Alyson Kilpatrick BL

FAO: JON BOUTCHER, OFFICER IN OVERALL COMMAND
RE: OPERATION KENOVA AND RELATED MATTERS
INDEPENDENT REVIEW OF ARTICLE 2 COMPLIANCE

UPDATE 1

9 February 2020

1. I provide the following update, following three days of engagement with the Operation Kenova team under the leadership of the Officer in Overall Command, Mr Jon Boutcher. I hope this is an efficient and helpful means of communicating to Mr Boutcher my ongoing observations and progress. Mr Boutcher has impressed upon me his desire for an independent review, aimed at identifying any issues in a timely manner. I can say at the outset, for the reasons set out below, that I have observed exceptional dedication to the imperative of an article 2 compliant investigation of matters of the utmost importance, sensitivity and complexity. I will not share this update with anyone other than Mr Boutcher but he is free to do so as he sees fit.

2. To put my review in context I set out an overview of article 2 ECHR as it relates to this update.

3. The requirement that investigators have Independence from those potentially implicated is well known and the subject of much judicial consideration, not least the recent local case of *McQuillan* (considered previously). It is often the subject for debate in the media. Those legal and media debates have focused on independence in the strict sense i.e. whether there is anything which undermines the capacity of the investigators to conduct an independent investigation. Independence is undoubtedly an essential element of an investigation (to which I will return at the conclusion of my review) but has become interchangeable with article 2 compliance. In other words, independence has become the short-hand for article 2 compliance. Independence however is but one criterion. The use of such short-hand has done a great disservice to the other equally critical and inter-related elements of article 2. For example, the ability to ensure public scrutiny and the engagement of families is reduced by some to 'window dressing'; soft skills taking second place to independence. That is not the case with the Kenova

team, which gives those elements their proper place as strict legal requirements.

4. Reducing article 2 to a debate about independence has also resulted in commentators observing that article 2 is “not the answer”. It is true that article 2 does not provide all of the answers to ‘dealing with the past’ but it was article 2 (and only article 2) which secured the Kenova investigation and it will be article 2 which regulates and provides for the continuation of Kenova and other investigations. This should be kept clearly in mind particularly when one witnesses, as I did, the extraordinary and deserved support for the Kenova team, which has resulted in unprecedented cooperation and engagement with victims and relatives. Those who have engaged with the Kenova team are unlikely to ever do so again if obstacles are put in the way of the investigation.

5. I will return to the issue of resources but for present purposes I note simply that a potential obstacle to article 2 compliance is under-funding of the investigation. Mr Boutcher, to remain independent in the legal sense, should be able to determine the level of resources he needs to complete his investigation and how to allocate them. As the old adage goes “he who pays the piper...” The vulnerability of the investigation to under-funding is not missed by the public, the courts or, more acutely, by the families: article 2, if properly understood and respected, should ensure that does not happen. The structures and practical arrangements for ensuring resources are adequate must be kept under close scrutiny. It should not be for those potentially implicated (remembering the court’s finding in *McQuillan* etc. as to practical independence of the PSNI) to control access to the tools necessary to reach factual findings and hold those responsible to account.

6. In this context it is important to return to the essential criteria for an article 2 compliant investigation. There follows a brief overview of the legal framework within which this investigation must fit. I also make some early observations on my assessment of the Kenova investigation’s compliance with that legal framework.

7. Article 2 does not begin, and certainly does not end, with requiring an independent investigation. Rather, it requires an effective official investigation, only one element of which is independence. I set out below some observations on the constituent parts of article 2 with the proviso that no single part stands alone; article 2 compliance must be assessed taking all parts together.

8. In the seminal case of *McCann & Others v UK* (1995) the European Court of Human Rights (ECtHR) put it this way “...a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have

been killed as a result of the use of force by, inter alios, agents of the State." What the ECtHR was emphasising in *McCann* was how the substantive obligation to protect life would be meaningless in the absence of a commensurate procedural obligation to conduct an effective investigation intended to expose any breach and hold the perpetrators to account.

9. After *McCann* the ECtHR went on to consider what was required for an effective investigation, in the article 2 sense.

10. The first ECtHR case which found a violation of the procedural obligation, *Kaya v Turkey* (1998), concerned the killing of a man by security forces in disputed circumstances in south-east Turkey. The ECtHR held that the case could not be considered a clear case of lawful killing and therefore could not be disposed of with minimal formalities. It found the investigation to have been seriously deficient for want of a proper forensic examination and an autopsy. The ECtHR noted that the investigating authorities had proceeded on the assumption that the deceased was a terrorist who had been killed in an 'armed clash' with security forces. The ECtHR observed that neither the prevalence of armed clashes in the region nor the high incidence of fatalities could dispense the authorities of the obligation under article 2 to ensure that deaths arising out of such clashes were effectively investigated.

11. *Kaya* set some parameters for the investigative duty as follows: "the procedural protection of the right to life inherent in article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances." The ECtHR went on "In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure."

12. In 2001, in four cases against the UK,[1] the ECtHR set out the core principles of the procedural obligation, which have not been departed from but have been refined in more recent cases. The ECtHR said, "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances... and to the identification and punishment of those responsible... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony...Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk

[1] McKerr v. the United Kingdom, no. 28883/95, ECHR 2001-III;Kelly and Others v. the United Kingdom, no. 30054/96; Shanaghan v. the United Kingdom, no. 37715/97; and Hugh Jordan v. the United Kingdom, no. 24746/94, ECHR 2001

falling foul of this standard." As the ECtHR observed in *Öneryildiz v Turkey* (2005) "the competent authority must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue." Moreover, in *Nachova v Bulgaria* (2005), it observed, "any deficiency in the investigation which undermines its ability to establish the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness."

13. In *Al-Skeini v UK* (2011), the ECtHR opined, "the investigation must be broad enough to permit the investigating authorities to take into account not only the actions of the State agents who directly used lethal force, but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life." In *Tunç v Turkey* (2014) the ECtHR clarified further, "In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate... That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible." Lastly, in this context, in *Mocanu and Others v Romania* (2014), the ECtHR Grand Chamber emphasised that "the investigation must be thorough, which means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation."

14. It is clear that to be effective the investigation must be adequate i.e. it must be capable of leading to a determination of what happened and of identifying and – if appropriate – punishing those responsible. This is not an obligation of result but of means: *Armani Da Silva v UK* (2016). The ECtHR has refused, expressly, to determine a model for article 2 investigations for that reason. It depends upon the circumstances in each case, with independent investigators best placed to determine what is needed to secure all elements of compliance. Those investigators must be free to conduct a thorough, objective and impartial analysis. Failing to follow an obvious line of inquiry for example would undermine to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible. The investigators must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony. In the instant case (Kenova etc.) where allegations include collusion with State agents over a passage of time during which victims' relatives have been disappointed by inordinate delay and have lost trust in the system the securing of evidence can be extremely difficult. That is why establishing credibility and trust in the investigation is crucial. It is more than a moral imperative; it is a legal requirement. If there is no trust, there will be no sharing of information, relatives will disengage thereby depriving investigators of a source of evidence and eye witness testimony.

15. Article 2 also requires (as part and parcel of an effective investigation) a sufficient element of public scrutiny to secure accountability in practice as well as in theory. Effectiveness should not be assessed according to a check-list of simplified criteria: *Velikova v. Bulgaria* (2000). Article 2 has, at its core, the maintenance (or rebuilding) of public confidence in the State's adherence to the rule of law and seeks to prevent any appearance of collusion in, or tolerance of, unlawful acts. As the ECtHR observed in *McKerr v UK* (2002), the degree of public scrutiny required may well vary from case to case but particularly stringent scrutiny must be applied by the relevant domestic authorities to the investigation of a death in which State agents have been implicated. *McKerr* concerned the death of Gervaise McKerr, who was killed in Northern Ireland in 1982 after over 109 rounds were fired into a car by police officers, killing all 3 inside, none of whom were armed. The ECtHR, in finding that the subsequent inquiry did not comply with article 2, gave weight to the fact that the inquiry's reports and their findings were not published in full or in extract meaning the investigation lacked public scrutiny. The court noted that, "this lack of transparency may be considered as having added to, rather than dispelled, the concerns which existed." Furthermore, no reasons were given to explain the decision that prosecutions were not in the public interest.

16. The ECtHR in its interpretation of article 2 applies a degree of pragmatism – it is not an arid academic exercise – and does not go so far as to require all aspects of all proceedings to be public as disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects on private individuals or other investigations. However, in all cases, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. Investigating authorities do not have to satisfy every request for a particular investigative measure made by a relative in the course of the investigation if there is a legitimate reason to deny it: see e.g. *Ramsahai and Others v the Netherlands* (2007); *Giuliani and Gaggio v Italy* (2011) but embarrassment or inconvenience for state authorities is certainly not a legitimate reason to withhold. At this stage in my review I can record that the Kenova team has balanced these competing factors in a way which is not just impressive from a managerial perspective but from a legal one. The utmost care is taken to identify and protect information which is sensitive and which could have prejudicial effects on private individuals or other investigations while providing sufficient information and updates to relatives to secure their legitimate interests are protected. There are in place strict protocols to manage material safely with overall command and responsibility resting with the Officer in Overall Command. Mr Boutcher's expertise, experience, professionalism and integrity is obvious to all and is perhaps one of the single most important factors in maintaining this investigation's compliance – with *all* legalities. He and his team have established a level of trust and public confidence that cannot be overstated. While the focus remains on the consideration of legal requirements and standards, the importance of his personal command of this investigation might be lost – unless viewed in the context of article 2, in all of its parts.

17. It is worth noting here that the obligation to gather evidence cannot be discharged unless those holding information and evidence cooperate fully with the investigation. If this investigation is to be effective and independent so as to comply with article 2 those in charge of the investigation must have the autonomy to identify material, to 'follow the evidence' and to recover and use whatever they consider relevant. Any diminution of that will impact adversely on the effectiveness of the investigation.

18. I must mention that Mr Boutcher's decision to set up an Independent Steering Group (ISG) of individuals with such a wealth of domestic and international experience, which meets routinely, to provide both assistance and objective challenge is one which goes to ensuring independence, effectiveness and public confidence. Over the course of three days in February 2020 the ISG met to receive updates from the Kenova team, to hear from people affected by the issues (including victims, relatives, serving and former members of the security services), to discuss progress and to provide constructive challenge. I have previously commented on the calibre, expertise and experience represented on the ISG but can now observe, having seen how they work, that the ISG is an exceptional resource for the Kenova team which provides invaluable service to the community in Northern Ireland. The contribution they make to securing delivery of all aspects of the article 2 criteria is invaluable.

19. I also had the opportunity to observe how Mr Boutcher and his team engage with the ISG and with those affected by the issues. I was impressed by their forensic approach, independence and resolve to discharge their obligations with the utmost professionalism and integrity. They not only demonstrate capability in a strict policing sense but have the sensitivity and intelligence to deal with people so that they can participate in the process and recover confidence in the process. They have been assisted greatly by the other oversight group set up to engage victims and victims' relatives – the Victim Focus Group (VFG). The VFG also comprises individuals with unmatched experience of working with victims and is representative of all those affected by the investigation. The VFG has enabled the team to reach people who had not engaged previously and eased the Kenova team's passage to retrieval of information. In addition to the VFG Mr Boutcher has reached out to many others some of whom have already expressed to me the importance of his personal accessibility and approach. There is no doubt that confidence lies with this team as a direct result of Mr Boutcher's command.

20. I will finish with a brief note on the extent to which article 2 requires cooperation across jurisdictions – an issue which clearly arises in this investigation. I will consider this further in due course.

21. Suffice it to say at this stage that the ECtHR has held that, in general, the procedural obligation falls on the Contracting State under whose jurisdiction the victim was at the time of death: *Emin and Others v Cyprus, Greece and UK* (2008), unless there are special features which require a departure from this general approach. Even in the absence of special features the ECtHR has emphasised that the corollary of the obligation on an investigating State to secure evidence located in other jurisdictions is a duty on the State where

evidence is located to render any assistance within its competence sought under a legal assistance request: *Rantsev v Cyprus and Russia* (2010). In other words, where there are cross-border elements to an incident the authorities of the State to which the perpetrators have fled and in which evidence of the offence could be located may be required to take effective measures: *Cummins and Others v UK*, *O'Loughlin and Others v UK* (2005).

22. In the case of *Güzelyurtlu and Others v Cyprus and Turkey* (2019), the ECtHR considered the duty of a State to cooperate with foreign authorities and found a violation of article 2 based on a lack of cooperation. It observed, "In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice... Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case... States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters."

23. In conclusion, and at this preliminary stage, I can offer the following. The Operation Kenova investigation appears to be an exemplar of one which is commanded and controlled with every aspect of article 2 firmly in mind and which has already contributed to securing public confidence in the rule of law. I will look forward to continuing my review with the cooperation of the team, to whom I am grateful.

ALYSON KILPATRICK BL
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