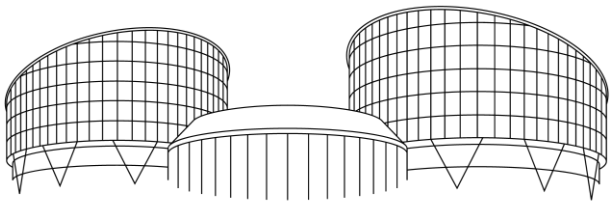

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF COLLETTE AND MICHAEL HEMSWORTH
v. THE UNITED KINGDOM

(Application no. 58559/09)

JUDGMENT

STRASBOURG

16 July 2013

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 Collette and Michael Hemsworth v. the United Kingdom,

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

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having deliberated in private on 25 June 2013,

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

PROCEDURE

1. The case originated in an application (no. 58559/09) 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 two Irish nationals, Mrs Collette Hemsworth and Mr Michael Hemsworth ("the first and second applicants"), on 12 October 2009.

2. The applicants were represented by Mr J. McGettrick, a lawyer practising in Belfast. The United Kingdom Government ("the Government") were represented by their Agent, Ms Yasmine Ahmed, of the Foreign and Commonwealth Office.

3. The applicants mainly complained under Article 2 that there had been an unlawful use of lethal force against the deceased, Mr John Hemsworth, and that the State had not fulfilled its procedural investigative obligations in that respect.

4. On 18 October 2011 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 11 January 2012 the Irish Government declined to 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 applicants were born in 1961 and 1933, respectively and live in Belfast. They are the wife and father, respectively, of Mr John Hemsworth.

A. The death of Mr John Hemsworth

7. The applicants maintained that, at 1 a.m. on 7 July 1997, John Hemsworth was walking home when he was passed by persons who were being chased by police officers from the Blues Operational Support Unit ("Blues OSU") of the Royal Ulster Constabulary ("RUC"). They also contend that one of those officers hit John Hemsworth on the face with a truncheon and that he fell to the ground where he was kicked on the left side and hit on the back with a truncheon by the officers. He went home and informed his wife. He then went to hospital and it is alleged that RUC officers taunted him about the incident on the way there. He was treated for undisplaced fractures to both sides of his right jaw bone.

8. Following an article in a local newspaper about the incident, two witnesses (one an allegedly direct witness) came forward.

9. Having experienced headaches and tingling in one arm in late October/early November 1997, on 27 December 1997 John Hemsworth began vomiting and complained of severe headaches. He collapsed and was transferred to hospital where he died on 1 January 1998.

B. The RUC investigation and the inquest

10. On 3 January 1998 a pathologist found that John Hemsworth died from a cerebral infarction and it was not possible to correlate the recent thrombosis causing the fatal cerebral infraction with a facial injury in 1997.

11. On 8 January 1998 the RUC began an investigation supervised by the Independent Commission for Police Complaints ("ICPC").

12. On 30 April 1998 the Coroner registered the death as he considered, given the pathologist's report, that an inquest was not necessary.

13. In his report of 4 August 1999, an expert in forensic medicine instructed by the first applicant found that it was "highly likely" that the assault was the sole underlying cause of death. Further to her request, on 2 February 2000 the Attorney General ordered the Coroner to hold an inquest.

14. Subsequently, a forensic expert briefed by the Coroner also concluded that, despite the delay between the fatal cerebral infarct and the injury of July 1997, it was likely that they were "linked in terms of

causation". The applicants claimed that the original pathologist later expressed his agreement with these later two expert opinions.

15. The RUC then asked the applicants to provide them with all relevant information and evidence and for their statements. The applicants forwarded the deceased's medical records and gave statements to the RUC. The two witnesses who had volunteered were interviewed as well as other persons living in the area. Numerous police and military personnel on duty in the area, as well as those deployed to the street where John Hemsworth was allegedly assaulted, were interviewed. The RUC Report on the Investigation dated 3 May 2001 accepted that John Hemsworth had been injured on 7 July 1997 but not that RUC officers had assaulted him or that those injuries had led to his death. Certain parts of this report are redacted.

16. On 7 June 2001 the Coroner opened a pre-inquest hearing, in 16 cases including into John Hemsworth's death, to hear submissions on the implications of the judgments of this Court of 4 May 2001 in certain cases concerning deaths in Northern Ireland (*Hugh Jordan v. the United Kingdom*, no. 24746/94, (extracts); *McKerr v. the United Kingdom*, no. 28883/95, both in ECHR 2001-III; *Shanaghan v. the United Kingdom*, no. 37715/97; and *Kelly and Others v. the United Kingdom*, no. 30054/96). The first applicant was legally represented, as she was for all domestic proceedings. The hearing was adjourned given the possibility of the referral of those cases to the Grand Chamber of this Court.

17. In September 2001 the Coroner adjourned the pre-inquest hearing, although he indicated that John Hemsworth's inquest would take place after Pearse Jordan's inquest (to whom the *Hugh Jordan* judgment related).

18. On 1 September 2000 the first applicant applied for legal aid for the inquest under the Lord Chancellor's Extra-Statutory Scheme (established in July 2000). On 5 June 2001 she began a judicial review action: that evening the Lord Chancellor granted her limited funding. The action continued in order to challenge that limitation on funding. On 7 January 2003 the High Court found against her as did the Court of Appeal (9 March 2005). With information gleaned from that action, in January 2002 the first applicant applied for legal aid under the Green Form Scheme. In February 2002 limited legal aid was proposed but in a manner she considered inconsistent with the State's approach in the first judicial review action. On 21 May 2003 the Legal Aid Department accepted that there had been some confusion as to the sources of legal aid for inquests and it issued a notice of clarification. The first applicant again issued judicial review proceedings. On 26 April 2004 the High Court found in her favour.

19. In November 2002 the first applicant wrote to the Coroner seeking progress in the inquest. The Coroner responded that he awaited the judgments of the House of Lords in the cases of *Amin* (*Regina v. Secretary of State for the Home Department ex parte Amin*, [2003] UKHL 51) and *Middleton* (*Regina v. Her Majesty's Coroner for the Western District of*

Somerset and other ex parte Middleton, [2004] UKHL 10). The first applicant requested the Coroner to progress certain pre-inquest matters. At a hearing in February 2003, some disclosure was made to the first applicant.

20. The applicants claimed that, during that hearing, the Coroner advised that there was no evidence that the deceased had been struck by RUC officers. The first applicant applied for the Coroner to recuse himself. At a further pre-inquest hearing on 2 September 2003, the Coroner accepted that he had to investigate the allegations that RUC officers were responsible for the death so the first applicant did not pursue the matter further.

21. On 20 December 2004, at a further pre-inquest hearing, the first applicant provided the Coroner with a list of witnesses they required including the police officers who were allegedly likely to have been responsible for and/or to have witnessed the assault.

22. A pre-inquest hearing was convened in March 2008 when the Coroner ruled on the witnesses he proposed to call, none of whom were RUC officers. The first applicant applied to the Coroner to recuse himself. The Coroner refused but indicated that he would receive further representations as to why RUC witnesses were required. The first applicant made such submissions. By letter of 14 November 2008 the Coroner refused to call any RUC witnesses or to recuse himself. The first applicant began a judicial review action. On 9 March 2009 the High Court found in her favour: a new Coroner was to be appointed and the RUC witnesses sought were to be called to give evidence.

23. Another pre-inquest hearing took place on 16 September 2009: it was agreed to call the additional witnesses requested by the first applicant and the Crown Solicitor's Office confirmed that full disclosure of all relevant materials had been made to the Coroner and to the next-of-kin, subject to a few isolated matters which were being dealt with.

24. The inquest began on 21 September 2009. It did not sit each day and certain witnesses were unavailable through ill-health. On 8 October 2009 the Coroner discharged the jury due to evidence which had emerged. The Coroner had decided to take a statement from a possible eye-witness to the assault. On receipt of the statement, it emerged that Officer M, of the Police Service Northern Ireland (the "PSNI" replaced the RUC in 2001), had taken the statement on the Coroner's behalf. However, Officer M had been a member of the RUC at the time of the alleged assault. He was also the Deputy Investigation Officer and, in addition, he was due to be called as a witness. The first applicant therefore requested and, in October 2009, the Coroner obtained and disclosed Officer M's journal entries on the police investigation. It emerged therefrom that Officer M had interviewed a soldier (Private G) in 2000. Private G had told Officer M that, on the day when John Hemsworth was allegedly assaulted, Private G had seen an officer in the RUC Blues OSU assaulting a civilian with a baton in an area close to the location of Mr Hemsworth's alleged assault. Private G had also told Officer

M that a senior military officer, as well as a senior RUC officer from the RUC Blues OSU, had told him that he should not report this incident to his superiors. Given the time it would take to recall witnesses and to call Private G, the Coroner considered it preferable to discharge the jury and conduct the inquest afresh.

25. The Coroner was advised by the Crown Solicitor's Office that all documentation in relation to Private G was destroyed in August 2009. The Coroner ordered the PSNI to prepare a paginated and indexed bundle of all material held by them in relation to the death of John Hemsworth, including any documentation held in relation to Private G. Officers unconnected with the original investigation should conduct this disclosure exercise. The PSNI confirmed that the Legacy Support Unit within the PSNI would deal with disclosure and that any officers allegedly involved in the assault or the subsequent investigation would have no further involvement.

26. On 29 November 2009 a further pre-inquest hearing was held, when the PSNI confirmed that, by 4 December 2009, the Coroner would be provided with the bundle of documents and the first applicant with a redacted version of same. While no documents in relation to Private G's allegations had been retained, Private G had been traced and his statement would be taken. The inquest was scheduled to begin on 21 January 2010.

27. The inquest resumed on 25 January 2010. On the second and third days of the inquest, two jurors advised the Coroner of connections to the police. The Coroner acceded to the first applicant's request to discharge the jury on the basis that the jury may have been already tainted.

28. On 22 April 2010 the first applicant obtained an expert medical report which found that marks on the deceased's face and back (apparent from photographs taken after the alleged assault) were consistent with the allegations of assault by police baton. The first applicant and the Coroner further corresponded about progressing the inquest. In June 2010 the Crown Solicitor's Office stated that it would brief an expert on the photographs and the marks. It did so in October 2010. In January 2011 the Crown Solicitor's Office's expert reported but did not address the question whether police batons could have made the marks on the deceased's body. In May 2011 a supplementary expert report was submitted.

29. The inquest began on 16 May 2011. Evidence was heard until 24 May 2011. Closing speeches were made on 26 May 2011. The first applicant was too ill to attend. Given the intervening judgment of the Supreme Court of 18 May 2011 (*McCaughey and Another, Re Application for Judicial Review* ([2011] UKSC 20, paragraph 43 below), the Coroner agreed that, so far as possible, the inquest would be conducted in such a manner as to comply with Article 2 of the Convention.

30. On 27 May 2011 the inquest jury rendered its verdict. It found the medical causes of death to be cerebral infarction and thrombosis of the right internal carotid artery. The jury accepted that John Hemsworth was injured

on 7 July 1997; that his injuries included fractures to both the right and left hand sides of his jaw bone, tramline bruising to the left jaw, neck and lower left side of his back as well as bruising to the right jaw; that those injuries "were most probably the underlying cause of his death"; that the injuries were "consistent with those caused by someone being struck by a baton, according to several expert witnesses"; that the photographs showed "distinctive and characteristic bruising associated with baton injuries"; that "the factures and bruising injuries were caused by being struck by a baton and kicked"; and that, since the RUC Blues OSU were the only police on the relevant street on the relevant night, it was "highly probable" that one or more of those officers was responsible for the injuries to Mr Hemsworth.

31. The Coroner announced that he would refer the matter to the Director of Public Prosecutions ("DPP") and ensured the production, from public funds, of a transcript of the inquest proceedings. Having waited until the new DPP was established in his post, on 25 January 2012 he formally referred the case to the DPP pursuant to section 35(3) of the Criminal Justice (Northern Ireland) Act 2002, indicating that the verdict "should be sufficient to indicate the contentious background to the death and its wider significance". On 3 February 2012 the DPP's office acknowledged the referral. Further to the applicants' queries, on 23 April 2012 the Coroner confirmed the referral and on 14 May 2012 that the DPP had acknowledged the referral. In their observations of 3 July 2012 the Government submitted that the matter was the subject of "active consideration" by the DPP.

C. Civil proceedings

32. On 5 September 2001 the applicant initiated civil proceedings against the PSNI and on 10 August 2011 a Notice of Intention to Proceed was served.

D. The Police Ombudsman

33. Further to the first applicant's request, the Police Ombudsman reviewed the police file. In his report of 1 May 2007 he considered that the medical experts did not agree on the extension of a causal link between the July 1997 injuries and the subsequent death so that there was no evidence that any RUC officer was responsible for John Hemsworth's death and he could identify nothing further that he could do to take the matter forward.

II. RELEVANT DOMESTIC LAW AND PRACTICE

34. The Court refers to the Domestic law and Practice in its judgment in the case of *McCaughey v. the United Kingdom* (no. 43098/09, 16 July 2013). It repeats below the following aspects for ease of reference.

A. Relevant legislation

35. Section 35(3)-(5) of the Justice (Northern Ireland) Act 2002 (amending the Prosecution of Offences (Northern Ireland) Order 1972) provides as follows:

> "(3) Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances.

B. Relevant jurisprudence

36. In *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* ([1995] QB 1, concerning England and Wales) the Court of Appeal ruled that "how" meant "by what means", a question directed to how the deceased came by his death. While a verdict could properly incorporate a brief and neutral statement, the verdict was to be factual, expressing no judgment or opinion and it was not the jury's function to prepare detailed factual statements.

37. In 2001-2003 the Court adopted six similar judgments concerning the investigation of killings by security forces in Northern Ireland (*Hugh Jordan v. the United Kingdom*, *McKerr v. the United Kingdom*, *Shanaghan v. the United Kingdom*, and *Kelly and Others v. the United Kingdom*, *all four cited above, as well as McShane v. the United Kingdom*, no. 43290/98, 28 May 2002; and *Finucane v. the United Kingdom*, no. 29178/95, ECHR 2003-VIII). A number of domestic judicial review applications followed.

38. In the case of *Regina v. Secretary of State for the Home Department ex parte Amin* ([2003] UKHL 51) the House of Lords ruled on the requirements of an Article 2 compliant investigation. In *R (Middleton) v West Somerset Coroner* ([2004] 2 A.C. 182) the House of Lords reviewed the scope of the *Jamieson* inquest and found that, since a *Jamieson* inquest could not examine whether the conduct of State agents might reasonably have prevented death, it was incompatible with Article 2. To comply with that Article, the inquest had to consider "by what means" and "in what circumstances" the deceased came by his death, so that the inquest verdict would be broader in scope.

39. On 11 March 2004 the House of Lords found that there was no obligation to conduct an inquiry compatible with Article 2 when the death had occurred before the HRA came into force (*In re McKerr* ([2004] 1 W.L.R. 807).

40. On 28 March 2007 the House of Lords delivered its judgment (*Jordan v. Lord Chancellor and Another* and *McCaughey v. Chief Constable of the Police Service Northern Ireland* [2007] UKHL 14). It

relied on the *McKerr* judgment to the effect that the HRA did not apply to a pre-HRA death or, therefore, to the investigation of any such death. However, Section 8 of the 1959 Act plainly required the police to disclose to the Coroner such information about the deaths as the police was then or thereafter able to obtain, subject to any relevant privilege or immunity.

41. In a later judicial review action, Hugh Jordan successfully contested a PSNI refusal to disclose to him all documents disclosed by it to the Coroner, except those to which valid professional privilege/immunity attached (*In re Jordan's Application* [2008] NIQB 148). The High Court's decision was informed by:

> "... the confusion that has been created by the fragmented production of documents over the years. There has been duplication of some documents and a failure to produce certain documents on some occasions and then their production on other occasions. It has been acknowledged that the level of redactions have on occasions been excessive."

Accordingly, the High Court ordered (section 8 of the 1959 Act) the PSNI to, *inter alia*, make a full and indexed disclosure to Hugh Jordan.

42. In 2008 alone there were six judicial review applications as regards Pearse Jordan's inquest. In 2009 the Court of Appeal made the following comment about the delay in holding the inquest into Pearse Jordan's death (*Hugh Jordan v. the Senior Coroner* [2009] NICA 64):

> "This inquest has taken an extremely long time to reach this point and has been dogged by procedural wrangling, frequent judicial review applications and hearings in the House of Lords and Strasbourg all of which have contributed to the length and complexity of the inquest.
>
> The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal incremental case law. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently. One must sympathise with any coroner called on to deal with a contentious inquest of this nature which has become by its nature and background extremely adversarial. The problems are compounded by the fact that the [PSNI] which would normally be expected to assist a coroner in non contentious cases is itself a party which stands accused of wrong doing. It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect. If nothing else, it is clear from this matter that Northern Ireland coronial law and practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest. What is also clear is that the proliferation of satellite litigation is extremely unsatisfactory and diverts attention from the main issues to be decided and contributes to delay."

43. Further to the delivery of this Court's judgment in *Šilih v. Slovenia* ([GC], no. 71463/01, 9 April 2009), the Supreme Court reversed *McKerr* and accepted that an inquest should be compliant with Article 2 even for a

pre-HRA death (*McCaughey and Another, Re Application for Judicial Review* [2011] UKSC 20).

THE LAW

44. The applicants complained, under the substantive and procedural aspects of Article 2, about John Hemsworth's death and, under Article 13 of the Convention, that they had no effective domestic remedy.

45. Article 2, in so far as relevant, reads as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

46. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

I. ALLEGED VIOLATIONS OF ARTICLE 2, ALONE AND IN CONJUNCTION WITH ARTICLE 13 OF THE CONVENTION

A. The parties' observations

1. The Government

47. The Government maintained that the applicants had not yet exhausted domestic remedies as regards the substantive complaint because their civil action was pending. While there appeared to be two lines of relevant case-law, they considered that the governing authority lay with the *Caraher v. the United Kingdom* line ((dec.), no. 24520/94, ECHR 2000 I; the six judgments concerning Northern Ireland cited at paragraph 37 above; and *Bailey v. the United Kingdom*, (dec.) no. 39953/07, 19 January 2010). The cases, which the applicants considered showed a contrary line, were distinguishable. In any event, given the pending decision of the DPP, the possible referral to the Police Ombudsman, possible criminal proceedings and related judicial review proceedings, it would be premature and

inappropriate to examine the applicant's complaint of a substantive violation of Article 2 of the Convention.

48. The Government also argued that there had been no violation of the procedural aspects of Article 2 of the Convention. Further to the judgment of the Supreme Court in May 2011 (*McCaughey and another, Re Application for Judicial Review* ([2011 UKSC 20), the Coroner was legally obliged to, and did, conduct an inquest in accordance with Article 2 of the Convention. The investigation was effective because, *inter alia*, that Convention compliant inquest led to a jury verdict which was sufficiently focused as to assist with the identification of a person responsible and to ensure accountability: indeed the Coroner had referred the matter to the DPP. The applicants' reference to the lack of police witnesses was imprecise and, notably, did not indicate how that affected the conduct of the inquest. The investigation was independent as it was supervised by the Independent Commission for Police Complaints ("ICPC") and, in any event, the applicant did not seek to apply for judicial review of the decision of the Police Ombudsman. As to public scrutiny, the next-of-kin declined to participate in the initial investigation in early 1998 but they did participate at other stages of the investigation and they fully participated in the inquest.

49. The Government acknowledged that there had been significant delay but argued that it could be explained and did not breach Article 2 of the Convention. They explained that it was initially thought that it was not a death requiring an inquest and the matter was then re-visited following receipt of the applicants' expert report. The RUC investigation then took place. The delay between 2001 and 2009 appears largely to have been caused by the litigation, initiated both by others and by the applicants. The delay between starting and ending the inquest (January 2010 and May 2011) was caused by the necessary discharge of the jury and by the time taken to consider a further report of the applicants. Awaiting the voluminous transcript of the inquest hearing and the establishment of the new DPP in his post explained the short delay in the Coroner referring the case to the DPP.

50. Finally, and as regards the applicant's complaint under Article 13, the Government maintained that the applicants had effective domestic remedies available to them. As well as an Article 2 compliant inquest, they had access to judicial review (to review any future decision or action of the DPP for its compliance with Article 2) and to civil proceedings which were still pending.

2. The applicants

51. The applicants complained about a violation of the substantive aspect of Article 2 arguing that Mr Hemsworth had been assaulted by officers from the Blues OSU of the RUC and that he had died as a result. They relied on the jury verdict in this respect.

52. As to the exception invoked by the Government about their pending civil action, they relied on the line of jurisprudence represented by *Nikolova and Velichkova v. Bulgaria* (no. 7888/03, §§ 55-56, 20 December 2007; *Beganović v. Croatia*, no. 46423/06, § 56, ECHR 2009...; *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, §§ 31-48, 27 May 2010; *Kopylov v. Russia*, no. 3933/04, § 121, 29 July 2010; *Gäfgen v. Germany* [GC], no. 22978/05, § 119, ECHR 2010...; and *Darraj v. France*, no. 34588/07, §§ 22-53, 4 November 2010). The present ineffective investigative and inquest processes undermined the civil action so, even if that action was pending, that did not deprive them of their victim status or mean that it could be concluded that they had not yet exhausted domestic remedies.

53. As to those investigative and inquest deficiencies, while the Supreme Court in *McCaughey* did rule that an inquest had to comply with Article 2, that judgment did not address non-compliance with Article 2 procedural obligations which pre-dated the judgment. That judgment did not therefore address the overall effectiveness of the investigation and its capacity to identify and hold accountable those responsible for the death.

54. They also argued that the investigation lacked independence. The initial investigation was conducted by members of the RUC who lacked hierarchical independence from those officers allegedly responsible for the death. The non-disclosure of essential evidence (concerning Private G and the eventual destruction of some other evidence) was one consequence of this and the Court had found (the above-cited *Hugh Jordan* judgment, at § 142) that supervision by the ICPC was insufficient to cure such a lack of independence of the investigating officers. The Police Ombudsman conducted a review. However, he did not conduct any further investigation and this was clearly inadequate to redress any deficiency (*Brecknell v. the United Kingdom*, no. 32457/04, § 76, 27 November 2007). He also proceeded on a false premise (later rejected by the inquest jury) as to the medical cause of death.

55. Delay had also prejudiced the effectiveness of the investigation. Although domestic law had changed to allow the inquest to compel the attendance of witnesses, key witnesses were unable to attend whereas they would have been more likely to have been available in 1997: the first applicant was too ill to attend; Ms L was a potential eye-witness but was not fit to attend; 9 RUC officers could not attend as they were either sick, out of the jurisdiction or could not be located; and the Senior Investigating Officer was unable to attend because of ill-health. Witnesses who attended were also able to rely on the passage of time to explain their inability to recall issues and/or to furnish documents. The delay to date would make future identification of the responsible officers difficult which would, in turn, be likely to affect the decision of the DPP as regards any potential prosecution. The delay also led to the destruction of evidence: the applicants pointed to early disclosure issues as regards the evidence of Private G and the loss of

relevant documents, which loss was of particular relevance since Private G had revoked his complaint in his oral evidence. More generally, the delay in holding the inquest rendered public scrutiny of it ineffective: while the applicants and the public had access to the inquest, the inquest was limited and, to a large extent, this was because of the delay in holding it. The jury was unable to identify the assailant and, given the inadequacy of the original investigation combined with delay, it was unlikely that the perpetrator(s) would ever be identified.

56. Finally, the applicants also complained that investigative delay was, of itself, a breach of Article 2 quite apart from any question of whether delay undermined the effectiveness of the investigation and inquest processes. The State was responsible for delay which was significant even compared to the endemic delays in investigations and inquests in Northern Ireland. They maintained that the delay was such that it caused them significant stress and ill-health and that it undermined public confidence in the inquest process.

57. They referred to particular periods of delay they considered unjustified including: between the death of John Hemsworth and the direction of the Attorney General to hold an inquest (January 1999 and February 2000); between the delivery of the House of Lords' judgment of March 2007 and the first pre-inquest hearing thereafter (March 2007-March 2008); between the decision of the Coroner not to call RUC witnesses and of the High Court directing that they be called (March 2008-March 2009); and between the date initially fixed for the inquest and the date it began (January 2010-May 2011). The failure by Officer M to disclose the evidence of Private G clearly led to further delay (September 2009-December 2009).

58. A delay of over 13 years before an Article 2 compliant inquest opened was excessive, unexplained and endemic. The Government accurately explained the delay between 2001-2009 by reference to pending litigation. However, that reveals a failure by the State to respond adequately to the procedural problems highlighted in the above-mentioned judgments of this Court concerning the use of lethal force in Northern Ireland. Instead of legislating comprehensively, the State left it to the applicants and others to clarify and develop domestic law through litigation and it cannot now blame those individuals for the delay that that engendered.

59. Finally, the applicants complained under Article 13 in conjunction with Article 2, that they had no effective domestic remedy as regards excessive investigative delay.

B. Admissibility

60. Save in relation to the complaint about investigative delay, the Court is not in a position to consider the merits of the complaints under the substantive and procedural aspects of Article 2 because the applicants' civil

action is pending (for example, *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I; *Hay v. the United Kingdom* (dec.), 41894/98; *McKerr v. the United Kingdom*, no. 28883/95, § 19-23, ECHR 2001-III; and *Bailey v. the United Kingdom*, (dec.) no. 39953/07, 19 January 2010) and because the initiation of further relevant investigative procedures, including of a criminal and/or disciplinary nature, remains possible (for example, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, §§ 55-56, 20 December 2007; *Gäfgen v. Germany* [GC], no. 22978/05, § 119, ECHR 2010...; and *Darraj v. France*, no. 34588/07, §§ 22-53, 4 November 2010).

61. The applicants' civil action, issued in 2001, is pending. The Court does not accept that there is any demonstrated factor which can be considered to have deprived the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of John Hemsworth's death and within any applicable limitation period, although the present inquest verdict and any future criminal/disciplinary proceedings (see immediately below) could clearly inform the civil action. While the lapse of time would have made it difficult for the civil court to piece together the evidence, any such attempt should in principle take place in a domestic, not in an international, forum (*McKerr v. the United Kingdom*, § 118; and *Hugh Jordan* §§ 111-112).

62. As to any further criminal or disciplinary proceedings, the Court considers particularly relevant two recent developments of May 2011.

In the first place, the Supreme Court delivered the above-cited judgment in the *McCaughey* case whereby it found that the procedural aspects of Article 2 could be engaged as regards outstanding investigative acts even in respect of a pre-HRA death. Accordingly, the Coroner in the present inquest agreed that that inquest would be Article 2 compliant in so far as possible. The applicants acknowledged "significant moves" made towards Article 2 compliant inquests including that the remit of the inquest no longer prevented a jury from exploring fully how a deceased came by his death and that a jury verdict was now capable of playing an effective role in the identification or prosecution of any criminal offences. They did not take issue with the conduct of their inquest in May 2011.

Secondly, the inquest verdict was largely in the applicants' favour in that it explicitly accepted key aspects of their claims about the death of John Hemsworth: that he was injured on 7 July 1997, that those injuries were most probably the underlying cause of his death and, further, that it was highly probable that one or more officers of the RUC Blues OSU was responsible for those injuries. While the inquest jury could not hold an individual accountable, the Coroner referred the matter to the DPP (paragraph 31 above) and the Government have confirmed that that matter is being actively considered by the DPP.

63. These two factors mean that certain criminal and disciplinary proceedings, of central relevance to the investigative obligation under

Article 2, can now be initiated by the State. In the first place, the DPP is required to examine the Coroner's reference and decide whether to pursue criminal charges against individual RUC officers from the Blues OSU. He may decide to pursue criminal charges and, even if not, he would have to give reasons, which reasons would, in turn, be amenable to judicial review. Secondly, having regard to the specific findings of the inquest jury as regards the likely responsibility of RUC officers from the Blues OSU, there would be no obstacle to the State initiating relevant disciplinary procedures including attempting to identify the relevant officers.

64. The applicants considered that a number of deficiencies had already prejudiced the investigation and thus any future proceedings. They pointed to a structural independence issue which had undermined the investigation. They also highlighted an attempted to cover-up Private G's evidence (see paragraphs 24-26 above). They recalled that Article 2 requires a serious allegation of attempted obstruction of an investigation to be examined and doubts confirmed or laid to rest (*McKerr*, § 137). The applicants also argued that delay had also already flawed the investigation (availability of documents and witnesses and ability to recall facts). However, despite these alleged flaws, the inquest jury was able to reach the above-described conclusions in the applicants' favour. The Court does not consider that it has been shown that the investigation has been so inherently flawed as to deprive the DPP of his ability to decide on the pursuit of any charge, or the criminal courts of their ability to establish the facts and determine criminal responsibility for John Hemsworth's death. Neither can it be excluded that future criminal, disciplinary or other procedures could adequately address the obstruction-of-justice allegation.

65. Neither should the applicants' complaint about the public nature of the investigation be addressed at this point. The Court recalls that disclosure of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on individuals or on other investigations, so that such disclosure cannot be regarded as an automatic requirement of Article 2: the core question is, rather, whether the requisite access of the public or of the victim's relatives may be provided for at other stages of the available procedures (*McKerr*, § 129). The applicants did not comment on disclosure to the inquest by the PSNI Legacy Support Unit or on the access they had to the inquest, and they did not suggest that any future post-inquest proceedings would not involve further disclosure, public scrutiny and their full involvement.

66. It is true that this Court identified certain procedural deficiencies before the inquest had even taken place in the *Hugh Jordan* case. However in contrast to the domestic law at issue in that case, since the Supreme Court judgment of May 2011, domestic law required the present inquest to comply with the procedural requirements of Article 2. The Coroner set out to do so

and any future proceedings must be conducted in a way which complies with Article 2 of the Convention.

67. In all of the above circumstances, the complaints under Article 2, other than the complaint about investigative delay of itself, are inadmissible as being 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. The Court notes that, should the applicants be dissatisfied in the future with the progress or outcome of those domestic procedures, it would be open to them to re-introduce these complaints under the substantive and procedural aspects of Article 2 of the Convention.

68. However, the consequence of the referral of the case to the DPP in 2012, 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 Hemsworth has still not finished 15 years later. 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.

C. Merits

69. Turning to the merits of the admissible complaint, it is well-established that Article 2 requires an investigation to begin promptly and to proceed with reasonable expedition (for example, the judgments of this Court of 4 May 2001 concerning Northern Ireland, paragraph 37 above), and 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 a 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 (*Hugh Jordan*, cited above, §§ 108 and 136-140).

70. The Court considers it striking that Mr Hemsworth died in January 1998 and that the inquest hearing proper did not begin until May 2011, more than 13 years thereafter and that further important procedural steps are outstanding.

71. During this period there were a number of delays which the Court considers attributable to the authorities and which are not justified. There was a 16 month period between the Attorney General communicating the need for an inquest and the first pre-inquest hearing (February 2000-June

2001): greater speed should have been imposed given the initial mistaken registration of the death. Thereafter the inquest was adjourned in June 2001 pending submissions on this Court's judgments of 4 May 2001 concerning Northern Ireland and then pending Pearse Jordan's inquest. The Coroner did not hear preliminary matters until February 2003. While the applicants delivered a list of witnesses in December 2004, the Coroner did not rule on this until after a series of significant and relevant domestic judgments (*Amin*, *Middleton*, *McKerr* and, finally, *Jordan and McCaughey* in 2007). It took a further year after that last judgment (March 2007) to hold a pre-inquest hearing (March 2008). The delay between March 2008 and September 2009 was explained by the Coroner's refusal, later overturned, to call RUC witnesses. There was a further delay between the date initially fixed for the second inquest and the date it began (January 2010-May 2011).

72. The Court also considers it important to highlight the reason for one of the longest periods of delay namely, from May 2001 to March 2008. This period was characterised by legal actions by the applicants' and others which were demonstrably necessary to drive forward their inquests and to ensure the clarification of certain important aspects of coronial law and practice including, notably, the rights of the next-of-kin. In particular, the principles flowing from this Court's judgments of 4 May 2001 were applied in domestic law, not through legislation, but through a series of complex and overlapping domestic judicial review applications. The entry into force of the HRA in 2000 also brought with it further questions of relevance to coronial law and, notably, its application to investigations into pre-HRA deaths, a key issue not finally resolved until the judgment of the Supreme Court in *McCaughey* of May 2011 which overturned the earlier judgment of the House of Lords in *McKerr* (paragraphs 36-43 above). The present inquest was therefore adjourned for long periods pending the outcome of highly relevant litigation initiated by others and by the first applicant (who was required twice to litigate to obtain legal aid).

73. However, this manner of proceeding inevitably extended significantly the length of investigations and inquests into security force killings in Northern Ireland and this was aptly described by the Court of Appeal in one of Hugh Jordan's numerous judicial review actions about the death of his son, Pearse Jordan (paragraph 42 above). 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 applicants with access to an effective investigation which would commence promptly and be conducted with due expedition (the above-cited *Jordan* and *McKerr* judgments at §§ 138 and 155, respectively).

74. 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 (*Hugh Jordan v. the United Kingdom*, cited above, §§163-165).

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

75. 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."

76. The Court has found that the investigative delay in the present case breached the procedural guarantees of Article 2 of the Convention. It 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 (paragraphs 72 -74 above). The Court recalls its findings under Article 46 as regards investigative delay in its above-cited *McCaughey* judgment. While the delay in the present case was not as long as that at issue in the *McCaughey* case, the present inquest delay was excessive and its root causes similar to those in *McCaughey*.

77. The Court recalls that 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 (*Abuyeva and Others v. Russia*, no. 27065/05, § 243, 2 December 2010). However, as the Court found in its *McCaughey* judgment, 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.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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

79. The applicants requested an award in respect of non-pecuniary damages. While they did not request a particular sum, they submitted psychiatric reports which underlined the impact on them of the death of Mr Hemsworth and which, in the case of Mrs Hemsworth, attested to the fact that the inquest delay in particular was a significant factor in the persistence of her problems of depression and anxiety.

80. The Government did not comment on this aspect of the applicants' claim.

81. The Court awards the applicants EUR 20,000 in total plus any tax that may be chargeable to the applicants in respect of non-pecuniary damage, to be converted into pounds sterling at the rate applicable on the date of settlement.

B. Costs and expenses

82. The applicants claimed 14,287.32 pounds sterling ("GBP") in legal costs and expenses before the Court, submitting relevant vouchers and bills. The Government considered this amount to be excessive and proposed GBP 8,000.

83. 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 these criteria, the documents in its possession and the total hours of work claimed, the Court considers it reasonable to award the sum of EUR 11,000, plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be converted into pounds sterling at the rate applicable on the date of settlement.

C. Default interest

84. 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* by a majority the complaints under Articles 2 and 13 concerning investigative delay admissible and the remainder of the application inadmissible;

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

3. *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;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, 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 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage; and
      (ii) EUR 11,000 (eleven 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;
5. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 16 July 2013 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 concurring opinions of Judge Kalaydjieva and Judge Mahoney are annexed to this judgment.

I.Z.
F.E.P.

CONCURRING OPINION OF JUDGE KALAYDJIEVA[1]

It would be difficult not to agree with the majority that the applicants' complaints that, in violation of the requirements of Article 2 of the Convention, "the investigative process ... has still not finished 23 years later" in the case of *McCaughey* (paragraph 129) and 15 years later in the case of *Hemsworth* (paragraph 68) are not manifestly ill-founded. The fact that the respondent Government failed to investigate "expeditiously" appears flagrant. This cannot in itself justify a downgrade of the usual analysis performed by the Court in cases under Article 2 to one appropriate for cases concerning the "unreasonable length of proceedings".

The wrong premise of this analysis is that the requirement of Article 2 for investigations "to begin promptly and to proceed with reasonable expedition" is "quite apart from any question of whether the delay actually impacted on [its] effectiveness". This premise seems to have little support in the Court's position in hundreds of other cases, where the Court held that "any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required standard of effectiveness" (see, among many other authorities, *Kelly and Others v. the United Kingdom*, no. 30054/96, §§ 96-97, 4 May 2001; *Anguelova v. Bulgaria*, no. 38361/97, § 139, ECHR 2002-IV; and *Mojsiejew v. Poland*, no. 11818/02, 24 March 2009). Moreover, the case-law is clear in indicating that in certain cases a criminal investigation is required regardless of whether or not civil proceedings were or were not instituted seeking compensation for the damage allegedly sustained. In this regard the present two cases must be distinguished from the case of *Hugh Jordan v. the United Kingdom* (no. 24746/94, ECHR 2001-III), where the applicant had not availed himself of the opportunity of civil proceedings, as well as from the case of *Caraher v. the United Kingdom* ((dec.), no. 24520/94, ECHR 2000-I), where the applicant had in fact come to an agreement on compensation. In any event this Court has never defined civil compensation proceedings as the sole appropriate forum for the determination of the issue whether or not there has been a violation of Article 2 or 3 of the Convention.

The analysis followed by the majority then continues along the line of the delays "attributable to" the fact of the "exceptional" complexity of the traditional scope and competence of the Coroner's inquest and/or the time necessary for the domestic judiciary to overcome them at the request of the applicants (see paragraph 126 in *McCaughey* and 69-70 in *Hemsworth*). The

1. This is an opinion common to the present judgment and the judgment in *McCaughey v. the United Kingdom*, no.43098/09, both delivered on the same date.

Convention does not prescribe any specific form in which the required prompt investigation should take place. The procedure, in which the establishment of the facts takes place is irrelevant in so far as they were made known to those affected as a result of the authorities' prompt and reasonable steps to this end (see, among many other authorities, *Stoyanovi v. Bulgaria*, no. 42980/04, §§ 64-69, 9 November 2010).

In these circumstances I am far from convinced that it was open to the respondent Government to rely on the deficiency or "complexity" of the existing domestic procedure, which seem to have been known to the authorities for some years after the first judgments of this Court in similar cases against the United Kingdom, or that they may rely on the time necessary to overcome the difficulties in the process of interpreting whether or not the domestic law "required [this] inquest to comply with the procedural requirements of Article 2" of the Convention (see paragraph 127 in *McCaughey* and 70 in *Hemsworth*. The fact remains that the respondent Government failed to demonstrate that it had taken any, still less "all reasonable steps" to investigate with a view to establishing the facts of their own motion.

The rationale of the analysis appears to further rely on the delays "attributable" to the applicants' own "understandable" conduct. The fact that the applicants in the present two cases were required to make long and painful efforts in order to trigger a proper and effective investigation into the deaths of their next-of-kin and have the scope of the Coroner's inquest expanded, thus bringing it into conformity with the requirements of Article 2 of the Convention, cannot be held to reverse the positive *ex officio* obligation of States Parties into a remedy which affected parties are expected to exhaust. While it is true that States Parties to the Convention are required to provide effective access for the next-of-kin to the investigation, this neither changes the burden of the *ex officio* duty of the authorities nor limits it to "providing the applicants with 'access' to an ... investigation which would commence promptly and be conducted with due expedition" (see *McCaughey* paragraph 138, and *Hemsworth*, paragraph 73). That the applicants "understandably" availed themselves of whatever procedure was open and available to them cannot be held against them.

This approach inevitably led the majority to the limited conclusion that the "unusual fact-finding exercise" of the Coroner's inquest itself was "not structurally capable ... of providing the applicants with access to an investigation which would commence promptly and be conducted with due expedition". I fully agree with this conclusion. However, I question its usefulness at a time when more than ten years have elapsed since the adoption of the first judgments (see paragraph 14 in *Hemsworth* and 85 in

McCaughey in similar cases concerning the United Kingdom. The principles concerning the duty to investigate were indicated already the judgment of *Hugh Jordan* (paragraph 72-74) and were followed with regard to all other States Parties to the Convention.

The circumstances of the present two cases concern the first and primary purpose of the investigation prescribed by Article 2 – the establishment and disclosure of the facts and circumstances known only to the authorities. The determination of appropriate effective redress, including administrative, disciplinary, criminal or pecuniary responsibility, is only possible as a result of such disclosure (see, for example, *Iliya Petrov v. Bulgaria*, no. 19202/03, 24 April 2012, or *Nencheva and Others v. Bulgaria*, no. 48609/06, 18 June 2013). An investigation appears to be unnecessary where the facts giving rise to the arguable complaints were known to the affected parties *ab initio* (see *Nencheva*, cited above).

There is nothing to explain, still less to justify, the failure of the domestic authorities to meet their obligations through more appropriate and expeditious means of their own choice, including by introducing appropriate legislative changes in choosing "as a matter of some priority" any other "specific modalities".

The question remains, however, whether in the face of a clearly ineffective domestic investigation which may be seen as amounting to a refusal to investigate, the Court may find itself in a situation where it may be prevented from subjecting such grave complaints to any scrutiny or must declare the domestic authorities "finally free" to discharge their obligations as they deem appropriate.

Looking at what appear to be ample, but missed, opportunities to do so for more than fifteen or even twenty years, I am not convinced that "the respondent State remains free to choose the means by which it will discharge its legal obligations" under Article 2 of the Convention. Such a conclusion falls short of those reached more than ten years ago in similar cases against the United Kingdom, where the Court indicated that "a prompt response by the authorities 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). The conclusions in that case were premised on the assumption that there were no reasons to believe that the applicant would be unable to assert his rights at the national level. This assumption remains valid only where the affected party was not already continuously confronted with obstacles in learning and establishing the facts – as in the present two cases.

The majority in the present two cases failed to scrutinise whether in the last two decades the authorities genuinely pursued – and the extent to which they finally achieved – this primary purpose of disclosure and establishment of facts, which would in its turn make possible any further steps required for the determination of disciplinary, criminal or pecuniary responsibility as appropriate. In this regard the majority merely noted the missing documents and witnesses and observed that "criminal and disciplinary proceedings, of central relevance to the investigative obligation under Article 2, can now be initiated" (paragraph 63 *Hemsworth*) and that "future criminal/disciplinary proceedings ... could clearly inform the civil action" instituted in 2001 (paragraph 61 *Hemsworth*). In its earlier practice this Court declared that a finding of delay on the part of the domestic authorities (92 *McCaughey*) was insufficient to deprive the injured party of its victim status in the absence of a remedy in this regard (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 178 et seq. and § 193, ECHR 2006-V).

It should not be overlooked that the Court developed its views on the positive obligations to investigate precisely in cases where the national authorities had failed to act promptly and effectively in establishing the circumstances and disclosing them to the public and to the injured parties. Where this is not done, the Court shall always be faced with the necessity to deal with the facts submitted by the parties as a first-instance court. In addition to their failure to investigate promptly and officially, the respondent Government did not find it necessary to inform the Court of its views as to whether or not the circumstances known to them disclosed a violation of Article 2.

After decades of being faced with demonstrated reluctance and what would appear to be an attempted obstruction of justice (see paragraph 23 in *Hemsworth*), the applicants in *Hemsworth* were advised that the matter of the appropriateness of any potential criminal responsibility for the use of force against a person who was not even suspected of terrorist activities was now the subject of "active consideration" by the DPP (paragraph 31 *Hemsworth*), while in *McCaughey* there was allegedly still a possibility that the DPP would have to reconsider his decision. Any subsequent decision would, "in turn, be amenable to judicial review" (paragraph 100 *McCaughey*).

Having declared that "save in relation to the complaint about investigative delay, the Court [unlike in cases against other countries] is not in a position to consider the merits of the complaints under the substantive and other procedural aspects of Article 2" (paragraph 121 *McCaughey*), the majority in fact reverted the applicants to further indefinitely long proceedings, advising them that "should [they] be dissatisfied in the future

with the progress or outcome of those [forthcoming] procedures, it would be open to them to re-introduce their complaints [before the Court] (paragraph 65 *Hemsworth*) .

In these circumstances I remain unconvinced that the domestic investigation was intended to "lead to the identification and punishment of those responsible" (see *Assenov and Others*, 28 October 1998, § 102, *Reports of Judgments and Decisions* 1998-VIII, with further reference to *McCann and Others v. the United Kingdom*, § 161, 27 September 1995, Series A no. 324; *Kaya v. Turkey*, § 86, 19 February 1998, *Reports* 1998-I; and *Yaşa v. Turkey*, § 98, 2 September 1998, *Reports* 1998-VI).

The absence of any plausible explanation for the failure to collect key evidence at the time when this was possible, and for attempts to even obstruct this process, should be treated with particular vigilance. In fact the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Articles 2 and 3 seem as a matter of principle to make it possible for at least some agents of the State to benefit from virtual impunity as a result of the passage of time.

I refer to my separate opinion in the case of *Oleksiy Mykhaylovych Zakharkin v. Ukraine* (no. 1727/04, 24 June 2010). "In such circumstances the victims of alleged violations will be further humiliated by the fact that the open denial of an investigation successfully prevented the Court's scrutiny and limited its role to witnessing acts which appear to be better qualified as "collusion in or tolerance of unlawful acts".

I would prefer not to comment on the amount of the applicants' compensation, which seems inappropriate even for "delays only", and/or the risk of creating an impression of cynicism. My concern is that the overall effect of this judgment not only multiplies the ineffectiveness already observed, but also renders this Court's subsidiary role clearly redundant. This role would have been unnecessary had the domestic authorities fulfilled their primary role in time.

CONCURRING OPINION OF JUDGE MAHONEY

This opinion is not intended to detract in any way from the reasoning of the Chamber's judgment, with which I fully agree, but merely to add some observations on a point that is addressed in the judgment but not gone into in much detail, namely the relationship between two contrasting lines of authority concerning the interplay between the substantive and procedural requirements of the right-to-life clause under the Convention (Article 2).

Two lines of authority

The Government relied on a line of British cases exemplified by *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I (see §§ 35 and 45 of the Chamber's judgment). This line of authority is usually summarised as entailing that where a breach of Article 2 – or Article 3, the clause prohibiting torture and inhuman or degrading treatment or punishment – has been acknowledged and adequate compensation paid in civil proceedings brought at national level, or where civil proceedings are pending or available, the Strasbourg Court should confine itself, in the international proceedings brought before it, to an examination of any plausible complaints made under the procedural aspect of Article 2 (or 3), it being accepted that payment of damages at national level cannot discharge the State from its duty under the Convention to secure the accountability of States agents for acts or omissions amounting to a breach of Article 2 (or 3).

The applicants, on the other hand, relied on a line of authority originating in *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, §§ 55-56, 20 December 2007 (see § 50 of the Chamber's judgment), which suggests that the examination of a substantive complaint under Article 2 (or 3) should be tied to the Court's assessment of all the procedural protections available, including investigative processes and not being limited to any civil action brought or available. On one reading of this case-law, it requires that, for the Court to refrain from considering the substantive complaint in the international proceedings brought before it, there must be a domestic procedure capable of leading to the identification and punishment of the perpetrator, not that that procedure must have in fact have done so (see, for example, the language used in *Fadime and Turan Karabulut v. Turkey*, no. 23872/04, 27 May 2010, § 39; and *Ablyazov v. Russia*, no. 22867/05, 30 October 2012, § 54).

Reconciling the two lines of authority

My approach is that these two lines of authority can well be read as being reconcilable and not divergent.

What is said in the *Nikolova and Velichkova* judgment goes to the content of the obligation imposed on the Contracting States by Article 2 and to the implications for the kind of strict scrutiny that should be carried out by this Court when examining Article 2 claims: in cases of wilful ill-treatment by State agents resulting in death, the breach of Article 2 cannot be dealt with by the State concerned exclusively through an award of compensation to the relatives of the victim. This judgment cites (at § 55) the risk, failing proper prosecution and punishment of those responsible, of "buying off" the violation, of purchasing immunity for the perpetrators. As it was similarly put in the *Karabulut* case (cited above, § 39):

> "Confining the authorities' reaction to incidents of deprivations of life to the mere payment of compensation would ... make it possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity ... .
>
> ... Article 2 imposes a duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and breaches of such provisions ... . Compliance with the State's positive obligations under Article 2 requires the domestic legal system to demonstrate its capacity to enforce the criminal law against those who have unlawfully taken the life of another ... .
>
> While there is no absolute obligation for all prosecutions to result in conviction, or in a particular sentence, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence, ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts."

The point was also succinctly made in the case of *Berganovic v. Croatia*, no. 46423/06, 25 June 2009, §§ 56, 44-45 as regards complaints under Article 3:

> "The civil remedies relied on by the Government cannot be regarded as sufficient for the fulfilment of a Contracting State's obligations under Article 3 of the Convention in cases such as the present one, as they are aimed at awarding damages rather than identifying and punishing those responsible... ."

Thus, the claim under Article 2 in relation to the procedural protection to be afforded in the national legal system in cases of killings by State agents will remain extant even if either sufficient compensation for conduct acknowledged as amounting to a substantive violation has already been awarded at national level or an effective domestic remedy capable of providing such acknowledgment and compensation is available. The possibility for the victim's relatives to seek and receive compensation represents only one part of the measures required of the national legal system under Article 2 in relation to deaths resulting from action taken by State agents and, in particular, where the action was deliberate ill-treatment.

In sum, ensuring proper investigation, followed, where appropriate, by prosecution of the perpetrators is a procedural obligation incumbent on States under Article 2 that continues to call for strict scrutiny on the part of

this Court even where a substantive violation has been acknowledged at national level and sufficient compensation awarded or an effective domestic remedy capable of providing such acknowledgment and compensation is available. Put another way, the extancy of this obligation means that on the international level an application alleging a procedural violation must be examined on its merits by this Court even where the substantive violation, for its part, has been, or is susceptible of being, acknowledged and compensated for at national level.

But these related conclusions do not in themselves and of themselves carry the consequence that an applicant is dispensed from the obligation incumbent on him or her under Article 35 § 1 to exhaust an appropriate domestic remedy, for example by bringing a civil action to obtain compensation for the substantive violation, if such a remedy is available and has not had its effectiveness undermined by the absence of adequate investigations. The differing obligations under Articles 2 (or 3) and 35 § 1 of the Convention, one incumbent on the State and the other on potential applicants to the Court, should not be confused and run into one.

This was brought out in the Court's judgment in 1996 Grand Chamber case of *Akdivar v. Turkey* (Reports, 1996-IV), one of the first cases to establish the State's duty to investigate under the Convention (for "Turkish" judgments employing similar reasoning, see *Aksoy v. Turkey*, Reports 1996-IV, and *Menteş and Others v. Turkey* [GC], Reports 1997-VIII; the "Turkish" case-law in this regard was then developed by the Court, through reading a duty to investigate directly into Article 2, in *Kaya v. Turkey*, Reports 1998-I, §§ 86-87, relying on the earlier British "Death-on-the-Rock" case of *McCann and Others v. the United Kingdom* [GC], 27 September 1995, Series A no. 324, §§ 161-163). By virtue of the operation of the burden of proof, so the Court explained in the *Akdivar* judgment, a complaint should not be rejected by reason of the mere existence of a theoretically adequate civil remedy if the applicant could demonstrate that the remedy was for some reason inadequate and ineffective in the particular circumstances or that there existed special circumstances absolving him or her from the requirement of exhaustion. One such reason may be constituted by the failure of the domestic authorities to undertake investigations in the face of serious allegations of misconduct or infliction of harm by State agents (§ 68). The Court recognised that in the particular circumstances obtaining in South East Turkey at that time,

> "the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative enquiries on which such remedies depend may be prevented from taking place" (§ 70).

The Court's conclusion on the facts was as follows:

> "Against such a background [of severe civil strife, coupled with the applicants' position of insecurity and vulnerability following the destruction of their homes], the

> prospects of success of civil proceedings based on allegations against the security forces must be considered to be negligible in the absence of any official inquiry into their allegations, even assuming that they would have been able to secure the services of lawyers willing to press their claims before the courts. ...” (§§ 73-75)

Not only would it sit ill with the Court’s aversion to blanket rules, but it would also fly in the face of the *Akdivar* case-law to deduce from the *Nikolova and Velichkova* line of authority any blanket rule to the effect that the failure to carry out an effective investigation and prosecution, as required by Article 2 (or 3), will always and automatically make it necessary for this Court to examine on its merits a substantive complaint made under the Article. As the Court was careful to state in *Akdivar*:

> “The Court would emphasise that its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that applicants are absolved from the obligation ... to have normal recourse to the system of remedies which are available and functioning. It can only be in exceptional circumstances such as those which have been shown to exist in the present case that it could accept that applicants address themselves to the Strasbourg institutions for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts.” (§ 77)

On the other hand, it does of course follow from *Nikolova and Velichkova*, as it does from *Akdivar*, that the possible rejection of the substantive complaint on the ground of non-exhaustion of domestic remedies should be tied to an assessment of all the procedural protections available, notably the existence or not of an adequate investigation; and this in order to see if an effective remedy to complain about the alleged substantive violation could indeed be said to be available to the applicant in practice. It can readily be acknowledged that in many cases the *Nikolova and Velichkova* approach will indeed require the Court to go into the merits of the substantive complaint.

In terms of the Court’s procedure, the result may well either be that, as in *Akdivar*, the inadequacies of the investigation are so evident that the ineffectiveness in practice of the remedy relied on by the respondent Government can be found at the outset; or, where a plausible procedural complaint of inadequate investigation is made, be that the question of exhaustion or not of domestic remedies has to be joined to the merits. But it cannot and should not be excluded that, in some cases, it is clear on the evidence that the effectiveness of the available domestic remedy to look at the substantive allegations of unjustified killing by State agents has not been so adversely affected as to render the remedy ineffective. In such circumstances, it is difficult to see any reason (i) why the applicant should be dispensed from his or her normal obligation under Article 35 § 1 to exhaust an available and effective remedy in relation to that particular, namely substantive, complaint and (ii) why the national system should not be allowed by this Court to do its subsidiary task.

A distinction should be drawn between two aspects of the Convention's operation. On the one hand, there is the strict scrutiny that this Court should always carry out in relation to Article 2 claims, notably as regards the procedural safeguards of proper investigation and prosecution, both in their own right as a ground for finding a violation of Article 2 and as a preliminary factor capable of affecting the effectiveness of legal and other remedies available to relatives of the victims. On the other hand, there is the "subsidiarity" obligation incumbent on applicants under Article 35 § 1 to exhaust available domestic remedies, even if those remedies relate to one branch only of their claim under Article 2, namely the substantive branch. There is overlapping and linkage between these two aspects of the Convention's operation, but the two are not 100% co-extensive. As was intimated in *Akdivar*, a finding of inadequate investigation and prosecution does not automatically, in a blanket fashion, render nugatory the applicant's obligation to exhaust an available and effective domestic civil remedy to recover compensation for the substantive breach of Article 2 or Article 3, as the case may be. The inadequacy of the investigation and prosecution undertaken, if any, may well be a factor, a powerful factor, pointing to ineffectiveness of the civil remedy for compensation in the circumstances, but it is not decisive in itself or in all circumstances.

In conclusion on this point of general principle, it would, in my view, be simplistic, and mistaken, to take the *Nikolova and Velichkova* jurisprudence as entailing an automatic obligation for this Court to examine on its full merits, substantive as well as procedural, a right-to-life case whenever there has been no adequate investigation and prosecution.

The position regarding civil remedies in Northern Ireland

The courts in Northern Ireland have at their disposal various procedural tools to establish the facts and, notably, to oblige witness attendance, to order disclosure and discovery of documents, and to manage evidence that is sensitive in terms of national security so as to find a fair balance between genuine security needs and a plaintiff's legitimate interest in establishing the facts. The standard of proof required to establish liability is the civil one of proof on the balance of probabilities, not the stricter criminal or Convention standard of proof beyond reasonable doubt. As I understand it, the underlying logic in previous Northern Ireland cases, such as *Jordan v. the United Kingdom*, no. 24746/94, ECHR 2001-III, is that the system of civil remedies in Northern Ireland (and indeed in the United Kingdom in general) is sufficiently well armed and strong to constitute, in principle, an effective means of establishing facts and liability and of obtaining adequate compensation, as appropriate, in relation to killings or serious ill-treatment allegedly committed by State agents. As a consequence – and this is in accord with the reasoning developed in *Akdivar* –, as regards a substantive

complaint of unlawfulling killing under Article 2, the civil claim is in principle to be exhausted. It would have to be demonstrated, in a particular case before this Court, that the deficiencies in the process of investigation and of prosecution of perpetrators were so serious that the civil remedy was compromised to the point where it would be unreasonable to expect the applicant to exhaust it. Arguably such a situation could arise where, for example, as a result of delay key evidence had been lost or destroyed, key witnesses had died or become untraceable, and so on.

A similar logic can be seen to have been applied in cases concerning other countries, but with a different result: in these cases, the system of civil remedies was considered to be such that, in the absence of an effective investigation, it did not offer any real chance of establishing either the facts relating to the death or liability on the part of State agents.

The particular circumstances of the present case

The Chamber found (at § 59 of its judgment) that in the present case "[no] demonstrated factor can be considered to have deprived the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of John Hemsworth's death". The verdict of the inquest jury in May 2011, rendered after several days of hearing witnesses, following the production of various expert reports and apparently following adequate disclosure of relevant documentary material by the authorities (see notably §§ 21, 23, 26, 27 and 63 of the Chamber's judgment), "was largely in the applicants' favour in that it explicitly accepted key aspects of their claims about the death of John Hemsworth", identifying its probable cause as being violent conduct by one or more police officers (see §§ 28 and 60 of the Chamber's judgment). It cannot be said at this point that the bringing of the civil action by the applicants has been rendered ineffective in practice by reason of an alleged lack of adequate investigation and proper prosecution. As the Chamber's judgment points out, "while the lapse of time would make it difficult for the civil court to piece together the evidence, any such attempt should in principle take place in a domestic court, not in an international forum". The domestic civil action brought by the applicants is capable of enabling them to obtain the same kind of finding that they are seeking in the proceedings before this Court, namely a finding of unjustified lethal conduct by members of the Northern Ireland police force, as well as the same kind of redress, namely an award of financial compensation. As a matter of general principle, subject, where applicable, to the specificities of the procedural protection afforded by virtue of Article 2 of the Convention, this is precisely the kind of situation that the rule of exhaustion of domestic remedies provided for under Article 35 § 1 of the Convention is meant to cover.

In *Nikolova and Velichkova*, as in a number of other similar cases, an already exhausted civil remedy granting compensation was held to be incapable of providing adequate redress for wilful ill-treatment by State agents resulting in death because of serious deficiencies in the completed investigation and criminal and/or disciplinary prosecution of the perpetrators. The most notable flaw being that the criminal and/or disciplinary proceedings brought against the perpetrators had ended with a result involving "a manifest disproportion between the gravity of the offence [found to have been committed] and the punishment imposed" (see, for example, *Nikolova and Velichkova*, cited above, §§ 62-63; and *Karabulut*, cited above, § 47; see also *Gäfgen v. Germany* [GC], no. 22978/05, §§ 123-125, ECHR 2010-..., in relation to conduct contrary to Article 3). Far from bringing the requisite procedural protection under Article 2, the outcome of the terminated investigative and prosecution process was judged to foster a sense of impunity on the part of the State agents responsible for the killing (see, for example, *Nikolova and Velichkova*, cited above, § 63 *in fine*).

In that respect the present applicants' Convention claim, unlike that in the above-mentioned cases, is premature "because the initiation of further relevant investigative procedures, including of a criminal and/or disciplinary nature, remains possible" (§ 58 of the Chamber's judgment). Indeed, the inquest verdict of May 2011, mentioned above, provides good cause (for criminal prosecution and/or disciplinary proceedings for unlawful use of lethal force by one or more members of the Northern Ireland police force and perhaps, as regards the evidence of a witness to the lethal incident (see §§ 22-24 and 62 of the Chamber's judgment), for obstruction of justice. The Coroner referred the matter in January 2012 to the Director of Public Prosecutions, who, according to the latest information before the Court in July 2012, was actively considering the file (see § 28 *in fine* of the Chamber's judgment).

As the Chamber's judgment points out (at § 65 *in fine*), should the present applicants be dissatisfied with the progress or outcome of the various, as yet uncompleted, domestic procedures, it would be open to them to reintroduce before this Court both their substantive complaints and their outstanding procedural complaints under Article 2.

Concluding remark

It may doubtless appear somewhat anomalous that, over 15 years after the death of John Hemsworth, the applicants' substantive complaints and most of their procedural complaints under the Convention's right-to-life clause can be legally characterised as "premature". However, the position is so precisely because the innumerable and excessive delays in the inquest proceedings prevented the investigative process from beginning promptly

and from being carried out with reasonable expedition. For this reason, even before the completion of the applicants' civil action and of any further proceedings, notably of a criminal and/or disciplinary nature, that might be brought, the Court could not but find a procedural violation of Article 2 on the basis that the United Kingdom had, in relation to this requirement of promptness and reasonable expedition, failed in its obligation to the applicants to ensure, through the legal system in Northern Ireland, the effectiveness of the investigative process concerning the death of their relative at the hands of the security forces.