Neutral Citation no. [2006] NIQB 80 | *Ref:* **MORF5699**

Judgment: approved by the Court for handing down | *Delivered:* **22/11/06**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY WITNESSES A, B, C, K AND N FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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AND IN THE MATTER OF A DECISION OF THE BILLY WRIGHT INQUIRY PANEL MADE ON 9 OCTOBER 2006

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MORGAN J

[1] The background to these applications is the murder of Billy Wright which occurred at Her Majesty's Prison Maze on 27 December 1997. Three members of the INLA were convicted in connection with the murder. The government subsequently requested a retired Canadian judge, Justice Peter Cory, to conduct an investigation to establish whether a public inquiry should be held in respect of allegations of collusion against the prison service. His report was published in April 2004 and he recommended a public inquiry in respect of those allegations.

[2] In November 2004 the government established a public inquiry under the provisions of section 7 of the Prison Act (Northern Ireland) 1953. In November 2005 that was converted to an inquiry under the Inquiry Act 2005.

[3] In connection with its obligation to gather documentary evidence the inquiry held a hearing which commenced on 30 October 2006 and lasted until 3 November 2006. Each of the applicants is a serving prison officer or had worked at some stage as an NIO official in prison administration and each was notified that they were required to attend as witnesses. They applied for anonymity and A and B also applied for screening. Each of them was unsuccessful in relation to the anonymity application and only witness B was successful in relation to the screening application. Each of them now seeks leave to apply for judicial review in respect of those decisions.

[4] In order to deal with questions of anonymity of witnesses and related matters the inquiry established a protocol. Paragraph 4 of the protocol

required those applying to make a written application to the inquiry setting out in full their reasons in support of the claim. Paragraph 5 stated that all applications would be considered by the inquiry panel on a case-by-case basis. At paragraph 6 the inquiry set out the relevant matters that it would take into account:

(a) the principle of open justice;

(b) whether the applicant's name had already entered the public domain;

(c) the level of any risk to the applicant that may arise through his/her name entering the public domain;

(d) the rights of the witness;

(e) the applicant's involvement in the matters under investigation, and whether there is a public interest in his/her name being known or not being known.

[5] In accordance with the protocol each of the applicants made a written application for anonymity and A and B also applied for screening. Each of them also provided confidential details setting out their personal circumstances in support of that application. Those applications were supported by a letter from the NIO of 6 March 2006 and a letter from the Director-General of the Prison Service dated 30 August 2006. The written applications and correspondence contended that the disclosure of the applicant's names and the giving of evidence unscreened in the cases of A and B would increase the risk which each of these applicants already faced from paramilitary groups.

[6] For the Applicants Mr Maguire QC contended that the inquiry panel's decision was flawed in a number of respects. First he submitted that its decision was procedurally unfair in that the panel failed to disclose the following materials or the gist thereof in advance of its decision:

(a) the PSNI threat risk assessment date 11 September 2006;

(b) the "further particulars" obtained by the panel from the PSNI in relation to the initial assessment, referred to in paragraph 5 of its decision;

(c) the "further information" supplied by the PSNI on 28 September 2006, referred to in paragraph 5 of the panel's decision;

(d) the "supporting background material" supplied by the PSNI in relation to its threat risk assessment, referred to in paragraph 16 of the panel's decision.

He referred in particular to paragraph 13 of the decision where the view of PSNI that there was no specific current threat to witnesses was set out. He submitted that limited weight could be given to that proposition since it stated nothing about the position of witnesses once their evidence had been given.

[7] Secondly he criticised the panel for failing to the discharge its duty of inquiry which he submitted arose under common law or pursuant to the applicant's rights under articles 2 and/or 8 of the convention by failing to seek or receive from the PSNI an individualised risk assessment which took account of all of the factors relied upon by the applicant in his application. It appears that none of the personal details submitted by the applicants were in fact provided to PSNI for their comment.

[8] He submitted that in relation to the article 8 issues arising in respect of the applicants there had been no process of evaluation and determination disclosed in the panel's decision and accordingly he submitted that there was an arguable case that the panel had failed to take those considerations into account. He submitted that these matters disclosed a disproportionate infringement of or failure to accord respect to the article 2 and/or article 8 rights of the applicants and he further submitted that the materials before the panel properly understood did not support the inference that the fears held by the applicants were not objectively justified.

[9] For the proposed respondent Mr Larkin QC pointed out that the panel had considered some 14 applications for anonymity and screening and had granted some applications and rejected others. This disclosed, he submitted, a careful case-by-case analysis of each situation. He submitted that there was no evidential support for the allegations that the panel had accorded manifestly excessive weight to some issues as described in the Order 53 statements. He submitted that having regard to the generic material that was made available in relation to the threat to each of the applicants it was unnecessary to seek out individualised threat assessments. He also pointed to paragraph 11 of the decision to demonstrate that article 8 had been taken into account.

[10] The issue for me is whether the applicants have disclosed an arguable case with a reasonable prospect of success. I have to consider the case on the basis of the materials upon which the applicants rely, the decision which the Panel made and the submissions of the parties. In particular I do not have any material put forward by the respondent which may be material to the determination of any application. Accordingly at this stage I conclude only that the applicants have satisfied me that there is an arguable case with a reasonable prospect of success. I accept Mr Larkin's submission about the lack of evidence to demonstrate that matters were given insufficient weight but these matters are raised in this application as features of the attack on

objective justification rather than as free standing grounds of challenge. I do not, therefore, restrict the grounds of challenge pleaded in the Order 53 statement. On the morning of the hearing Mr Maguire put forward three additional grounds. The first of those related to the test applied by the Panel at paragraph 11 of its decision. He submitted that the test applied by the Panel introduced an unlawful threshold in the Panel's consideration of article 2 rights. It is not at all clear to me that the context in which the term "real risk" is used in this sub-paragraph will justify that submission but I consider that it is arguable, that I should permit the amendment of the Order 53 Statement and that I should give leave on that point. In relation to the second and third additional grounds I consider that the relevant portions of the IMC Reports and the transcripts of any hearings on which the applicants rely should be apparent on the papers before any further amendment is made.