**The Glenanne gang, the PSNI and uncovering the past**

On 28th July the High Court ruled on the failure of the PSNI to produce an HET report on the activities of this gang.

The key to understanding the significance the ruling is the “McKerr cases” where the European Court of Human Rights ruled that Article 2 rights are violated if the State does not place an adequate and effective investigation to protect the right to life.

HMG produced a package of measures to address the court’s criticisms and to prevent such failings in the future.

The package dealt with the duty of the DPP to give reasons for not prosecuting, the scope and speed of Coroners inquests, practice at these inquests, legal aid for families at such inquests, and the establishment of the Historical Enquiries Team [“HET”]

In the Glenanne case, the HET inquiries were undertaken by the ‘white team’ detectives based in England, with no prior connection to the RUC/PSNI. It examined 89 incidents that occurred between July 1972 and June 1978, including 46 murder cases, involving 80 deaths. The intent was to produce an overarching report , which the families believed was the “Glenanne Inquiry”. By May 2010 the HET had completed about 80% of the overarching report.

Enter ACC Drew Harris who, in June 2014, said that the HET was committed to the preparation of bespoke family reports but the preparation of “*an overarching report would not provide any evidential opportunities not currently being considered during the Review process. The HET does not intend to prepare an overarching thematic report into those cases referred to as the “Glenanne Gang linked cases”.*  To prepare such a report would divert HET resources from their central role of conducting a review and preparing a report for families specific to the death of their loved ones.

Treacey J said in his judgment that there were always to be two main strands to the work of the HET:

* The “individual strand” which involved interacting directly and personally with the families of each separate victim of the Troubles killed between 1968 and 1998. The purpose was to “bring a measure of resolution” to those families and to “identify and address issues and questions that are unresolved from the families’ perspective”;
* The “collective strand” which was reflected in Objectives 2 and 3 of the HET namely to “re-examine [the] deaths … and to ensure that ALL investigative and evidential opportunities are subject to a thorough, professional examination in a manner that satisfied the PSNI’s obligation of an “effective investigation” in conformity with the PSNI Code of Ethics as far as possible”. There was also an undertaking to do so in a way that commands the confidence of the community.

Insofar as the ‘collective’ strand was concerned :

“So in the original conception of the work of the HET it was always intended to develop a database to facilitate the cross-referencing of material and the quest for evidential links and patterns which might not appear from review of individual cases alone. The development of this element of the HET process appears to be the UK’s proposal for addressing the systemic nature of some of the failings identified in the McKerr series.”

He went on:

“So the system proposed by the UK for dealing with potential “collusion” cases involved two elements. First, there would be an investigation of each case conducted in-house by the HET’s White Team and Complex Inquiry Team both of which were based in England and comprised investigators recruited from outside NI and who had no prior link with the RUC and/or the PSNI. Those investigators were to conduct their enquiries with the specific purpose of “looking for evidence of offences which might be characterised as “collusion”. In addition to the in-house HET re-investigation of these cases they would also be referred to the PONI who would conduct a parallel investigation focussed on the conduct of any police officers potentially linked to the offence”.

Mr Justice Treacy said the ability of the LIB to continue the work of the HET is undermined by the fact that it has less [*sic*] resources, significantly reduced scope and is not independent in the manner required by Article 2 and the Package of Measures. He said the LIB lacks structural and operational independence as well as functional reach and meaningful output. He concluded that the changes introduced by the Chief Constable are “fundamentally inconsistent with Article 2 and the package of measures” and that the current LIB cannot comply with even the required minimum elements.

The substance of the ruling is that “extreme unfairness” had occurred in the manner in which Mr Barnard [the brother of Patrick Barnard, who was killed , aged 13] was dealt with by Drew Harris and the Chief Constable.

However the judgment has much wider implications, when read alongside other recent judgments.

It is clear that , absent the ‘white team’ and the HET as an organization, there is no Article 2 compliant and effective organization exists in Northern Ireland for the investigation of State involvement in crime during the Troubles.

The Police Ombudsman has no authority to investigate outside the actions of police, thus he handed his report into Stakeknife to the Director of Public Prosecutions, who handed it to the Chief Constable who handed it to Chief Constable Boucher and Operation Kenova.

In *Re Patricia Bell 2017 NIQB 38* the High Court has ruled that the state has underfunded the Police Ombudsman to such an extent that the state has acted unlawfully. This decision by Maguire J. is under appeal by the Department of Justice, a decision presumably made by civil servants, given that there is no minister. I asked the Permanent Secretary if he had acted on advice from John Larkin, the Attorney General but he declined to confirm or deny.

In *Re Margaret McQuillan* delivered 3rd March 2017 , Maguire J. ruled that the proposed investigation by the LIB into a death in June 1972 , *“lacked the requisite independence required to perform an Article 2 compliant investigation in respect of this death”*

**In summary**

Apart from Operation Kenova, there may be no Article 2 compliant investigation into overall State involvement in the Troubles.

The Police Ombudsman is so severely underfunded by the politically unmanned Department of Justice that it is in breach of its duties to citizens.

The LIB is unlikely to be Article 2 compliant in any investigation of State involvement in killings.

**Where to now?**

Whilst Nationalists and Republicans [rightly] complain of collusion between Loyalist terrorists and the police, it is significant that they rarely mention what part the Security Service or the Secret Intelligence Service or the Army might have played.

After the failure of the supergrass cases, the State stepped up its penetration of all paramilitary organisations.

Present the allegations that by 1990, PIRA was heavily infiltrated by the State, it is very likely that a high proportion of murders, carried out by PIRA had an element of State involvement. This could have been by participating informants, by prior State knowledge of an operation or by subsequently supplied intelligence. It is also likely that agents were placed by the State in PIRA, in the manner of “Kevin Fulton”.

We know that Donaldson was an informer and Sandy Lynch and Scapatticci worked for the State, memorably in the sting against Morrison. Allegations have been made against Sean Maguire [who was present with Scap when Lynch was held] and Brian Gillen by me and others.

One is forced to the conclusion that , absent another investigative team such as Kenova, there is presently no satisfactory body to whom victims and survivors can turn for justice.

This seems to have escaped our politicians and the Victims’ Commissioner and associated bodies.

It is unlikely to have escaped the Whitehall mandarins.

Or did they plan it like this?