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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DESMOND McCABE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Hugh Southey KC & Sean Devine (instructed by KRW Law) for the Applicant
Philip Henry KC & Ben Thompson (instructed by PSNI Legal Services) for the first Proposed Respondent
Tony McGleenan KC & Philip McAteer (instructed by the Departmental Solicitor's Office) for the second Proposed Respondent

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HUMPHREYS J

Introduction

[1] The applicant was the victim of an attempted murder attack on 14 November 1990, carried out by the Provisional IRA. He issued civil proceedings on 29 November 2017 against the Chief Constable of the Police Service of Northern Ireland ('CCPSNI'), the Ministry of Defence and Peter Keeley seeking damages for the personal injuries sustained in the attack, alleging negligence, conspiracy, assault, battery, trespass to the person and misfeasance in public office.

[2] By this application for leave to apply for judicial review, the applicant seeks to challenge a decision made by the CCPSNI, announced on 21 March 2025, whereby all available resources in legacy related casework were dedicated to the Omagh Bomb Inquiry ('OBI') and no sensitive work would be carried out for a period of up to six months in any other legacy related matters.

[3] More generally, the applicant challenges the failure, on the part of the Department of Justice ('DOJ') to provide the necessary resources to progress legacy litigation which requires consideration of sensitive material.

[4] The proposed respondents are the CCPSNI and the DOJ.

The civil proceedings

[5] The evidence reveals the following chronology of events in relation to the civil action brought by the applicant:

Date	**Event**
29 November 2017	Writ issued
26 November 2018	Memorandum of Appearance entered
4 August 2020	Statement of Claim served
6 July 2022	Defence served
24 March 2022	Section 6 JSA 2013 declaration made.

[6] This action is linked to a number of others by virtue of the alleged involvement of Mr Keeley, who is said to have been a British agent within the Provisional IRA who carried out a number of gun attacks.

[7] Since the making of the section 6 declaration, the court has been engaged in closed material proceedings ('CMP') in relation to a lead case, that of Peter McCabe Senior, the applicant's father. It was in the context of the ongoing work within the CMP that the CCPSNI announced his decision.

The decision to pause

[8] Counsel on behalf of the CCPSNI set out in a position paper that a significant and resource intensive request from the OBI had been received which required consideration of sensitive and non-sensitive material arising out of 32 dissident republican attacks in the 1990s. It was explained that this necessitated a very difficult decision relating to the allocation of resources. It was decided:

> "Therefore, starting on 10 March 2025, all available researchers who have the necessary skills and credentials to undertake sensitive research of the kind required will work on the Omagh Bombing Inquiry Rule 9 request. This will be for a period up to approximately six months. During this time, no sensitive research will be conducted by the PSNI in any other court-based work."

[9] The position paper goes on to say that PSNI simply do not have the resources to deal with the demands of legacy related casework and that the underfunding of the organisation meant that difficult decisions had to be made.

[10] It was stressed that this 'pause' only related to sensitive work and that other litigation steps, involving pleadings, interlocutory applications and non-sensitive disclosure could still be undertaken during this time.

[11] In the response to pre-action correspondence dated 7 April 2025 the CCPSNI stated:

> "In respect of the lead case, the PSNI has already provided its sensitive discovery. The temporary re-direction of PSNI sensitive research resources to the Omagh Bomb Inquiry is not having any impact on the Applicant's civil proceedings, and certainly not any material impact."

[12] Following a court direction, the position was amplified by the PSNI in a communication dated 20 May 2025:

> "The McCabe series of cases (in which Peter McCabe Snr's case is the lead case) is currently under active case management in closed under a CMP. The issues being dealt with therein are not impacted by the PSNI's recent decision to temporarily reallocate sensitive researchers to service the Rule 9 disclosure requirements imposed by the Omagh Bombing Inquiry. No delay has been occasioned to the lead case, or Desmond McCabe's case, as a result of the Omagh Bombing Inquiry related reallocation of resources."

The grounds of challenge

[13] The applicant argues that the impugned decision is unlawful as it amounts to a breach, by the proposed respondents, of the applicant's article 6 ECHR right to have his civil rights determined within a reasonable time, contrary to section 6 of the Human Rights Act 1998 ('HRA'). Further, it is contended that the decision is irrational as it interferes with the fundamental right of access to the courts.

Article 6

[14] Article 6 ECHR states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[15] In *Scordino v Italy* (29.3.06, App 368913/97), a decision of the Grand Chamber, the ECtHR observed that the article 6 requirement:

> "… obliges the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements. It wishes to reaffirm the importance of administering justice without delays which might jeopardise its effectiveness and credibility." (para [224])

[16] The Strasbourg jurisprudence makes it clear that in any specific case, assessment of whether the reasonable time requirement has been breached will entail a consideration of the particular circumstances of the case including its complexity, the conduct of the applicant and of the relevant authorities – see, for example, *Bielinski v Poland* (14.11.22, App 48762/19).

[17] In relation to the applicant's conduct, it is apparent that only delays attributable to the state can justify a finding of violation of the reasonable time requirement. However, delay occasioned by an applicant will not relieve the state of its obligations – cf. *Humen v Poland* (15.10.99, App 26614/95). As the ECtHR said in *Union Alimentaria Sanders v Spain* (7.7.89, App 11681/85):

> "… the court considers that the person concerned is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using delaying tactics and to avail himself of the scope afforded by domestic law for shortening the proceedings."

[18] In the instant application, there is a delay of almost three years between the issue of proceedings and the delivery of a statement of claim. This is wholly unexplained and the court can only infer that responsibility for this rests with the applicant and his advisors.

[19] The applicant does not plead that any actual delay has been caused to the progress of his case by the actions of the state. Rather, he says that delay will inevitably be caused by the CCPSNI decision under challenge. This is evidentially without foundation and, moreover, is flatly contradicted by the 20 May 2025 PSNI communication.

[20] The uncontroverted evidence in this case is that no delay at all, let alone unreasonable delay which could arguably violate article 6, has been caused by the impugned decision. This aspect of the case is clearly without merit. No arguable case with realistic prospects of success has been established.

Irrationality

[21] Properly analysed, the irrationality challenge is simply a mirror image of the article 6 claim. The basis for the argument that the decision is unreasonable is that it interferes with the right of access to the courts.

[22] Again, there is a complete lack of evidence to substantiate this assertion. The applicant has issued proceedings and these are under active case management within a CMP by a Judge of the High Court. The evidence clearly establishes that this process has been unaffected by the decision under challenge.

[23] This claim is obviously hopeless.

The resources issue

[24] No doubt as a result of the significant evidential hurdle faced by the primary claim, the applicant has amended his Order 53 statement to include a generic challenge to the alleged failure to provide resources required to progress litigation which entails the analysis of sensitive material.

[25] The DOJ argues that the applicant lacks the necessary standing to bring such a claim.

[26] Order 53 rule 3(5) of the Rules of the Court of Judicature (Northern Ireland) 1980 ('the Rules') provides as follows:

> "The court shall not, having regard to section 18(4) of the Act, grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates."

[27] By section 7 of the HRA, any person who claims that a public authority has behaved unlawfully under section 6 may only bring proceedings if he is or would be a victim of that act. By section 7(3) the question of victim status is equated to the sufficient interest test for standing in judicial review. By virtue of section 7(7):

> "…a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

[28] In *Re Taylor's Application* [2022] NICA 21, the Court of Appeal referred to the Grand Chamber decisions in *Senator Lines v Austria* [2006] 21 BHRC 640 and *Burden v UK* [2008] BHRC 709 and concluded:

> "In order to claim to be a victim of a violation, a person had to be directly affected by the impugned measure. The

> ECHR did not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit the individuals to complain about a provision of national law simply because they considered, without having been directly affected by it, that it might contravene the convention. It was, however, open to a person to contend that a law violated his rights, in the absence of an individual measure of implementation, if he was required either to modify his conduct or risk being prosecuted or if he was a member of a class of people at "real risk" of being directly affected … Plainly a vague or fanciful possibility of a future Convention violation will not suffice. In short, "*risk*" in this context denotes *real risk*. This requires, per *Senator Lines*, a reasonable and convincing evidential foundation."

[29] There has been no article 6 violation in this case, nor any evidence of a future real risk of same. The applicant does not therefore enjoy victim status for the purpose of section 7 of the HRA.

[30] As I have already set out, there is no juridical distinction between the article 6 claim and that grounded on irrationality. For this reason, the applicant does not have a sufficient interest in the matter to ground a claim of standing for this judicial review application.

[31] On that basis, the application for leave in respect of the resources issue must be dismissed.

[32] Had I found that the applicant had standing to advance the challenge on the resources issue, the authorities make it clear that this is an area in which the courts will tread lightly. Decisions around the allocation of resources are, par excellence, matters for Ministers who are subject to the accountability mechanisms of elected legislatures.

[33] In the context of the funding of the health service, and the failure to provide treatment to the applicants, the Court of Appeal recently commented in *Re Wilson & Kitchen's Application* [2023] NICA 54:

> "The subject is one of much controversy and obviously broad and substantial dimensions. It is manifestly inappropriate for judicial intervention." (para [78])

[34] Similar observations can be made about the instant case. In an era of constrained funding for public services, difficult choices must be made at every level as to the allocation of resources. The DOJ itself has limited funds and must make decisions as to the appropriate level of provision for the PSNI. In turn, the CCPSNI

must determine how to allocate and spend his budget. It may be argued, for instance, that the requirements of front line policing and crime prevention ought to be prioritised above the disclosure demands of legacy litigation.

[35] In *DOJ v Bell* [2017[NICA 69, Gillen LJ concluded that:

> "…it is undesirable for the courts to get involved in questions of how either financial priorities are accorded or allocation of resources are determined by governmental departments."

[36] He recognised that:

> "…when issues are raised under Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms as to the guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration…Nonetheless in general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources." (para [19])

[37] Even in a case where an article 6 violation were established, the court would not mandate a funding requirement, which is the relief sought in this application. In such a case, the applicant would have a remedy in declaratory relief and potentially in damages. Thus, even if the applicant had standing, I would not have found that he had established an arguable case with realistic prospects of success in relation to the resources challenge.

Alternative remedy

[38] Furthermore, if the applicant were concerned about undue delay in the prosecution of his claim, it was always open to him to seek the court's intervention to direct steps to be taken or to make orders. All courts are obliged to conduct business in accordance with the overriding objective, with the express aim of ensuring that cases are dealt with expeditiously and fairly – see Order 1 rule 1A of the Rules.

[39] In the context of a CMP, where the plaintiffs are represented by special advocates, they are at liberty to communicate with these closed representatives and encourage such steps to be taken. The special advocates can only communicate with the plaintiffs' open representatives with the authorisation of the court under Order 126 rule 10(4) of the Rules but this mechanism exists in order to ensure that open representatives can remain informed, insofar as that is compatible with the closed proceedings.

[40] This applicant has not chosen to take any steps to inform himself of the progress of the CMP or to allay any concerns he may have about undue delay. This represents a failure to avail of the domestic law remedies for shortening the proceedings.

[41] Were it necessary to do so, I would have refused leave on the basis that judicial review is a remedy of last resort and the applicant enjoys an effective and adequate alternative remedy by engaging with the court's case management powers.

Conclusion

[42] For all these reasons, the applicant has not established any arguable case with realistic prospects of success and the application for leave to apply for judicial review must be dismissed.