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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION BY COLM CAMERON FOR JUDICIAL REVIEW (No. 1 and 2)

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Mr Southey KC with Mr Stephen Toal (instructed by KRW Law Solicitors) for the Appellant
Mr McGleenan KC with Mr Ben Thompson (instructed by the Crown Solicitor's Office) for the Respondent
Mr McKay (instructed by the Directorate of Legal Services) on behalf of the Police Ombudsman for Northern Ireland

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Before: Keegan LCJ, Horner LJ, Colton J

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal against judgments by Humphreys J ("the trial judge") dated 17 May 2023. The appellant is the son of James Cameron who was murdered alongside Mark Rodgers by Ulster Freedom Fighters ("UFF") terrorists on 26 October 1993. By means of judicial review he challenged the failure of the Historical Enquiries Team ("HET"), a unit within the Police Service of Northern Ireland ("PSNI"), to release their findings into the death and the alleged ongoing failure by PSNI and the Police Ombudsman of Northern Ireland ("PONI") to whom a complaint had also been made, to complete an investigation into his father's death that was compliant with article 2 of the European Convention of Human Rights ("ECHR"). In both instances, the trial judge dismissed applications for judicial review against the PSNI ([2023] NIKB 63, the "PSNI judgment") and PONI ([2023] NIKB 64, the "PONI judgment").

[2] The primary focus of this case is whether the article 2 investigative obligation is triggered by virtue of the test set out in *Brecknell v UK* [2008] 24 EHRR 42 which has recently been discussed and applied by the Supreme Court in *Re Rosaleen Dalton's Application for Judicial Review* [2023] UKSC 36.

[3] At the outset, it is noted that although there are two respondents in the appeal, it is common case amongst the parties that if the appeal against the PSNI fails, it follows that the appeal against the PONI will fail also.

Grounds of appeal

[4] The amended notice of appeal, dated 19 June 2023, advances six grounds of appeal. The first four grounds relate to what may be termed the 'Brecknell analysis'; the fifth concerns the trial judge's analysis of the genuine connection test; and the sixth concerns the legitimate expectation ground. As such, we distil the following three questions for determination:

(i) Whether the trial judge was wrong to conclude that the *Brecknell* threshold "will not be lightly satisfied", and having considered both the relevant legal principles and an assessment of the evidence before him, whether he was wrong to conclude that the threshold had not been satisfied;

(ii) Whether the trial judge was wrong to conclude that the genuine connection test had not been met; and

(iii) Whether the trial judge was wrong to conclude that no undertaking was made that gave rise to a legitimate expectation that the HET report would be published.

[5] We note that the appellant also submits that the appellate court should follow the approach set out by Lord Reed in *Re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 para 30 when deciding this appeal. Although the above decision plainly sets out guidance on how appellate courts should conduct proportionality reviews in an *ab ante* challenge, Mr Southey has suggested that the same logic applies to the present case, which he terms as the "equivalent of a proportionality review." He says that the court's primary duty is to determine whether there has been compliance with article 2, which requires an application of the evidence to the law. As such, Mr Southey submits that the court is engaged in a question of law and is not making any findings of fact. In determining whether the legal test has been met, the court must look to all the evidence available to it, requiring it to go beyond whether the conclusions reached by the trial judge were unreasonable.

[6] Even in cases of proportionality, a category of case that does not include the present appeal, the Supreme Court has stated that "the existence of the requirement of necessity and proportionality does not alter the near-universal rule that appeals in England & Wales proceed by way of review rather than by way of re-hearing" (*H-W (Children) No 2* [2022] UKSC 17, at para [48]). As recently held by this court in *Re Lancaster, Rafferty and McDonnell's Application for Judicial Review* [2023] NICA 63, para [17] (itself a proportionality case), "the correct approach is to review the trial

judge's findings and to intervene only if we consider that he was wrong." This is not a low intensity *Wednesbury* review.

[7] As the legal principles are settled by virtue of the *Brecknell* test, the outcome in every case will turn on the plausibility or credibility of the fresh factual evidence. While we accept the point that this court has, in any event, been referred to the same evidence as the trial judge, this fact does not permit the Court of Appeal to simply cast aside the trial judge's findings and conduct a *de novo* hearing. In any event, we are bound to say that in this case even if it were a rehearing as opposed to a review we would have come to the same conclusion.

Factual background

[8] At 07:34 hrs on 26 October 1993, a hijacked Citroen BX19 car stopped outside Kennedy Way Council Depot. Two men, armed with a .45 sub machine gun and a VZ58 7.62mm selective fire rifle and wearing overalls, reflective vests and balaclava masks, got out while the driver waited in the car. Upon entering the depot, the gunmen opened fire aiming at the workers. James Cameron and Mark Rodgers were killed in the attack. Five others were injured while 19 people escaped unharmed.

[9] Police and emergency services soon arrived at the scene. The murderers had already fled, however, and the Citroen was found abandoned in Donegall Pass not long after. By 9:50am the paramilitary group the UFF had contacted the BBC and claimed responsibility for the attack.

[10] This brutal murder came during a period of heightened tensions in Belfast. Three days prior, 23 October 1993, a bomb attack carried out by the Provisional IRA at Frizzell's Fish Shop on the Shankill Road in Belfast had killed 10 people and injured 57 others. In all, 90 lives were lost throughout 1993 as a direct result of the Troubles; 68 of those were civilians.

[11] The RUC investigation into the shooting at Kennedy Way was swift and resulted in 16 suspects arrested for their suspected involvement in the murders. Of these, two persons were suspected to be the gunmen by the RUC. However, no confession was made and there was no forensic evidence connecting them to the murders. In total, 14 of the 16 suspects were released without charge on grounds of insufficient evidence.

[12] The remaining two suspects were charged with offences relating to the shooting. Wendy Ann Davies was charged with aiding and abetting the murders of James Cameron and Mark Rodgers and other offences relating to the attack. She pleaded guilty to seven charges of assisting offenders for her part in the murders. Thomas Edward Beggs was charged with the murders of Mr Cameron and Mr Rodgers and other offences relating to the shootings at the depot. He pleaded guilty to various charges including the double murder of Mr Cameron and Mr Rodgers. Neither Davies nor Beggs were suspected of being the gunmen.

[13] In 2006 the appellant's family sought to have the case reviewed by the HET. A persistent backlog of cases meant that the review did not begin until 2012, when the case was taken out of chronological order due to the failing health of the appellant's aunt. HET informed the Cameron family in July 2013 that a draft Review Summary Report ("RSR") into the murder had been completed and would be sent to them once editing and checks had been completed. At that stage it was confirmed to the Cameron family that the draft RSR was tailored to the questions raised by the Rodgers family and the intention was to mirror the report to the Cameron family once it had been through the editorial process.

[14] In the event, the HET was disbanded in September 2014 before the Cameron draft RSR was completed. A draft RSR was, however, made available to the Rodgers family in March 2016. The PSNI position, as confirmed in the affidavit evidence of Temporary Detective Superintendent Harrison, is that there is no draft RSR in respect of the HET enquiry into the murder of James Cameron. This was confirmed to the family in correspondence dated 8 December 2016.

Discussion

[15] The appellant has long maintained that the RUC/PSNI investigation into his father's murder was defective as it did not deal with alleged collusion/collusive behaviours. The appellant states that this fault pervades the RUC investigation and the HET review process. Central to the appellant's overall claim is that the RUC's original investigation:

> "… did not take into consideration the probability that members of the RUC and/or British military had acted in connivance with the loyalist paramilitaries responsible by way of direct or incidental assistance in the planning and execution of their murders."

[16] When the case was heard before the High Court, the appellant sought to introduce evidence that, taken together, he maintained would give rise to the *Brecknell* obligation to revive the investigation into his father's death. In, the European Court of Human Rights ("ECHR") stated that the State's investigative obligation under the procedural limb of article 2 ECHR may be revived:

> "... where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing" (at para [71]).

[17] All parties advanced detailed submissions on the applicability of *Brecknell* to the present case. The particulars of these arguments will be addressed further

below. It is only necessary at this stage to be aware of the test that the appellant seeks to meet which flows from para [71] of *Brecknell*.

[18] The evidence brought forward by the appellant was set out by the judge at first instance (PSNI judgment, paras [4]-[19]). However, as the evidential claims go to the very heart of this appeal, it is necessary to recite this evidence once more which falls under a number of limbs.

[19] The first limb may be characterised as the alleged failures of the police to take preventative measures before the murders on 26 October 1993. This argument draws upon the context of the time when the murders occurred as follows. The Kennedy Way murders occurred three days after Frizzell's Fish Shop was targeted by the Provisional IRA. Many of the funerals for the victims of that attack were taking place on the day of the shooting. There were valid fears that attacks could be mounted as reprisals. So palpable was the fear of reprisals in the community that the appellant recounts in his grounding affidavit that his mother pleaded with his father not to go into work the next day.

[20] In this context, the appellant relies on open-source material to build a narrative linking Johnny Adair, the convicted loyalist terrorist, to his father's murder. In particular, the appellant builds on the claim made in the book, "*Mad Dog: The Rise and Fall of Johnny Adair and 'C Company'*", that following the explosion at Frizzell's Fish Shop, Adair told an RUC constable that he was "away to plan a mass murder." The appellant maintains that Adair had close connections to the security forces. Hence the argument goes that the apparent link between Adair and the Kennedy Way shootings were not investigated by the RUC or the PSNI at any stage. The appellant relatedly made the claim that the VZ-58 rifle used in the attack was imported into Northern Ireland from Lebanon by the loyalist paramilitary, Brian Nelson.

[21] A second limb which the appellant pursues is that a threat made by the UFF forewarned the police about the Kennedy Way attack. In this regard it is correct that on 25 October 1993, the day before the murder, a telephone warning was issued to Belfast City Council. An internal broadcast by the RUC (compiled by the HET) confirms that there was a "general threat" made against "Catholic depots." From this information, the appellant draws the conclusion that the warning was targeted at the Kennedy Way Depot where his father worked. He does so for two reasons. First, Kennedy Way was the only depot in the area which was staffed solely by Catholic employees. Second, Kennedy Way was also the only depot which had not closed as a mark of respect for the victims of the IRA attack on the Frizzell Fish Shop.

[22] For these two reasons, the appellant queries the apparent absence of the usual "ring of steel" around Kennedy Way. The ring of steel was an army vehicle checkpoint ("VCP") that was routinely stationed at Lower Kennedy Way. The appellant states that he was told by survivors of the Kennedy Way attack that the VCP was not in operation on the day of the murder. The appellant states that this

was confirmed by the HET when compiling the RSR for Mark Rodgers' family. The report cites an army document detailing a record of VCPs in the area on the night before the attack.

[23] The logs in question were made available to the court. In many places the document is undecipherable, however, it clearly states that a VCP was stationed on Black's Road nearby from 05:45 hrs until 06:30 hrs. The remarks attached to the log records:

> "VCPs, Main Routes, Attention to Private Estates and building sites."

[24] It is the appellant's case that the absence of an army checkpoint indicated collusive behaviour between loyalist paramilitaries and the RUC. In advancing this point, Mr Southey highlighted the following information. First, he observed that the RSR was, on the face of it, content that the VCP in and around Kennedy Way had been "stood down about one hour before the gunmen arrived at the depot", but that they were "unable to explain the rationale for the setting up and standing down of a VCP in Kennedy Way on the morning that Mark [Rodgers] was murdered" (HET RSR, pg 411-12). It was said that the HET therefore at least shared the concerns mounted by Mark Rodgers' family. Second, the RSR further recorded details of the RUC interview of Thomas Beggs, who alleged that he was told there would be "no checkpoints" before the attack (HET RSR, pg 400).

[25] In support of this point a third limb of argument was raised based upon a different PONI report in relation to the murder of Damien Walsh. Mr Southey cross-referenced the allegation made by the appellant with the findings of the PONI Walsh report. That report found significant failings of the RUC in the police investigation into the murder of Damien Walsh at the Dairy Farm on 25 March 1993, in which surveillance operations were also withdrawn before a loyalist attack. In reaching that conclusion, the Ombudsman observed:

> "11.24 My investigation also viewed intelligence obtained by police, following the murder, stating that the UDA/UFF were provided with information by a police officer and 'British Intelligence' which informed their attack at the Dairy Farm. This intelligence did not identify any police officer or member of the security forces who was providing the information.
> […]
>
> "11.68 I am of the view that police ought to have considered resuming the surveillance operation during this three-day period given the developing intelligence picture, the attacks that were taking place, and risk of further attacks on the nationalist community. I have

> found no evidence that a risk assessment took place or that any consideration of these heightened risks was undertaken. This related to both the three-day period prior to Damien's murder or following it when the security force operation at the Dairy Farm had concluded, therefore freeing police surveillance resources to be deployed elsewhere. Surveillance on 'C' Company did not resume until 30 March 1993."

[26] The appellant therefore makes the point by analogy that the lack of surveillance along Kennedy Way could have materially contributed to the attack being carried out. This it is said was recognised, in the Rodgers RSR:

> "One of the reasons why the attack took place on that day may be because those who planned and carried out the attack were aware that there was no checkpoint in Kennedy Way. […] It is possible that those who planned the attack may have earlier travelled the route taken by the gunmen to check for the presence of VCPs before giving the final orders to carry out the attack." (Rodgers RSR, CB/pg428-429).

[27] The appellant's case is there that, given the recognised heightened tensions in Belfast at the time, and the real fear of loyalist reprisals, there was an increased need to have effective checkpoints in areas that could have been targeted. This obligation is amplified by the warning issued by the UFF against "Catholic depots" the day before the attack. It should be recognised, and indeed this point was stressed by Mr Southey, that there may well be an innocent explanation for the absence of a VCP on the morning of the attack. However, it is the appellant's view that the lack of a VCP presence adds into the analysis of whether the evidence before the court is sufficient to cross the *Brecknell* threshold.

[28] If the first aspect of the appellant's claim is based on the RUC's alleged failings before his father's murder, the second aspect of the claim is the alleged failures in the RUC's investigation. To this extent, the appellant avers in his grounding affidavit that, in the course of the initial investigation, Detective Superintendent Sheehy informed the family that the RUC knew who was responsible for the murders, but that they would not charge them as they were under investigation in a larger case. There is no record of that investigation resulting in any conviction, leading the appellant to believe that the RUC abandoned the family's hope for redress.

[29] The appellant also relies on a document produced in the context of civil litigation against the PSNI that is proceedings separate to this appeal. There was no dispute as to the admission of this evidence by the respondents. The document is an

RUC file marked "No Downward Dissemination." It identifies the VZ58 rifle used in the Kennedy Way shooting and further names three suspects.

[30] Mr Southey accepted that the original investigating officers were made aware of this NDD document. However, he maintained that the document is relevant because there is material indicating that NDDs were used by the RUC when there was a concern about the need to protect informants. Here, Mr Southey referred to a footnote contained within the PONI Loughinisland report, which contextualises the apparent use of NDDs in relation to the RUC's response to the Loughinisland shootings on 18 June 1994. The footnote reads:

> "Documents detailing sensitive intelligence, often relating to the identities of persons suspected to have been responsible for murders or other serious crime, were often marked 'NDD' (No Downward Dissemination) by RUC Special Branch (SB). Intelligence marked as NDD was normally only seen by senior officers of at least the level of Detective Chief Superintendent. The material was not forwarded to Divisional CID for further action. This discipline was designed to protect the source of the information by ensuring a process of consultation was undertaken at a senior level between SB and CID before arrests informed by the intelligence were made."

[31] The appellant therefore avers that the prospect of informants being present in the Kennedy Way murders was not suitably investigated. It is further the appellant's case that the use of NDD speaks to the collusive behaviour between loyalist paramilitaries and the RUC.

[32] Although accepted of less import Mr Southey also raises the point that in 2008 the evidence included a balaclava and a glove or gloves. Subsequently the balaclava has disappeared, and the other items are no longer in storage. Thus, this is raised as a further failing.

[33] The final aspect of the appellant's evidence also relied on reports published by PONI into similar loyalist attacks and the failings of the RUC when investigating those attacks. These reports – referred to here as PONI Walsh and PONI South Belfast respectively – are said to demonstrate three points in the appellant's favour. First, they speak to the specific allegations about the C Company and its relationship with the security forces. Second, the reports demonstrate what is now known about alleged collusive behaviour in the Northern Irish police forces, providing crucial context about the credibility of concerns in the present appeal. Third, given what has been said in the caselaw regarding the *Brecknell* threshold, the reports demonstrate what might yet be discovered from future investigations.

[34] The PONI Walsh report specifically covered the withdrawal of surveillance. The concern in PONI Walsh was that "the UDA/UFF were provided with information by a police officer and 'British Intelligence' which informed their attack at the Dairy Farm" (PONI Walsh, para 11.24). This concern fed into the findings made by the Ombudsman that there had been collusive behaviour between C Company and the RUC.

[35] The PONI South Belfast report investigated the police handling of loyalist paramilitary murders in South Belfast in the period 1990-1998. While the Kennedy Way shootings occurred in West Belfast, the appellant relies on the report to demonstrate the similar failure to act against informants. PONI South Belfast found that informants were inadequately managed by the RUC during this period and that informants continued to be used even though they were actively involved in serious criminality, including murder (PONI South Belfast report para 18.142 (vi)).

[36] The appellant argues that these reports taken together bear remarkable similarities to the shooting at Kennedy Way and the subsequent investigation. It is the appellant's position that the findings of the PONI reports translate to the present case and raise plausible and credible evidence that demands investigative revival.

[37] As a result of all of the matters referenced above, the appellant maintains that when considering all of the evidence together, the *Brecknell* revival obligation has been met.

[38] The PSNI respondent's evidence was summarised by the trial judge at paras [20]-[35] of the PSNI judgment. The evidence is comprised of affidavits sworn by senior PSNI figures, with exhibit evidence attached thereto. The PSNI avers that the material they have produced fundamentally disputes the appellant's claim that there is plausible or credible evidence meriting the revival of the investigation into the murders of James Cameron and Mark Rodgers.

[39] The first PSNI affidavit was sworn by Temporary Detective Superintendent ("TDS") Ian Harrison. At paragraph 18 of that affidavit, TDS Harrison confirms the PSNI's view that the initial investigation "was comprehensive in that it led to the prosecution, conviction and imprisonment of two people […] all avenues of investigation which might reasonably have been pursued, were so pursued."

[40] As set out by Humphreys J in the PSNI judgment (para [22]), the following investigative steps were identified by TDS Harrison:

> "(i) Three crime scenes were identified and examined, namely Kennedy Way itself, Southport Court where the gunmen's vehicle was hijacked and Donegall Parade where the vehicle was abandoned;

(ii) Senior police officers and SOCOs attended Kennedy Way and evidence in the form of ammunition, bullet fragments, debris, tape lifts and fingerprints was removed from the scene;

(iii) The vehicle was the subject of specialist examination;

(iv) All scenes were photographed and mapped;

(v) A series of case conferences was held between 26 October and 4 November to co-ordinate the team of detectives assigned to the investigation;

(vi) House to house visits were carried out at the three scenes and a number of witnesses identified;

(vii) A total of 104 statements were taken from non-police witnesses;

(viii) 63 police officers provided statements;

(ix) 27 houses in various parts of Belfast were searched and various items seized including clothing, shoes, books and a car. All items of evidence were submitted to the Forensic Science Laboratory for analysis;

(x) Fingerprints obtained were checked against a list of 78 persons believed to be associated with the UFF;

(xi) Security cameras along the route taken by the gunmen were checked;

(xii) More than 60 suspects were interviewed, 16 of which were arrested and questioned about their suspected involvement in the murders, two of these were the suspected gunmen, ciphered as AB and CD. AB was questioned 39 times and CD 50 times. Neither made any admissions nor was there any forensic evidence to link them to the crimes."

[41] TDS Harrison further addressed the specific complaints raised by the appellant about the initial investigation in his grounding affidavit. As to the comments allegedly made by DS Sheehy in the course of the initial investigation,

TDS Harrison avers that nothing in the case papers supported those comments, with the consequence that the Legacy Investigation Branch ("LIB") is not in a position to comment as to any allegations made. It was further confirmed that DS Sheehy is now deceased. Secondly, TDS Harrison states that no allegations of collusion were made at the time of the investigation. In any event, TDS Harrison points to the successful conviction of two persons and avers that he has not identified "any evidence to support the contention that RUC officers provided assistance to or otherwise colluded in the murder of these innocent civilians." Third, TDS Harrison confirms that the allegation that gunmen were allowed to pass through VCP checkpoints are not supported by any documentation.

[42] TDS Harrison then addressed the alleged failures of the HET process raised by the appellant, thereby confirming that the PSNI no longer had possession of the balaclava. TDS Harrison disputed, however, the evidential value that the balaclava would hold in any case, citing the lack of DNA analysis techniques available at the time of the original investigation.

[43] TDS Harrison further set out the conclusions of the HET's RSR into the death of Mark Rodgers. The RSR concluded:

> "(i) The original RUC investigation was thorough, well managed and resourced with all appropriate lines of enquiry being pursued;
>
> (ii) There was an absence of identification or forensic evidence which could have led to the convictions of others;
>
> (iii) There were no new lines of inquiry or investigative opportunities identified." (As summarised by the trial judge, PSNI judgment para [31]).

[44] The issue of the NDD document raised by the appellant was addressed in the affidavits of Detective Superintendent Stephen Wright and Temporary Detective Superintendent Nicola Marshall. DS Wright confirmed the accuracy of the information provided to the appellant in this regard. TDS Marshall further exhibited a handwritten note from a conference that took place the day after the Kennedy Way shooting. A typed copy of the note was provided. The note confirmed that the names of the suspects had been disseminated to the investigators and that the names be retained on the HOLMES investigation database. In addition, it was averred that there was no intelligence in advance of the attack.

[45] Having set out the factual circumstances and legal principles in play, the trial judge asked himself two questions in relation to article 2 ECHR: (1) whether there is plausible or credible material which meets the *Brecknell* test; and (2) if the *Brecknell* test is met, whether the 'genuine connection' test is met on the facts of this case.

[46] Regarding the first question, the trial judge followed the approach of the Supreme Court in *Re McQuillan, McGuigan and McKenna* [2021] UKSC 55 which was then the most recent judgment, *Dalton* having been delivered after his judgment.

[47] We glean the trial judge's approach from paras [44] and [45] of the PSNI judgment which must be read as a whole:

> "[44] The Brecknell test is only met when there is new material which is plausible or credible and which is relevant to the identification and eventual prosecution of a perpetrator. In *McGuigan & McKenna's Applications*, the Hooded Men cases heard at the same time as *McQuillan*, the Supreme Court considered a volume of material which had come into existence post-October 2000, and which provided detail in relation to the interrogation techniques used and the identification of those responsible. Lord Hodge stated:
>
> > 'What is critical here is not the inconclusive nature of earlier investigations but whether there exists such weighty and compelling new evidence as to require a fresh investigation. In our view, the new material does not add significantly to the state of knowledge in relation to this matter as it stood in 1978 nor does it alter its substance.' [para 128]
>
> [45] The Supreme Court's language is indicative of the fact that the Brecknell test will not be lightly satisfied. In *Re McEvoy's Application* [2022] NIKB 10, I held that the test was met in circumstances where the new material identified emerged from a PONI report which directly related to the subject death and from a documentary film which identified evidence relating to those responsible for the unlawful death. On the basis of the evidence adduced, I concluded that there were "real concerns about the collusive behaviour of those investigating the attack" [para 30(v)] and that it "casts real doubt on the ability of the original RUC investigation to bring those responsible to justice."

As will be discussed further below, the appellant seriously disputes the trial judge's comment at para [45] that the *Brecknell* test "will not be lightly satisfied." And maintains that by virtue of this he did not apply the correct legal test.

[48] The trial judge then turned to the appellant's evidence. He distinguished the present case from *Re McEvoy's Application*, where he found that *Brecknell* was triggered as the new evidence related directly to the murder in that instance.

[49] The trial judge proceeded to make six key findings in reaching his outcome in the present case. We recite these as follows drawing from para [46] of the judgment.

> "(i) The state of knowledge of potential collusion could not be a *Brecknell* trigger – it alone does not constitute a plausible or credible piece of evidence relevant to the identification or prosecution of perpetrators. If it were, it would potentially mean that article 2 is revived in every case of killing by loyalist paramilitaries from 1990 to 2000;
>
> (ii) The fact that preventative measures (in the form of surveillance on C company) may have been removed in March 1993 cannot be said to have any evidential impact on the investigation into these killings. It does not have any relevance to the identification or prosecution of the perpetrators. Significantly, the respondent's evidence is that there was no intelligence received prior to these shootings nor is there any evidence that a VCP was moved from this vicinity prior to the attack;
>
> (iii) The general claim of a failure to alert the victims of loyalist violence falls into the same category;
>
> (iv) A full account has been provided by the respondent in relation to the one intelligence document marked 'NDD.' The uncontroverted evidence is that the information contained therein was disseminated to detectives and the individuals were treated as suspects. There is no evidence in this case at all that informers were involved;
>
> (v) The fact that there was no contemporaneous investigation into allegations of collusion is explained by the lack of any such complaint at the relevant time. A generalised claim that collusion did occur, read across from other investigations, cannot satisfy the requirements of *Brecknell*;
>
> (vi) The claim that there is therefore real doubt around the ability of the original investigation to bring the perpetrators to justice faces the formidable obstacle that two individuals were convicted, one of whom pleaded

> guilty to the two murders. The investigation was therefore manifestly capable of bringing offenders to justice, even if evidence could not be obtained to bring some of the perpetrators before the courts."
> (PSNI judgment, para [46])

[50] Further the trial judge accepted the PSNI respondent's argument that the balaclava, if found, would not generate evidence to "sustain a claim of collusion" (PSNI judgment, para [47]). Similarly, he dismissed the allegation that the VZ58 rifle used in the murder had been imported from Lebanon by Brian Nelson. As such, on an overall analysis, the judge determined that the criteria for the *Brecknell* test had not been met.

[51] Although there was strictly no need to then engage in an analysis of the genuine connection test, the judge opted to address the issue in any event. It was accepted that the first limb of the genuine connection test was met: that the murder occurred within the "reasonably short period of time" before the critical date of the entry into force of the Human Rights Act 1998 (citing *Janowiec v Russia* (2014) 58 EHRR 30 and *McQuillan*). The issue arose within the second limb: that "a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force" (*Janowiec*, para [148]).

[52] The judge held that the genuine connection test was not met. There was, he said, a "qualitative difference between specific evidence which forms the basis for a new aspect of an investigation and general unsubstantiated allegations which derive principally from other cases" (PSNI judgment, para [55]). As such, the unsubstantiated allegations could not amount to a major part of the investigation.

[53] The judge next dealt with the legitimate expectation challenge. In this regard, he held that the appropriate test was whether the public authority (in this case the PSNI) had given a promise in "clear, unambiguous terms which is devoid of relevant qualification" (citing *Re Finucane's Application* [2019] NI 292). The trial judge found that on the evidence, no such undertaking was made (PSNI judgment para [60]).

Our conclusions

Ground 1: Brecknell revival?

[54] This ground was the primary focus of this appeal and so we deal with it in some detail in this judgment. We begin by tracing all relevant domestic and European jurisprudence. The terms of article 2 read 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."

[55] As is well-known, article 2 ECHR contains substantive and procedural obligations. When it is engaged, the State must ensure that an effective investigation is carried out into deaths resulting from the unlawful use of force (*McCann v United Kingdom*, paras [157]-[164]). This investigation must be prompt and, in cases where the involvement of the State has been alleged, be carried out with the necessary level of independence (*Tunç v Turkey Application no. 24014/05* paras [220]-[225]; *McQuillan*, paras [193]-[200]). In this appeal, the issue arising from article 2 concerns its application before the Convention entered into force in the United Kingdom on 2 October 2000.

[56] In *Brecknell*, the European Court of Human Rights held that, in certain circumstances, the obligation to investigate unlawful deaths may, in certain circumstances 'revive.' The court explained its finding in the following way:

> "69. The court would also comment that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.
>
> 70. The court would, however, draw attention to the following considerations. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be

pursued further. Both parties have suggested possible tests. The court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely-differing situations that might arise. It is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to the Contracting Parties to provide further protection or guarantees. For example, contrary to the applicant's assertion, if Article 2 does not impose the obligation to pursue an investigation into an incident, the fact that the State chooses to pursue some form of inquiry does not thereby have the effect of imposing Article 2 standards on the proceedings. Lastly, bearing in mind the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (*Osman v the United Kingdom*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, § 116).

71. With those considerations in mind, the court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The court would further underline that, in light of the primary purpose of any renewed investigative efforts (see paragraph 65 above), the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use

> powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results. (*Osman*, cited above, § 121)." [emphasis added]

The court continued at para [72]:

> "Where the assertion or new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged (see, for the importance of this criterion from the very earliest stage of the procedure, *Ramsahai and Others v the Netherlands* [GC], no. 52391/99, §§. 325, 333-341, ECHR 2007...)."

[57] The Strasbourg Court had cause to consider the *Brecknell* ruling in *Šilih v Slovenia* (2009) 49 EHRR 37 and *Janowiec*. Although both cases primarily concerned the application of the "genuine connection" and "Convention values" tests, it is clear that *Brecknell* bore into the court's analysis. In particular, the Grand Chamber provided guidance in *Šilih* at paras [142]-[144]:

> "142. The court reiterates at the outset that the procedural obligation to investigate under article 2 is not a procedure of redress in respect of an alleged violation of the right to life that may have occurred before the critical date. The alleged violation of the procedural obligation consists in the lack of an effective investigation; the procedural obligation has its own distinct scope of application and operates independently from the substantive limb of article 2. Accordingly, the Court's temporal jurisdiction extends to those procedural acts and omissions which took place or ought to have taken place in the period after the entry into force of the Convention in respect of the respondent Government.
>
> 143. The court further considers that the reference to 'procedural acts' must be understood in the sense inherent in the procedural obligation under article 2 or, as the case may be, article 3 of the Convention, namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party. This definition operates to the exclusion of

other types of inquiries that may be carried out for other purposes, such as establishing a historical truth.

144. The mention of 'omissions' refers to a situation where no investigation, or only insignificant procedural steps, have been carried out, but where it is alleged that an effective investigation ought to have taken place. Such an obligation on the part of the authorities to take investigative measures may be triggered when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible. Should new material emerge in the post-entry into force period, and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the court will have to satisfy itself that the respondent State has discharged its procedural obligation under article 2 in a manner compatible with the principles enunciated in its case law. However, if the triggering event lies outside the court's jurisdiction ratione temporis, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test, discussed below, has been met."

As Lord Hodge subsequently observed in *McQuillan*:

> "137. […] It is clear that the Grand Chamber had the investigative obligation revival principle in *Brecknell* directly in mind when writing this passage and that in the last sentence of para 144 it specifically intended to limit the operation of that principle in relation to deaths occurring before the critical date by reference to the "genuine connection" test and the "Convention values" test."

[58] Moreover, the court in *Janowiec* observed that:

> "144. […] Should new material emerge in the post entry into force period, and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the Court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law."

[59] There has been considerable discussion of the *Brecknell* revival test in the domestic caselaw. The appellant cited Lord Kerr's obiter comments on *Brecknell* in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355. In that case, the majority of the Supreme Court held that there was no article 2 obligation into the killing of 24 unarmed civilians in Selangor, Malaysia in December 1948. Although the court held that there was no article 2 obligation incumbent on the State in that case, Lord Kerr suggested that had there been, the *Brecknell* test would have been met, suggesting that "it is not necessary that the new material take the form of hard evidence. Allegations, provided they are credible and have the potential to undermine earlier findings, will suffice" (*Keyu*, para [265]). These obiter comments are set out for completeness' sake with the caveat that:

(i) Lord Neuberger did not find any reason to rely on *Brecknell* in his judgment; and

(ii) when the case came before the Strasbourg Court, the case was ruled inadmissible as it was significantly out of time.

[60] Similarly, in *Re Finucane*, Lord Kerr observed that:

> "114. […] the Grand Chamber in *Brecknell* was careful to point out that not every allegation, however trivial, would revive the duty to investigate. But it was equally emphatic that it behoved state authorities to be sensitive to any information or material which might cast doubt on conclusions reached on foot of earlier investigations. Significantly, moreover, it said that an 'earlier inconclusive investigation' should be pursued further in order to meet the procedural obligation under article 2."

This, in turn, led Lord Kerr to consider that there was sufficient evidence to merit a revival into the investigation of the murder of Patrick Finucane on 12 February 1989.

[61] In *McQuillan* the Supreme Court referred to the "weighty and compelling evidence" formulation of the ECtHR in *Janowiec*. At para [128], Lord Hodge held:

> "The new material undoubtedly provides a considerable amount of detail in relation to the authorisation of the five techniques which was not previously publicly available. In particular, it identifies the part played by individual Ministers. It also casts light on the policy decision by the UK Government not to pursue criminal or disciplinary proceedings against individuals. However, that is not sufficient to give rise to an investigative obligation. What is critical here is not the inconclusive nature of earlier investigations but whether there now exists such weighty

and compelling new evidence as to require a fresh investigation. In our view, the new material does not add significantly to the state of knowledge in relation to this matter as it stood in 1978 nor does it alter its substance. As the Court of Appeal put it:

> '105. […] The omission of any adequate investigation seeking to establish criminal responsibility in respect of the unlawful treatment of those subjected to the five techniques has been publicly recognised since at least 1978 and although the recent focus on the additional material in the National Archive emphasises the proper sense of injustice felt by those who were subjected to the techniques that material does not constitute new material raising reasons for the conduct of an adequate investigation beyond those that have been known for a long time.
>
> 106. The jurisprudence of the Convention does not permit the simple application of new law to past facts. …'"

[62] It is the above passage in particular that led Humphreys J to conclude that the *Brecknell* test "will not be lightly satisfied."

[63] The final case on this matter to be considered is the Supreme Court's recent decision in *Re Rosaleen Dalton's Application for Judicial Review* [2023] UKSC 36. *Dalton* confirmed that *Brecknell* could extend to "non-perpetrator cases" (per Lord Hodge, Lord Sales and Lady Rose at para [178], Lord Leggatt at para [216] and Lord Burrows and Dame Siobhan Keegan at para [316]). Lord Leggatt further warned against taking "too restrictive a view" on the practical effect of the *Brecknell* principle. As such he said:

> "217. […] What is triggered by a new, credible allegation, piece of evidence or item of information is not the revival of an old obligation which had ceased but the creation of a new obligation to investigate the allegation or material (in conjunction with any relevant information previously available). The fact that the subject of the new allegation or material has not been investigated before cannot be a good reason why no investigation should take place. To the contrary, the absence of any earlier investigation of the matter is part of what triggers an investigative duty."

[64] As to the question to be asked in relation to *Brecknell*, Lord Leggatt was of the view that it is not whether there had been a complete or comprehensive inquiry at the original time, but whether "there were further investigative steps that it was reasonable to take, having regard to the passage of time since the relevant events occurred." (para [225])

[65] This view was shared by Lord Hodge, Lord Sales and Lady Rose, who at paras [189] and [190] observed that:

> "[…] It is not the case that, where new plausible or credible information emerges, there is a complete revival of the article 2 procedural obligation with the same force and effect as it would have had if the death had only just occurred.
>
> 190. Rather, there is a spectrum of obligation which may apply regarding further inquiry. If new information bearing on the circumstances of a death emerges, there should be some process of evaluation to see if it is plausible or credible. If it is found to be plausible or credible to a sufficient degree, a further evaluation is required to see whether a renewed investigation in the light of that information would be capable of serving any or all of the objectives which an article 2 investigation is directed towards and whether it is reasonable to pursue those objectives. This is likely to require taking into account the resources available, current calls upon those resources and the degree to which such objectives are likely to be achieved."

[66] By-and-large, the court can at this stage agree with the PSNI respondent's submission that *Dalton* "breaks no new ground" with regard to the *Brecknell* principle which it applied. The only additional matter is that *Dalton* does define ambit as including non-perpetrators as well as perpetrators. The guidance outlined in *Dalton* is useful in terms of application of the test in domestic law to the facts of a particular case.

[67] The central argument of the appellant was that the trial judge erred in concluding that the *Brecknell* test "will not be lightly satisfied." The appellant argued that a "generalist" approach to *Brecknell* ought to be adopted. As such the appellant states that para [69] of the *Brecknell* judgment is a warning against an overly prescriptive approach to revival. Further, it is said that the language used by the court in *Brecknell* at para [71] is indicative of a test that is "fairly easy" to meet. The appellant further reiterated that the domestic authorities point to a similarly broad approach to *Brecknell*. Mr Southey referred to *Keyu* and *Finucane*, as set out

above, arguing that these cases spell out how the court should consider application of *Brecknell* in practice. To that we add that *Dalton* is now the most recent authority of the Supreme Court which should be applied.

[68] The key point, applying *Dalton*, is whether there is a prospect of furthering the objectives of article 2 in circumstances where a previous investigation is incomplete. In this regard it is best to utilise the language of *Brecknell*, para [71] which was applied by the Supreme Court. To that end, what is required for an obligation to investigate to arise is a credible and plausible allegation and that when assessing the significance of new material, the court must be sensitive to the extent to which there may be doubt about previous investigations (applying *Finucane* and *Dalton*). The previous investigations need not be shown to be clearly wrong.

[69] The gravamen of the appellant's case is that the approach employed by Humphreys J was too stringent. We do not accept that argument. First, it is wrong to rely on one phrase in the judgment at para [45] where the judge quotes from *McQuillan* which in turn quotes from *Janowiec* para [144]. To be fair to the judge he did not have the benefit of *Dalton* when he was deciding the case. In addition, the judge was aware of the *Brecknell* test as he specifically referenced it at para [44].

[70] The requirements of para [70] of *Brecknell* have been consistently applied by our courts. In addition, as *Brecknell* makes clear, it is not any assertion or allegation which triggers an obligation. We are not attracted to the appellant's articulation that it is "fairly easy" to meet the test. It is more accurate to say that that the test will only be met where there is plausible and credible evidence upon which a new round of proceedings is justified. That involves a qualitative analysis in each case. Thus, whilst we may have used different language from the judge the appellant's specific claim that the judge erred because he said the *Brecknell* test "will not be lightly satisfied" in one part of the judgment cannot succeed on an overall view of the judgment.

[71] Finally, on this point we return to the fact that the judicial exercise is to conduct an evaluation of fact to decide if the legal test is met. There is no doubt that the trial judge has conducted this exercise comprehensively. When the judgment is read as a whole, we do not think, that he has left any material fact out of account.

[72] The next question for this court is whether the factual evaluation made by the trial judge is wrong. Having considered this question carefully we are not satisfied that the trial judge has fallen into error in his factual evaluation. That is because of the factors he refers to at paras [46]-[49] of the judgment which to our mind are core to an evaluation of this case. Specifically, we think that the judge was entirely correct to find that the state of knowledge of potential collusion in Northern Ireland cannot found a valid claim of revival of the investigative obligation itself otherwise any factual circumstance could be captured involving killings by loyalist paramilitaries between 1990-2000. As the trial judge said, a generalised claim that collusion may have occurred in other cases cannot be read across to meet the test in

this specific case. Similarly, the trial judge could not rely on a book recounting claims of what actions individuals might take following the Shankill Road bombing.

[73] In addition, we think that the PONI reports on Walsh and Loughinisland are highly fact specific and cannot be read across to support a revival of the investigative obligation in this case. The submissions made by Mr McKay for PONI are convincing on this issue. He rightly points out that there are inherent dangers in selecting small extracts from a Public Statement without looking at a report as a whole. With respect to the Damien Walsh report, that concerned an investigation which took place in very different circumstances. The conclusion relating to collusive behaviours did not constitute a determination nor demonstrate collusive behaviours involving the security forces and a terrorist cell. The shooting at the Heights Bar Loughinisland was carried out by the UVF which is a different terrorist organisation to that who took responsibility for Mr Cameron's death.

[74] Further, examination of the VCP logs clearly do not prove a point that surveillance was withdrawn. They are simply a record of checkpoints. The logs highlight that the VCP was due to end at 06:30 hrs in any case. This material does not support a claim that there was a deliberate lifting of checkpoints to allow the killers of Mr Cameron a free passage to the depot. There is simply no credible evidence to substantiate a claim that the VCP was moved from the vicinity prior to the attack.

[75] The NDD document has been well explained in evidence by both the PSNI and PONI and does not amount to credible evidence that an informer was involved. None of the other evidence is plausible and credible to meet the *Brecknell* test. As Mr McKay has stated the use of the NDD denomination can have a number of explanations.

[76] As the trial judge records at para [47] there was an admitted failing in the proper securing of evidence in the form of the balaclava at some stage post 1994. However, we agree with him that there is no suggestion that this piece of real evidence would generate some basis to sustain a claim of collusion and cannot therefore assist the appellant's case. Equally, as the trial judge states at para [48] "it was known at the time of the murders that a VZ58 was used and that these weapons were imported into Northern Ireland by loyalist paramilitaries. The alleged involvement of Brian Nelson is without any evidential support." This is not 'new' material which came into being after the critical date. None of these assertions can avail the appellant.

[77] Overall, we find the PSNI respondent's evidence and arguments to be persuasive on this core ground of appeal. Mr McGleenan compellingly highlighted the circumstantial nature of much of the evidence which the appellant relies upon, which he argued are mainly unsupported conclusions. The PSNI respondent urged the court to accept the evidence provided by the PSNI, which, they said, demonstrated that there was no credible evidence of collusion. In our view this is a

valid submission. Accordingly, we do not consider that the judge's overall conclusion is wrong in relation to the PSNI actions in this case and in relation to PONI.

[78] In any event, for the avoidance of doubt, this court has conducted its own check with the benefit of the guidance in *Dalton* which the trial judge did not have. We apply the guidance from that judgment that *Brecknell* may apply to non-perpetrator cases and that the language of *Brecknell* at para [71] should be utilised against the facts of any case. Having undertaken this exercise ourselves we do not find plausible or credible evidence of collusion which would warrant a revival of the investigative obligation in this case.

[79] Whilst in this case the appellant with the assistance of his solicitor and counsel has been assiduous in putting forward evidence of collusion in other cases and other circumstances before the court, the exercise does not aid the appellant in his quest for a further investigation of the circumstances of his father's death in this judicial review.

Ground 2: Genuine connection

[80] We can deal with this issue in shorter compass. The trial judge correctly identified the two-part nature of the test, requiring both that: (a) the death must fall within the "reasonably short period of time" alluded to in *Janowiec* and *McQuillan*; and now *Dalton*; and (b) a major part of the investigation must have been carried out, or ought to have been carried out, after the critical date namely the passing into law of the Human Rights Act 1998 on 2 October 2000. The temporal limit is not in issue. However, the second limb of the genuine connection case is in play.

[81] The trial judge noted the appellant's reliance upon the facts in *McQuillan*, regarding the discovery of military logs which supported the view that there was army involvement in her death. These would have satisfied the genuine connection test had Ms Smyth's death fallen within temporal range. The judge correctly noted at para [55] that the "qualitative difference between specific evidence which forms the basis for a new aspect of an investigation (as applied in *McQuillan*) and general unsubstantiated allegations which derive principally from other cases (as applies in this case)." The trial judge concluded that the latter could not amount to a major part of the investigation, and that the genuine connection test could not be satisfied on the facts. This was reinforced by the RSR, which indicated that there were "no other lines of inquiry or investigative opportunities identified." We agree with this conclusion.

Ground 3: Legitimate expectation

[82] Again, we need not analyse this ground to any great extent. The trial judge dealt with the legitimate expectation argument regarding the HET report at paras [58]-[63] of his judgment. The legal test derives from *Re Finucane's Application* [2019]

NI 292 which the judge applied. He identified the core requirement that "a legitimate expectation only arises when a public authority gives an undertaking or promise in clear, unambiguous terms which is devoid of relevant qualification." Disposing of the argument, at para [60] he concluded on the evidence that "… no such undertaking was given to the applicant or his family." Mr Southey could not convince us otherwise, and so this ground of appeal must also fail.

Disposal

[83] We are sympathetic to the family of the appellant who have suffered, as many families have suffered, because of the Troubles and who are keen to obtain as much information as possible regarding the tragic death of their loved one. However, we must apply the law when assessing whether there should be a revival of the investigative obligation. Having done so we must reject the appellant's arguments and affirm the decision of the trial judge. Accordingly, the appeal is dismissed.