Court in *McQuillan, McGuigan and McKenna* (n 1 above) [178].

13 *Brecknell v United Kingdom* (2008) 46 EHRR 42, para 68.

14 Ibid para 71 (citations omitted, emphasis added).

The *Brecknell* test, as it has come to be known, is considered applicable also in relation to investigations into alleged or suspected article 3 ill-treatment.[15] As the above excerpt demonstrates, at the heart of the test is a focus on pursuing individual criminal accountability: the question is whether the new or newly revealed allegation, evidence or information is relevant to the identification, prosecution and punishment of the perpetrator(s) of the human rights violation at issue, and the prospects of success of any prosecution are relevant to determining whether (and what) renewed investigative efforts would be reasonable.

The Supreme Court found that the new material pertaining to the treatment of the Hooded Men did not satisfy the *Brecknell* test because, although it provided 'a considerable amount of detail in relation to the authorisation of the five techniques which was not previously publicly available', including identifying the part played by individual ministers and shedding light on the policy decision of the UK Government not to pursue proceedings against the individuals involved, it did not – in the view of the Supreme Court – add significantly to the state of knowledge in 1978 or alter its substance.[16] The Supreme Court borrowed from the judgment of the Court of Appeal in Northern Ireland in enumerating the various (many of them deeply troubling) facts that had been 'known' in 1978:

> By 1978, as a result of the Compton Enquiry, the Parker Committee Report, the debates in Parliament, the investigations by the European Commission and the hearings before the [Strasbourg Court] the following matters were established:
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> (i) the precise nature of the techniques used and the purposes for which they were used;
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> (ii) the persons in respect of whom they were used;
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> (iii) the extent of the training and preparation for their use;
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> (iv) the fact that a secret base was identified for their application;
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> (v) the use of the techniques had been authorised at a high/senior level;
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> (vi) the authorisation included ministerial authorisation (referred to by Lord Gardiner);
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> (vii) the use of the techniques was unlawful;
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> (viii) the use of the techniques was in breach of article 3 of the Convention ;
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> (ix) the use of the techniques was an administrative practice of the United Kingdom;

15 *McQuillan, McGuigan and McKenna* (n 1 above) [115].
16 Ibid [128].

> (x) the UK Government had chosen not to co-operate fully with the investigation carried out by the European Commission;
>
> (xi) that attitude persisted during the hearing before the Court;
>
> (xii) the UK Government made clear that it did not intend to carry out any investigation into the criminal or disciplinary liability of those who authorised and applied the techniques. ...
>
> It is clear, therefore, that by 1978 there was a compelling case for the investigation of those who authorised and implemented the unlawful use of the five techniques with a view to prosecution for any criminal offences disclosed. That investigation did not take place because of a policy decision made within the UK Government. All of that was known.[17]

In particular, the Supreme Court sought to underline that 'the question of authorisation at Ministerial level was a live issue in the investigations which took place up to 1978' but 'was not pursued at that time as a matter of policy'.[18] This appears to have been central in the Supreme Court's determination that 'the applicants should have been aware of the lack of any effective criminal investigation as early as the 1970s'[19] and, presumably, that it was therefore not the case that the 2014 revelations amounted to 'events or circumstances ... which cast doubt on the effectiveness of the original investigation'[20] more than the events or circumstances of the 1970s already had. Lastly, the Supreme Court considered that the ECtHR's finding in the 2018 *Ireland v UK* revision decision that the new material did not demonstrate facts relating to the *level* of authorisation which were unknown to the court when it delivered its original judgment[21] – the UK had at the time conceded that the 'five techniques' had been authorised at 'high level'[22] – was key to establishing that the *Brecknell* test was not satisfied.[23] The Supreme Court also dismissed the further evidence concerning withheld medical reports indicating the likely severe and long-lasting effects of the 'five techniques' on the basis that 'this material cannot be relevant to the identification and eventual prosecution or punishment of a perpetrator of conduct in breach of Article 3'.[24] Accordingly, the

17 *Re McGuigan's Application for Judicial Review; Re McKenna's Application for Judicial Review* [2019] NICA 46, [103]–[104], cited by the Supreme Court in *McQuillan, McGuigan and McKenna* (n 1 above) [125]

18 *McQuillan, McGuigan and McKenna* (n 1 above) [127].

19 Ibid [131].

20 *Brecknell* (n 13 above) para 68.

21 *Ireland v UK* [Revision Decision] (n 6 above) para 136.

22 *Ireland v UK* [1978 Judgment] (n 3 above) para 97; *Ireland v UK* [Revision Decision] (n 6 above) paras 117–118.

23 *McQuillan, McGuigan and McKenna* (n 1 above) [129].

24 Ibid [130] (citations omitted).

Supreme Court held that the Court of Appeal in Northern Ireland had been right to depart from the first instance judge's finding that the *Brecknell* test was satisfied, following the ECtHR's revision decision.[25]

THE SUPREME COURT'S APPLICATION OF THE 'GENUINE CONNECTION' AND 'CONVENTION VALUES' TESTS

The determination of whether UK authorities were under an investigative obligation under articles 2 and 3 ECHR required the court to assess whether a duty to investigate could be said to be engaged in relation to events in the early 1970s. The Supreme Court turned to this question next, and sought to answer it by applying the 'genuine connection' and 'Convention values' tests as developed in the jurisprudence of the ECtHR, notably the judgments in *Brecknell*,[26] *Šilih v Slovenia*[27] and *Janowiec v Russia*.[28] The Supreme Court interpreted the Strasbourg Court's case law as establishing that in order for investigative obligations to be applicable in relation to an incident which had taken place before the ECHR came into effect in respect of the state concerned, there must be either:

> (1) a 'genuine connection' with the triggering event, meaning
>
> (a) a reasonably short period of time between the triggering event and the entry into force of the Convention, which should not exceed 10 years, and
>
> (b) that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that State; or
>
> (2) where the 'genuine connection' test is not met, an extraordinary situation where there is a need to ensure that the guarantees and the underlying values of the Convention are protected.[29]

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25 Ibid [119]–[129].

26 *Brecknell* (n 13 above).

27 *Šilih v Slovenia* (2009) 49 EHRR 37. For a critical analysis of *Šilih*, see Eirik Bjorge, 'Right for the wrong reasons: *Šilih v Slovenia* and jurisdiction *ratione temporis* in the European Court of Human Rights' (2013) 83(1) British Yearbook of International Law 115.

28 *Janowiec v Russia* (2014) 58 EHRR 30. For a critical analysis of *Janowiec*, see Corina Heri, 'Enforced disappearance and the European Court of Human Rights' *ratione temporis* jurisdiction: a discussion of temporal elements in *Janowiec and others v Russia*' (2014) 12(4) Journal of International Criminal Justice 751.

29 See the analysis in *McQuillan, McGuigan and McKenna* (n 1 above) [135]. See *Šilih* (n 27 above) paras 161–167; *Janowiec* (n 28 above) paras 141–161.

For the Supreme Court, however, the 'critical date' was not that of the entry into force of Convention obligations in respect of the UK *as a matter of international law*. Drawing a distinction between the obligations of the UK at international law and the obligations borne by UK authorities under domestic law, the Supreme Court deemed the 'critical date' for the purposes of the 'genuine connection' test in the case before it to be the date of the commencement of the HRA, which was 2 October 2000, rather than the date on which the UK accepted the right of individual petition under the Convention, which was 14 January 1966.[30]

The Supreme Court highlighted three 'features' of the HRA in making this determination. First, it underlined that 'although the Convention rights created in domestic law by the HRA are defined by reference to the Convention, they are distinct from the rights in the Convention itself'.[31] This notion stems from the idea, traced back to the House of Lords' judgment in *Re McKerr*, that the HRA created 'new' rights whose scope depends on the domestic courts' interpretation of the HRA, rather than simply 'mirroring' the rights found in the ECHR and interpreted by the ECtHR.[32] Second, the Supreme Court set out that the HRA 'does not have retrospective effect', a principle based on a 'general presumption' against the retrospective effect of statutes which establish rights and obligations – something that, according to the court, 'reflects values of fairness, legal certainty and the rule of law'.[33] Nonetheless, the Supreme Court clarified that this principle is qualified in respect of the HRA insofar as 'there could be a limited application of the article 2/3 investigative obligation in respect of a triggering event which occurred before 2 October 2000'.[34] The extent of this qualification would be crucial to determining the applicability of the investigative obligation to the case of the *Hooded Men*. Finally, the Supreme Court sought to both assert and complicate the so-called 'mirror principle' according to which 'Parliament intended that the domestic rights created by the HRA in relation to public authorities should mirror the rights in the Convention, applicable in international law to the United Kingdom as a contracting state.'[35] In particular, the Supreme Court underlined that (Parliament intended or anticipated that) there might be violations of Convention rights committed by UK public authorities prior to 2000 for which a remedy could be sought

30 *McQuillan, McGuigan and McKenna* (n 1 above) [147]–[168].
31 Ibid [149].
32 *In Re McKerr* [2004] UKHL 12, [25] (Lord Nicholls).
33 *McQuillan, McGuigan and McKenna* (n 1 above) [151].
34 Ibid [154].
35 Ibid [155].

in Strasbourg but not in UK courts under the HRA.[36] Moreover, the Supreme Court acknowledged that the applicability or decisive force of the 'mirror principle' had been questioned or qualified in a range of domestic judgments.[37] Finally, emphasising that the HRA is meant in principle not to have retrospective effect, it reasoned that the 'critical date' against which the 'genuine connection' to the 'triggering events' (the events triggering the investigative duties at issue, ie the killing of Ms Smyth and the subjection of the Hooded Men to the 'five techniques') was to be assessed should be the date on which the HRA came into force.[38]

Referring to the 10-year criterion emerging from *Šilih* and *Janowiec*,[39] the Supreme Court distinguished the facts of the cases before it from those in *Finucane*, a case in which the Supreme Court had accepted that the investigative obligation was at play, in circumstances where the 'triggering event' – the brutal murder of lawyer Pat Finucane – had taken place just over 11 years prior to the coming into force of the HRA.[40] The Supreme Court in *McQuillan, McGuigan and McKenna* stressed that it 'would significantly undermine the legal certainty which the Grand Chamber had sought to achieve in *Janowiec* if longer extensions than this were to be contemplated or permitted'[41] and indicated that

> an extension beyond the normal ten year limit of *up to two years* is permissible where there are compelling reasons to allow such an adjustment constituted by circumstances that (a) any original investigation into the triggering death can be seen to have been seriously deficient and (b) the bulk of such investigative effort which has taken place post-dates the relevant critical date.[42]

Given that the cases before the court were well outside these temporal limits, the Supreme Court considered the 'genuine connection' test not to be met.[43]

Turning to the 'Convention values' test, the Supreme Court underlined that 'the Convention values test must be applied on the basis of the law as it stood in 1971 and in the years immediately following'.[44] This allowed it simultaneously to acknowledge and at the same time not treat as decisive the fact that '[it] is likely that the

36 Ibid [156].
37 Ibid [157].
38 Ibid [158]–[168].
39 See text to n 29 above.
40 *Re Finucane* [2019] UKSC 7.
41 *McQuillan, McGuigan and McKenna* (n 1 above) [144] with reference to *Janowiec* (n 28 above) para 146.
42 Ibid [144] (emphasis added).
43 Ibid [176].
44 Ibid [189].

deplorable treatment to which the Hooded Men were subjected at the hands of the security forces would be characterised today, applying the standards of 2021, as torture'.[45] It focused on the fact that the 'five techniques' had not been considered by the ECtHR to amount to torture in 1978, and implicitly side-lined the alternative view of the European Commission two years earlier,[46] as well as the acknowledgment that the 'five techniques' had amounted to 'torture' in communications of UK Government ministers.[47] The Supreme Court therefore concluded that, as they were understood in the 1970s by the ECtHR, the 'five techniques' could not be seen to negate the very foundations of the Convention. It rejected the notion that an administrative practice of 'inhuman and degrading treatment' in contravention of the absolute right enshrined in article 3 ECHR, which was what the ECtHR had found in *Ireland v UK* in 1978,[48] could be said to negate the foundations of the Convention. In doing this, it focused on the Grand Chamber's indication in *Janowiec* that the 'Convention values' requirement would be satisfied where the events at issue involved 'serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments'.[49] The Supreme Court's comments suggest that it did not consider inhuman and degrading treatment to reach that level of severity, although it ultimately argued that given its conclusion on the *Brecknell* test, it was 'not necessary to express a concluded view in relation to the application of the Convention values test to the particular circumstances of the case of the Hooded Men'.[50]

A NARROW BASIS FOR QUASHING THE DECISION NOT TO INVESTIGATE

Ultimately, the Supreme Court quashed the PSNI's decision on narrow grounds and on the understanding that, if it based its decision on the 'right' grounds, the PSNI could opt not to investigate and remain well within the bounds of rationality. The Supreme Court said:

> In the present case it could not be said that the decision of the PSNI made on 17 October 2014 not to take the matter further was, in itself, irrational. Given the passage of time since the ill-treatment of the Hooded Men in 1971, the fact that those who authorised the use of the

45 Ibid [186].
46 *Ireland v UK* [Commission Decision] (n 2 above).
47 On the Rees Memo, see *McQuillan, McGuigan and McKenna* (n 1 above) [226]–[227].
48 *Ireland v UK* [1978 Judgment] (n 3 above) para 167.
49 *Janowiec* (n 28 above) para 150.
50 *McQuillan, McGuigan and McKenna* (n 1 above) [191]–[192].

> five techniques were either dead or very elderly, our conclusion in this judgment that the new material publicised by the RTÉ documentary did not add to a significant extent to what was known already at the time of the previous investigation in 1978, and the many competing demands on police resources, a decision could rationally have been made not to undertake a further investigation. The decision to take no further action was not based, however, on any of the matters just mentioned. Its basis was stated to be that the investigation … had not identified any evidence to support the allegation that the British Government authorised the use of torture in Northern Ireland.[51]

The significance of this finding should not be dismissed: what the Supreme Court is saying here is that there *is* evidence to support the view that the British Government explicitly authorised the use of torture in Northern Ireland. However, the quashing of the PSNI's decision not to investigate is couched in such terms as to be, in effect, an invitation for the PSNI to re-take the decision not to investigate on what the Supreme Court deems more rational grounds,[52] including the death or old age of those who had authorised the use of the 'five techniques' and the consequently reduced prospects of successful prosecution, combined with the competing demands on police resources.

HUMAN RIGHTS-BASED INVESTIGATIONS AND THE RIGHTING OF ('HISTORICAL') WRONGS

The Supreme Court took a number of interesting steps in its reasoning towards the conclusion that the investigative obligation under article 3 ECHR did not operate in respect of the new revelations concerning the subjection of the Hooded Men to the 'five techniques'. First, building on prior case law, it chose to treat the 'critical date' as being the date at which the obligations that the UK had assumed under the ECHR were given domestic effect. Second, it applied the *Brecknell* test with a focus on whether the new information revealed by RTÉ's 'The Torture Files' altered what had been known in 1978 regarding what was already an ineffective investigation, and was relevant to identifying, prosecuting and punishing any perpetrator(s) of conduct in breach of article 3. Third, it opted for the numerical approach to the 'genuine connection' test (largely following in the footsteps of the Strasbourg Court), based on the number of years between the triggering event and the 'critical date'. And fourth, it adopted a narrow understanding of 'Convention values', with emphasis on the idea that the 'Convention values' requirement

51 Ibid [245].

52 See Anurag Deb and Colin Murray, 'One date to rule them all: McQuillan, McGuigan and McKenna [2021] UKSC 55' (*UK Human Rights Blog* 7 January 2022).

would be satisfied where the events at issue involved 'serious crimes under international law, such as war crimes, genocide or crimes against humanity' and applying this with reference to (a selection of) 1970s perceptions of what had happened to the Hooded Men.

There is much to dissect in the Supreme Court's reasoning in the months and years to come. For the purposes of this comment, I want to consider the wider significance of how the Court viewed the wrong(s) committed against the Hooded Men in its application of the 'Convention values' test, even if this element of the judgment was not – according to the court – key to the outcome, and briefly to contextualise the rest of the court's line-drawing by looking somewhat beyond the technical dimensions of its reasoning.

The Supreme Court applied the 'Convention values' test with particular emphasis on the examples of the sort of wrong-doing that would 'satisfy' the test given by the ECtHR's Grand Chamber in *Janowiec*, namely 'serious crimes under international law, such as war crimes, genocide or crimes against humanity'.[53] In this way, the Supreme Court reduced the statement of principle within the same paragraph in *Janowiec*, which indicated that 'the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention',[54] to the illustrative example offered by the ECtHR. Yet if we are to take the idea of an event negating the Convention's foundations seriously, it is relevant to refer to the ECtHR's frequent association of violations of article 3 with the Convention's fundamental values. The ECtHR has repeatedly underlined that 'respect for human dignity forms part of the very essence of the Convention',[55] or that 'the very essence of [the Convention system] ... is respect for human dignity',[56] that 'Article 3 of the Convention enshrines one of the most fundamental values of democratic societies', and that 'the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity'.[57] Accordingly, there was ample scope for finding, as Maguire J had done at first instance, that the systematic authorisation and infliction of purposeful ill-treatment (which many at the time considered to be torture and most, today,

53 *Janowiec* (n 28 above) para 150. See *McQuillan, McGuigan and McKenna* (n 1 above) [191].

54 *Janowiec* (n 28 above) para 150.

55 *Bouyid v Belgium* (2016) 62 EHRR 32, para 89.

56 *Vinter and Others v United Kingdom* (2016) 63 EHRR 1, para 113.

57 *Bouyid* (n 55 above) para 81 (citations omitted).

including the Strasbourg Court and the Supreme Court, would consider to be torture) negates the very foundations of the Convention.[58]

Lastly, it is striking that the Supreme Court opted to interpret and apply the 'Convention values' test in such a retrogressive way. The idea that a departure from the 'genuine connection' test is called for in circumstances where the wrong at issue negates the foundations of the Convention suggests an emphasis on the object, purpose and spirit of the Convention, and thereby a rich, purposive approach[59] to interpreting and applying what is now referred to as the 'Convention values' test. Deciding, therefore, that the 'Convention values' test and its application to the issue at hand is to be understood in terms of (a selection of) perceptions in the 1970s hollows out the value-driven assessment which the 'Convention values' safeguard is meant to represent. It cloaks in thin formalism what is meant to be a thicker, value-laden standard that serves 'to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner'[60] in the here and now.

More broadly, and in the context of what is fundamentally a technical judicial treatment of grave human rights abuses the full extent and gravity of which has never been formally and authoritatively established,[61] it is important to look beneath the layers of technicality under which the heart of the case lies. At the heart of the case brought by Mr McGuigan and Ms McKenna is not only an instantiation but a virtually uninterrupted history of the British Government's involvement in torture.[62] Northern Ireland constitutes a prominent but by no means isolated site of such abuse.[63] Indeed, as a Cypriot in Northern Ireland, conscious of documented practices of torture by British forces in Cyprus in the 1950s,[64] and getting to hear about the 'five techniques' from many of the Hooded Men themselves, I was confronted with the historical thread of British torture.

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58 *Re McGuigan's Application for Judicial Review; Re McKenna's Application for Judicial Review* [2017] NIQB 96, [251]–[254].

59 See, in this respect, the Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller in *Janowiec* (n 28 above) at paras 30–35.

60 *Šilih* (n 27 above) para 163.

61 But see the detailed accounts in Kathleen Cavanaugh, 'On torture: the case of the "Hooded Men"' (2020) 42 Human Rights Quarterly 519; Aoife Duffy, *Torture and Human Rights in Northern Ireland: Interrogation in Depth* (Routledge 2019).

62 For an analysis of the historical continuum of British torture and judicial responses thereto, see Conor Gearty, 'British torture, then and now: the role of the judges' (2021) 84(1) Modern Law Review 118.

63 See, in this regard, Ian Cobain, *Cruel Britannia: A Secret History of Torture* (Portobello Books 2012).

64 Ibid 90–99.

Torture is about dehumanisation. Jean Améry, who was a survivor of torture, located in it the utter and complete 'negation' of the mutual humanity between the torturer and the person tortured.[65] Torture, as Michelle Farrell has put it, is 'the reduction of the human … to the status of less than human'.[66] And torture operates on a continuum of othering – victims of torture often find themselves in the hands of torturers having already been vilified, marginalised, abandoned. Michael Rosen has underlined that atrocities like torture are often facilitated by the expressive denial of the humanity of their victims.[67] These dynamics are not new. In ancient Greece, as Page DuBois highlights, torture served as a physical 'marker' of lesser status, which delineated the boundary 'between the untouchable bodies of free citizens and the torturable bodies of slaves'.[68] Darius Rejali traces, in more recent practices, the operation of torture as a 'civic marker' demarcating those deemed worthy of being treated as fully human from those deemed less worthy, reminding those deemed 'lesser' of 'who they are and where they belong'.[69] In the case of the *Hooded Men*, their detention and subjection to the 'five techniques' was closely tied to their association with what Paddy Hillyard has described as a 'suspect community'.[70]

There are two reasons why it is important to acknowledge the 'five techniques' inflicted on the Hooded Men as part of a continuum of torture, inhumanity and profound and pervasive dehumanisation. The first is that it better illuminates the way in which the wrong done to the Hooded Men in 1971, and the inadequacy of the official response to it, has reverberated over time. Indeed, the ECtHR's reasoning on the distinction between torture and inhuman and degrading treatment in its 1978 *Ireland v UK* judgment was used in the infamous Torture Memos to play down the severity of, and justify, the United States' Central Intelligence Agency's euphemistically labelled 'enhanced interrogation techniques' after 9/11.[71] The second reason why we

65 Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and its Realities* (Indiana University Press 1980) 35.

66 Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge University Press 2013) 246.

67 Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) 158.

68 Page DuBois, *Torture and Truth* (Routledge 1991) 63.

69 Darius Rejali, *Torture and Democracy* (Princeton University Press 2007) 56–58.

70 Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (Pluto Press 1993). Although the book focuses on experiences of the Irish community in Britain, it is relevant to the experiences of persons of similar background to the Hooded Men in Northern Ireland during the Troubles: see Cavanaugh (n 63 above) 534–535.

71 See David Cole (ed), *The Torture Memos: Rationalizing the Unthinkable* (The New Press 2009).

ought to acknowledge these continuities is that it reminds us that it is important to contextualise such events and view them as part of a bigger picture encompassing the factors that enabled them and that have continued to enable similar abuses thereafter. Structural, systemic and, at times, systematic patterns and continuums of dehumanisation and torture are obscured and, arguably, perpetuated by a continued tendency to decontextualise, individualise and/or treat as aberrant incidents of abuse and dehumanisation. Recently, in reporting on UK complicity in torture after 9/11, the Intelligence and Security Committee specifically highlighted and criticised a tendency by UK agents to view occurrences of torture and rendition as isolated incidents. The Committee found that it should have been clear that the problem went beyond isolated aberrations and called for a coordinated response rather than the piecemeal and inadequate responses which materialised.[72] A tendency to disaggregate and decontextualise may itself be part of a pattern of denial, of refusal to confront a past and present practice of inflicting, instigating, enabling, tolerating, and/or knowingly benefiting from torture and ill-treatment – and, indeed, of 'future-proofing' British torture.[73] It is worth reflecting, in this context, on whether the reasoning and outcome in the *McGuigan and McKenna* appeal – with its formalistic appraisal of the significance of the new revelations, its drawing of rigid temporal lines, and its narrow focus on (the prospects of) individual criminal accountability – represents at best a failure to counter this phenomenon, and at worst a contribution to sustaining it.

Yet while the Supreme Court's judgment in this case may be seen as part of the problem, it is important that we do not ourselves individualise and decontextualise it in identifying it as such. Rather, we should look to the human rights edifice itself, and interrogate how and why a positive obligation orientated at rendering human rights protections practical and effective has come to be the subject of such rigid line-drawing in respect of the rights, wrongs and values at play. And we should ask how and why the investigative obligation under such fundamental rights as the right to life and the right against torture and ill-treatment has come to be understood as being orientated *primarily* at prosecution and punishment, rather than at identifying both the circumstances in which abuse occurred and the patterns, systems and structures that enabled it, and seeking full accountability

72 Intelligence and Security Committee of Parliament, Detainee Mistreatment and Rendition: 2001–2010 (House of Commons 2018) 87.

73 Ruth Blakeley and Sam Raphael, 'Accountability, denial and the future-proofing of British torture' (2020) 96(3) International Affairs 691. See also Ruth Blakeley and Sam Raphael, 'The prohibition against torture: why the UK Government is falling short and the risks that remain' (2019) 90(3) Political Quarterly 408.

as well as effective guarantees of non-recurrence. Adopting the latter approach to the investigative obligation would require accountability to be understood in richer, less individualised, terms than criminal redress, and necessitate a more reparative and transformative – or transformatively reparative[74] – approach to 'dealing with the past'.[75] Such a revision of the investigative obligation would arguably better serve the aim of 'practical and effective protection' of rights,[76] which is the primary purpose (meant to be) served by positive obligations under the Convention, particularly in the context of abuses that form part of a pattern or continuum, such as British involvement in torture. It would also, arguably, allow us to see a continued failure to acknowledge and address the full scale of the wrong-doing committed and harm inflicted as a continuing violation;[77] for the Hooded Men, this enduring experience of victimisation and injustice has been all too painfully felt for more than half a century.[78] Finally, seeing accountability as both reparative and transformative might help us more clearly see that 'dealing with the past' in Northern Ireland (and elsewhere) is not about diverting resources better used for the protection of human rights in the present and future, but, rather, about better protecting human rights in the present and future.

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74 On transformative reparations, see Rashida Manjoo, 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21(9) International Journal of Human Rights 1193.

75 I encountered these succinct and evocative terms while working at Queen's University Belfast several years ago – for some examples of layered scholarship and policy work grappling with 'dealing with the past' in Northern Ireland, see: Christine Bell, 'Dealing with the past in Northern Ireland' (2002) 26(4) Fordham International Law Journal 1095; Louise Mallinder, 'Metaconflict and international human rights law in dealing with Northern Ireland's past' (2019) 8(1) Cambridge International Law Journal 5; Northern Ireland Human Rights Commission, *Dealing with Northern Ireland's Past: Towards a Transitional Justice Approach* (2013); Kieran McEvoy et al, 'Dealing with the past in Northern Ireland' project: see website.

76 *Valiulienė v Lithuania* App no 33234/07 (ECtHR, 26 March 2013), para 75; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, para 284.

77 On continuing violations and continuing situations, see Antoine Buyse, 'A lifeline in time – non-retroactivity and continuing violations under the ECHR' (2006) 75 Nordic Journal of International Law 63. On the continuation of suffering in the absence of redress, see Maeve O'Rourke, 'Prolonged impunity as a continuing situation of torture or ill-treatment? Applying a dignity lens to so-called "historical" cases' (2019) 66 Netherlands International Law Review 101.

78 Freya McClements, '"Hooded Men": UK court finds PSNI decision not to investigate case unlawful' *Irish Times* (Dublin 15 December 2021).