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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVEW)

IN THE MATTER OF AN APPLICATION BY SOLDIERS A&C FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF 18 APRIL 2024 BY THE ATTORNEY GENERAL FOR NORTHERN IRELAND PURSUANT TO SECTION 14 OF THE CORONERS ACT (NORTHERN IRELAND) 1959

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Mr Joseph Aiken KC and Ms Helen Law (instructed by McCartan Turkington & Breen Solicitors) for the Appellants
Mr Tony McGleenan KC and Mr Nick Compton (instructed by the Solicitor for the Attorney General for Northern Ireland) for the Respondent

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Before: Keegan LCJ, Colton LJ and Fowler J

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

Introduction

[1] The appellants are Soldiers A & C. They were involved in the incident which led to the death of Mr Joseph McCann on the afternoon of 15 April 1972 at a time of civil disturbance. Mr McCann was believed to be an active and prominent member of the Official IRA. There was a vehicle checkpoint on the day in question adjacent to the Markets area of Belfast. It appears that a police officer approached the soldiers in order to obtain their assistance in arresting Mr McCann, who was said to be wanted on suspicion of terrorist offences. There was an encounter (it is alleged) between Mr McCann and the police officer. It is further alleged that members of the security forces shouted at him to stop but that he continued running. Shots were discharged by three soldiers at Mr McCann who died as a result.

[2] The three soldiers involved were Soldiers A, B and C. A and C were prosecuted for murder in the criminal courts. B died some years after the incident. The criminal

proceedings have recorded that A & C each fired a single shot at Mr McCann. However, Soldier B probably fired the balance of the shots fired.

[3] A & C were acquitted at a criminal trial after statements made at the time were ruled inadmissible. The trial judge, O'Hara J, criticised the process under which the statements were taken at that time, see [2021] NICC 3.

This case

[4] The context of this case is a referral by the Attorney General for Northern Ireland ("AGNI") on 18 April 2024 for a fresh inquest into the death of Mr McCann, (an original inquest having reported in 1973), following the criminal proceedings. The AGNI has a wide discretion pursuant to section 14(1) of the Coroners Act (NI) 1959 to direct when she considers it advisable. She received submissions from all interested parties prior to making her decision.

[5] The legislative backdrop is also pertinent to this, and other Troubles related cases currently before the courts. Section 44 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act") prohibits the holding of new inquests into troubles-related deaths. The inquest directed by AGNI is caught by that provision. As the law currently stands, no inquest will take place unless or until section 44 is amended or repealed.

[6] The appellants applied for leave to apply for judicial review of the AGNI's decision to direct the fresh inquest referred to above. The Order 53 statement frames the challenge under various heads including illegality, irrationality, failure to provide adequate reasons, error of fact and law, and the taking into account of irrelevant considerations.

[7] The judge at first instance, Humphreys J in his judgment reported at [2025] NIKB 31, categorised the challenge under four heads as follows:

(i) Error of law, in that it was alleged that the AGNI misdirected herself as to the purpose of holding an inquest;

(ii) Error of fact, in that it was alleged that the AGNI failed to recognise that certain statements were adduced at the original inquest;

(iii) Want of adequate reasons; and

(iv) It was alleged that the AGNI fell into error in directing an inquest 12 days before the Legacy Act came into effect in relation to troubles-related inquests.

[8] On 29 May 2025, the judge granted leave on grounds (ii) and (iv) above and directed that no further steps be taken (other than filing the notice of motion) until further order. The reason for the stay was that at the date of judgment no inquest

would take place at this time due to the effect of the Legacy Act and that it was best to wait and see how legislative change would affect legacy inquests before convening a full hearing should one become necessary. An application to remove the stay was refused on 2 December 2025. We have read the transcript of that ex tempore ruling.

[9] The appellants issued a Notice of Appeal on 4 June 2025 seeking to renew their application for leave on ground (i) and appealing the grant of a stay. Leave was granted by the trial judge to pursue the stay appeal.

Ground 1: renewal of application for leave

[10] We have listened carefully to Mr Aiken's economical and focused submissions on this point and the reply provided. It is common case that the purpose of an inquest is to answer the four statutory questions found in Rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963.

[11] Para 30 of the AGNI's decision is key and reads as follows:

> "There are clearly significant issues as to the availability of material witnesses, both security force members and civilians. This is apparent from the 2021 Crown Court proceedings and the same difficulties would undoubtedly arise in any inquest that might take place. However, an inquest would not be inhibited from considering the soldiers' written statements and could potentially receive oral evidence from military and other witnesses and would thereby be able to provide a public record of what occurred. Further, the prosecution failed because the judge held that the soldiers' 1972 statements and the 2010 material were inadmissible not due to the unavailability of military and other witnesses."

[12] The judge was not assisted by the overly prolix Order 53 statement. However, Mr Aiken has persuasively referenced how the issue of public record was pleaded as engaging not just error of law which the judge analysed but under the head of taking into account irrelevant considerations and error of fact. The judge does not deal with these aspects of the argument in his judgment.

[13] We were persuaded by Mr Aiken's argument that in referring to creating a public record in her direction the AGNI arguably took into account an irrelevant consideration and also made an error of fact. The latter argument is supported by the comprehensive decisions on this subject matter which are in the public domain. Thus, whilst the point is made that the AGNI was simply referring to a consequence of a fresh inquest, we think, looking at how this issue is pleaded across three domains that there is an arguable alternative argument which merits the grant of leave. To our mind this outcome does not cause any significant issue for the respondent as the

question could arise in any overall assessment of how the AGNI exercised her discretion. Leave is therefore granted on ground (i) in favour of the argument made on behalf of Soldiers A & C as we find that the threshold of arguability is met.

Ground 2: The imposition of a stay

[14] The imposition of a stay in proceedings is a matter for the discretion of the first instance judge, falling within the court's power to regulate its own procedures. We note that in *AB (Sudan) v Secretary of State for the Home Department* [2013] EWCA Civ it was found that the imposition of a stay involves the exercise of discretion on the part of a judge and so judgments of this nature are rarely reversed on appeal. The circumstances in which such a reversal might occur were described in *Azam v University Hospital Birmingham HNS Foundation Trust* [2020] EWHC 2284 (QB) at [50] as:

(i) A misdirection in law;

(ii) Some procedural unfairness or irregularity;

(iii) That the judge took into account irrelevant matters;

(iv) That the judge failed to take account of relevant matters; or

(v) That the judge made a decision which was "plainly wrong."

A decision which is "plainly wrong" was said at [51] to be a decision which exceeded the "generous ambit within which reasonable disagreement is possible." This is a high threshold.

[15] We are aware of *Jordan* [2019] UKSC 9 and *McCord* (unreported, 18 January 2019), two Northern Ireland cases where stay decisions were reversed. Furthermore, we have been referred to the Illegal Migration Act 2023 case ([2024] NIKB 44) in which a stay was imposed by the Court of Appeal (and in which the Supreme Court refused the Home Secretary leave to appeal). Each case is, of course, fact specific. We also observe that *Jordan* and *McCord* concerned arguments directly made under the Human Rights Act 1998.

[16] We also bear in mind that in an appeal of this nature, we should not simply substitute our own view.

[17] Returning to the instant case, when the matter first came before Mr Justice Humphreys, as the inquest was not allocated to a coroner by 1 May 2024, it falls within the ambit of the putative section 16A of the Coroners Act (Northern Ireland) 1959 as inserted by section 44 of the Legacy Act. As a consequence of those provisions as the law currently then stood there could be no fresh inquest into the death of Mr McCann. He decided to grant a stay on the grounds that there was no utility in hearing the

matter. In doing so, he also took into account the overriding objective in Order 1 rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980. He did, however, comment that "legislative changes may occur, but it remains a matter for Parliament to determine whether and to what extent inquests caught by the Legacy Act may resume."

[18] Since the judge made the original decision to impose a stay, there have been significant developments in Parliament. In particular, the Northern Ireland Troubles Bill, published on 14 October 2025, proposes to make significant amendments to the Legacy Act. It proposes to rename the Independent Commission for Reconciliation and Information Recovery. In relation to inquests, the key proposal is clause 84 which would introduce a new section 16AB into the 1959 Act. If enacted, this provision would require the Advocate General for Northern Ireland (or his delegate) to consider this case and determine whether an inquest should be convened or to direct the senior judicial panel member of the newly formed Legacy Commission to investigate.

[19] Arising from the draft Bill, Mr Aiken made an application before Mr Justice Humphreys to remove the stay. Mr Justice Humphreys refused to do so, and the question of the stay comes before us for consideration of his two disposals.

[20] Mr Aiken makes the point that the direction of legislative change is clear and that this process should not be used as a shield to prevent litigation proceeding which, if successful, would take the case out of the pool of referred inquests to be considered by the Advocate General if the clause is enacted in law. Against that, Mr McGleenan submits that the next of kin could, in any event, refer the matter to the new Legacy Commission in the absence of a direction from the Attorney General. Either way, a level of uncertainty arises for A and C who are elderly and understandably anxious about further investigations as evidenced by their affidavits.

[21] We have considered the competing arguments. In doing so, the human side of this and other Troubles cases is not lost on the court, given the position of A and C and the next of kin. However, legacy matters are currently being debated in the political arena. The appellants say that the Northern Ireland Troubles Bill and the Framework Document signed by the British and Irish governments suggest that the legislation is very likely to come into force. It was argued that this provides impetus to lift the stay.

[22] However, there remain issues of controversy. The legislative process must take its course, and it remains to be seen whether clause 84 will pass into law in its current form or not. Thus, while we are sympathetic to Mr Aiken's arguments we do not think that the judge has reached a decision outside the range of reasonable decisions at this time particularly while, as he said, there are some imponderables in play. He is correct about that. As the judge stated in his recent ex tempore judgment:

> "The timescale for that remains uncertain, as does the final product. It would be, in my opinion, quite wrong for the

> judiciary to assume the outcome of the parliamentary process. These matters are properly for consideration by representatives in both Houses of Parliament and ultimately for the content of the legislation to be approved and to receive Royal Assent before one can say with any certainty what the ultimate outcome of the legislation looks like and how it impacts upon this particular case as well as inquests more generally."

[23] Mention must also be made of the overriding objective in deciding whether to impose a stay or not. The judge rightly took this into account. That is because the aim of the court is to deal with cases justly in accordance with the overriding objective found in Order 1 rule 1A of the Rules of the Court of Judicature (NI) 1980.

[24] Thus, having reviewed the judge's decisions it has not been established that he has misdirected himself or made an error such that we would overturn his decision on the grant of a stay. Also, at a point in time which should be relatively soon the court will be in a better position to assess the potential consequences of the AGNI's direction which is under challenge. In the overall circumstances that pertain we find that the balance is correctly struck at present. Fundamentally, we cannot say that a stay at least until the passing of the new legislation is unreasonable. When the Bill receives Royal Assent, the appellants would be in a stronger position in terms of advancing their case to have the judicial review dealt with then. Of course, should other issues arise including delay the balance may shift.

Conclusion

[25] We, therefore, grant leave in favour of the applicants A & C on the ground that the AGNI either made an error of law, took into account an immaterial consideration or made an error of fact as regards a fresh inquest providing the vehicle to create a public record. We dismiss the appeal against the stay at the current time.