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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **25/03/2025**

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 MARC MORELAND FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Hugh Southey KC and Joshuah Carroll (instructed by KRW Law LLP) for the Applicant
Tony McGleenan KC and Philip McAteer (instructed by the Crown Solicitor's Office) for the Proposed Respondent

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HUMPHREYS J

Introduction

[1] In July 1994 the applicant's mother, Caroline Moreland, was abducted and brutally murdered by members of the Internal Security Unit ('ISU') of the IRA. She was interrogated and tortured for about two weeks before her body was dumped near Rosslea, Co Fermanagh. Prior to her murder, her captors recorded a 'confession' from Mrs Moreland in which she alluded to passing information to British intelligence in relation to IRA activities and operations.

[2] In this recording, she spoke of being arrested in September 1992 and threatened with the loss of her children and a lengthy period of imprisonment and then agreeing to work for Special Branch.

[3] In June 2016 Operation Kenova was established with a remit to investigate the commission of criminal offences by the state agent known as Stakeknife and by members of the security forces connected to Stakeknife.

[4] During the course of these investigations, other cases were passed to Operation Kenova, including the murder of Caroline Moreland.

The Operation Kenova Interim Report

[5] On 8 March 2024 the Interim Report of Operation Kenova ('the Interim Report') was published. This publication occurred in advance of:

(i) Prosecution decisions by the Public Prosecution Service ('PPS');

(ii) The outcome of any criminal proceedings; and

(iii) The preparation of case-specific reports setting out findings.

[6] The Interim Report contained a number of detailed, high level, interim findings including that serious crimes went unsolved and unpunished as a result of steps taken by the security forces to protect and maintain their agents.

[7] However, the Interim Report also made it clear that there remained work to be done and that a Final Report, together with individual reports, would issue in due course. Paragraph 74.9 states:

> "Where I have found culpable acts and omissions on the part of the security forces, I will call them out and address them in my final case-specific reports and in discussions with those forces and each affected victim or family"

[8] On the date of publication, the then SOSNI made a statement which included the following:

> "As this is an "interim" report, I will not comment at this time on behalf of the Government on the detail of the report. It contains several specific, very serious allegations that remain subject to consideration by the courts.
>
> It would not be right for the Government to make any comment on the substance of the Interim Report until the conclusion of litigation related to it. I note the recent decisions made by the Public Prosecution Service for Northern Ireland in relation to files passed to them by Operation Kenova, which once again go to show how difficult it is to achieve criminal justice outcomes in legacy cases. Due to numerous related civil cases, however, that remain ongoing, it would be inappropriate to comment further at this time. There is also the prospect of appeals against any of the recent decisions made by the Director for Public Prosecutions for Northern Ireland."

[9] The applicant met with representatives of Operation Kenova on 18 June 2024. He was informed that there was no evidence of the involvement of the agent known as Stakeknife in his mother's murder. A number of suspects had been identified and four individuals arrested and questioned by the Kenova team between February 2018 and August 2021.

[10] On 29 February 2024 the PPS wrote to members of the applicant's family informing them of a decision not to prosecute three individuals suspected of involvement in the abduction and murder. In the opinion of the PPS, the available evidence was insufficient to prove that any of the suspects were involved in the murder.

The impugned decision

[11] On 12 March 2024 the applicant's solicitors, KRW Law, wrote on behalf of a client Carol Wilson in relation to the death of Thomas Wilson which occurred on 24 June 1987. This letter was written in response to the Interim Report and stated its purpose as being:

> "…a preliminary request to you to give immediate consideration and anxious scrutiny to establish an independent statutory inquiry pursuant to section 1 of the Inquiries Act 2005."

[12] The correspondence was premised on the article 2 obligation to investigate the circumstances surrounding the death of Thomas Wilson not having been met by either the Interim Report or the provision of a bespoke family/individual report and the final report of Operation Kenova.

[13] The letter asserts that the Interim Report makes it clear that there were a number of highly placed state agents within the ISU of the IRA aside from Freddie Scappaticci and that this ought to be a focal point in support of a public inquiry.

[14] The solicitors stated:

> "Please be advised that this does not represent our formal application. It is a preliminary notification in advance of such formal request, the detail of which will be informed by the content of both the pending bespoke Family Report and the final Operation Kenova Report later this year.
>
> In the meantime we would welcome your preliminary assessment on our request regarding the advisability of establishing an inquiry as described above."

[15] The Secretary of State replied on 22 March 2024, acknowledging that the correspondence did not represent a formal application for an independent statutory inquiry but was a preliminary notification in advance of such a request. It referenced the SOSNI's 8 March 2024 statement and live issues in respect of the criminal prosecution process with the prospects of appeals and judicial reviews of PPS decisions. It concluded:

> "In light of the above, it is the Government's position that this is not the time to consider establishing an independent statutory inquiry."

[16] The decision under challenge in these proceedings is the SOSNI's decision:

> "to refuse to hold a public inquiry into the state penetration, infiltration and oversight of a number of highly placed agents of or informants within PIRA ISU."

The grounds of challenge

[17] The applicant contends that the decision is unlawful on two bases:

(i) Breach of the article 2 investigative obligation; and

(ii) Process rationality.

[18] The death of Caroline Moreland occurred within the period required for the temporal connection and, arguably, there was no adequate investigation into the role of state agents in her killing until after the coming into force of the Human Rights Act on 2 October 2000.

[19] The applicant contends that the requirement to conduct an effective investigation may, in certain circumstances, necessitate the conducting of a thematic inquiry. Support for this is derived from the first instance judgment of Treacy J in *Re Barnard* [2017] NIQB 82, albeit this was overturned on appeal as a result of the application of the temporal limits of article 2.

[20] The applicant recognises that much important work has been carried out by Operation Kenova. A complaint is made, however, that this was undertaken in private without the involvement of the next of kin. In particular, the families of the victims have been unable to question the key witnesses as to the activities and alleged failings of the state.

[21] On this basis, it is said the circumstances call for a thematic investigation with family involvement which could only be satisfied by the holding of a public inquiry.

[22] In *R (KP) v Secretary of State for Foreign and Commonwealth Affairs* [2025] EWHC 370 (Admin), Chamberlain J recently explained the nature of rationality challenges in judicial review as follows:

> "In most contexts, rationality is the standard by which the common law measures the conduct of a public decision-maker where there has been no infringement of a legal right, no misdirection of law and no procedural unfairness. It encompasses both the process of reasoning by which a decision is reached (sometimes referred to as "process rationality") and the outcome ("outcome rationality")" (para [55])

[23] The two species of rationality are contrasted:

> "Process rationality includes the requirement that the decision maker must have regard to all mandatorily relevant considerations and no irrelevant ones but is not limited to that. In addition, the process of reasoning should contain no logical error or critical gap. This is the type of irrationality Sedley J was describing when he spoke of a decision that "does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic": *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, [13]. In similar vein, Saini J said that the court should ask, "does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?": *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [33].
>
> Outcome rationality, on the other hand, is concerned with whether – even where the process of reasoning leading to the challenged decision is not materially flawed – the outcome is "so unreasonable that no reasonable authority could ever have come to it" (*Associated Wednesbury Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233-4) or, in simpler and less question-begging terms, outside the "range of reasonable decisions open to a decision-maker" (*Boddington v British Transport Police* [1999] 2 AC 143, 175)." (paras [56] & [57])

[24] This process rationality challenge is grounded on an alleged failure to take into account the fact that the request for a public inquiry was not limited to matters related to Stakeknife. It is also argued that immaterial considerations were taken into account, namely that a public inquiry would be tantamount to the Government commenting

on the substance of the Interim Report and the existence of pending civil litigation and potential criminal proceedings.

Re Finucane

[25] In *Re Finucane's Application* [2019] UKSC 7 the Supreme Court concluded that an independent review conducted by Sir Desmond de Silva into the murder of Patrick Finucane by loyalist paramilitaries had not been article 2 compliant. The court made a declaration to that effect but declined, in the circumstances, to order a public inquiry of the type advocated by the deceased's family. Lord Kerr concluded:

> "It is for the state to decide … what form of investigation, if indeed any is now feasible, is required in order to meet that requirement."

[26] In the subsequent case, *Re Finucane's Application* [2022] NIKB 37, the applicant complained that the state had failed to take any action to remedy the failure to carry out an article 2 compliant investigation identified by the Supreme Court. The approach adopted by the state had been one of 'wait and see' pending the outcome of further police and PONI investigations. The evidence suggested that the outcome of such further steps was "many years away" (see para [61]). Scoffield J held:

> "…it is not open to the respondent to adopt this 'wait and see' line. That is because, in light of the additional delay, which is inevitable in this approach, it breaches the article 2 requirement of reasonable expedition and, in so doing, also inevitably increases the risk of rendering an article 2 compliant investigation unfeasible." (para [122])

Consideration

[27] It is significant that in the Interim Report, its authors assert that Operation Kenova is itself article 2 compliant. Three reports were commissioned from Alyson Kilpatrick, now Chief Commissioner at the Northern Ireland Human Rights Commission. She concluded:

> "…in so far as Article 2 ECHR compliance is concerned, it is the exemplar of what such an investigation should, and can, be with the right leadership and personnel. I have not been able to identify any failings for which recommendations need to be made other than that the independent investigation must be supported, resourced and continue to be led by an expert independent team."

[28] In the opinion of Ms Kilpatrick, Operation Kenova satisfied the article 2 requirements of independence, effectiveness, promptitude, public scrutiny and involvement of the next of kin.

[29] Counsel for the applicant have made the case in argument that the next of kin have played no effective role in Operation Kenova and that the investigation has been conducted in private without family involvement. This suggestion is flatly contradicted by the Interim Report and its appendices.

[30] However, the authorities make it clear that the appropriate time to assess whether or not a particular investigation was article 2 compliant is after the event. In *Re Kelly's Application* [2004] NIQB 72, Kerr LCJ stated:

> "Ultimately, a decision on whether the inquiry that is currently taking place will satisfy the procedural requirements of article 2 must depend on an evaluation of all the circumstances of the actual investigation, not least the outcome that it produces. At present, however, I am of the clear view that, as constituted, the investigation has the capacity to fulfil those procedural requirements. Whether it does so must await its completion." (para [32])

[31] This approach was endorsed by the Supreme Court in *Re McQuillan's Application* [2021] UKSC 55 which held:

> "The Court of Appeal recorded in its summary of applicable legal principles…that there should be a strong presumption against a judicial review application challenging the practical independence of a police investigation before the conclusion of the investigation. We agree. The court should generally intervene before the conclusion of an investigation only if it can be shown that the arrangements for the investigation as envisaged and any arrangements which could or might sensibly be put in place as the investigation proceeds would not have the capacity to fulfil the article 2/3 investigative obligation by being an effective investigation, thereby giving rise to the need for a fresh investigation." (para [200])

[32] No case has been advanced that Operation Kenova is incapable of fulfilling the investigative obligation. The outcome of the investigation remains unknown. This applicant may be entirely satisfied with the case-specific report and receive all the information which the family has sought over the years. In such circumstance, it would be nonsensical to pursue a challenge to the article 2 compliance of the investigative process.

[33] This illustrates the fundamental flaw at the heart of this application. Operation Kenova has not completed its work. The families do not know the outcome of the individual, case-specific reports but they have been told that where there have been culpable acts or omissions on the part of security forces these will be addressed. If, ultimately, Operation Kenova completes its work and the article 2 obligation is satisfied, any call for a public inquiry would be unnecessary, inappropriate and futile.

[34] This also serves to explain why the applicant's correspondence of 12 March 2024 is couched in terms of a "preliminary request" and represents a "preliminary notification" in advance of a "formal request." Rightly, the applicant's solicitors observed that the detail of any such request would be informed by the family report and final report of Operation Kenova.

[35] The judicial review application is therefore demonstrably misconceived. There has been no decision on whether or not to hold a public inquiry. It would be wholly inappropriate to do so before the work of Operation Kenova is complete. The stated position of SOSNI that "this is not the time to consider establishing an independent statutory inquiry" is unassailable.

[36] The process rationality claim is similarly flawed. Since there has been no refusal to hold a public inquiry, it cannot be said that the decision under challenge is infected by any irrationality. In any event, it could not be said to be irrational to take into account the potential for criminal proceedings and/or the ongoing civil litigation. As the Supreme Court recognised in *Re Dalton's Application* [2023] UKSC 36, these can contribute to the meeting of the article 2 obligation. No arguable case can be made on the evidence that the issue of any possible inquiry relating to matters beyond Stakeknife was left out of account. It has been recognised in Operation Kenova that the murder of Caroline Moreland did not involve the state agent known as Stakeknife.

Conclusion

[37] In light of the above, no arguable case with a realistic prospect of success has been established by the applicant and the application for leave to apply for judicial review is therefore dismissed.