Neutral Citation No. [2017] NIQB 104 | *Ref:* **TRE10459**

Judgment: approved by the Court for handing down | *Delivered:* **07/11/2017**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APLICATION BY EDWARD BARNARD FOR JUDICIAL REVIEW OF THE DECISION BY CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

TREACY J

Introduction

[1] The court delivered judgment in this case on 28 July 2017 which is reported at [2017] NIQB 82. The parties were allowed time to consider the judgment and to try and agree the appropriate form of relief. The parties have agreed an order quashing the impugned decision, the terms of the Declaration and the order for costs. Mr Peter Coll QC confirmed that the terms of the Declaration were intended to cover both unlawfulness at common law and under the Human Rights Act 1998. The sticking point was whether the court should also make an order of Mandamus along the lines suggested by the applicant in the draft Order. The Respondent objected to any Mandamus submitting that the applicant's proposed draft was both (i) too vague and uncertain and (ii) prescriptive.

[2] The only issue is whether or not this court should grant an Order of Mandamus and, if so, in what terms.

Relief Sought by the Claim

[3] The amended Order 53 statement sought:

> "An order of Mandamus to compel the respondent (or any alternative mechanism) to conduct a lawful investigation and to complete and publish the required overarching thematic report in accordance with any judgment, order or direction of this honourable court."

[4] The grounds on which the relief was sought included breach of the applicant's common law legitimate expectation that the overarching thematic report would be completed and published as well as Article 2 ECHR and thereby section 6 of the HRA.

Judgment

[5] The applicant submitted that the foundation for enforcing the remedy required by the common law and Article 2 was to be found in the courts findings (with the applicant's emphasis):

> "The HET considered 89 cases to be part of the Glenanne series. In at least three of these cases it reported in its RSRs that there was direct evidence of collusion. The remaining cases were 'linked' by suspects, ballistics or intelligence. Therefore, **because of the work done and the reports made by the HET, there is a credible suspicion of collusion in respect of the remaining cases and a revived article 2 duty arises** (para200)."

[6] The court, counsel said, had acknowledged that the HET considered that completion of an Overarching Thematic Report was a

> "key process by which it may be possible to unearth evidential opportunities that were not capable of discovery by looking at the cases in isolation." (para201)

On that basis, counsel continued, the court held as follows:

> "The Chief Constable in halting that process which had been openly promised and which was acknowledged to be essential to the HET's purpose **has defeated the legitimate expectations of the families and others and turned his back on the potentially rich source of evidential opportunities into the wider issues of State collusion which the HET recognised their processes**, as described to the CM and the ROI sub-committee on the Barron Report, **might uncover. This decision frustrates any possibility of an effective investigation to examine the wider issues of state involvement which could fulfil the Article 2 duty which now arises and has foreclosed any possibility that the Article 2 duty will be fulfilled."** (para202)

[7] On the question of legitimate expectation Mr Friedman drew attention to the fact that the court at para 209 characterised the unfairness in this case as *"extreme"* and the court concluded that:

> "It is a matter of very grave concern that almost two decades after the McKerr series of judgments decisions were taken apparently by the Chief Constable to dismantle and abandon the principles adopted and put forward to the CM to achieve

> Article 2 compliance. There is a real risk that this will fuel in the minds of the families the fear that the State has resiled from its public commitments because it is not genuinely committed to addressing the unresolved concerns that the families have of State involvement. In the context of the Glenanne series, as I said earlier, **the principal unresolved concern of the families is to have identified and addressed the issues and questions regarding the nature, scope and extent of any collusion on the part of State actors in this series of atrocities including whether they could be regarded, as the Applicant argued, as part of a 'State practice'.** I consider that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgments in the McKerr series and with the package of measures." (p209)

Discussion

[8] Mr Friedman submitted that (i) the applicant and the other Glenanne family members have waited many years for the state to be publicly accountable for its acts and omissions; (ii) the Court has reached its own view that the allegations of state collusion are at least "*credible*"; (iii) there is a range of common law and human rights compliance issues at stake; (iv) delay has caused significant emotional hardship (which continues). In this context he relied on the following passage from Stephens LJ in *Jordan* [2014] NIQB 71 p27:

> "The investigation into the death of a close relative, impacts on the next of kin at a fundamental level of human dignity. It is obvious that if unlawful delays occur in an investigation into the death of a close relative that this will cause feelings of frustration, distress and anxiety to the next of kin."

Delay he submitted also risks some of the family members dying before any final and meaningful resolution is reached (as has already happened in this case) and it undermines wider public confidence.

[9] Counsel for the applicant contended that the judgment has disposed of the defendant's submission (para 113) that there could be no common law "*abuse of power*" in resiling from the decision to produce an overriding report. The respondent's argument, he said, was founded on what was characterised as the limited "*powers and objectives*" of the HET, "*confined to a consideration of the investigations previously conducted*" [in individual cases] "*for the purpose of determining whether there were any available investigative opportunities*". The respondent had submitted that "*the HET was never given a remit of compiling overarching analytical reports into linked cases – and never actually did so*". The court was asked to accept that "*The fact that the Chief Constable has declined to complete an overarching investigative report* ***against that background*** *betokens pragmatic and prudent allocation of his limited resource rather than an abuse of power*".

[10] Counsel correctly observed that the court rejected that submission and made detailed findings that such a remit was identified as part of the function of the HET and repeatedly declared to be as such in writing and orally, to families, civil society groups, the CM and the Baron Committee. There was then an adoption of new terms of reference internally on an undisclosed date after 2010, for reasons which were never minuted, and which were not communicated to the Policing Board Working Group until 2014**.** The new terms of reference meant that:

> "[The] structure and process now in place lacks most, if not all, of the essential safeguards which the UK Government agreed with the CM to put in place for future investigations of cases of this nature in order to comply with the decisions of the ECtHR in the McKerr series of cases. These changes came about apparently as a result of the decisions of the Chief Constable and Assistant Chief Constable (para190)."

[11] Counsel reminded the court that the judgment agreed with the criticisms of these changes by Policing Board Working Group, holding that the PSNI (i) must discharge its legal obligations and (ii) may not defer or delay the discharge of those obligations; (iii) that any process which is confined to reviewing unsolved deaths without more will not in itself comply with art 2; and (iv) that it "*...is abundantly clear that any process must not operate so as to violate art 2 and undermine the package of measures*". The Court added that:

> "*It is clear to this court that the changes introduced by the Chief Constable are fundamentally inconsistent with art 2 and the Package of Measures*" (para192)."

[12] Turning to the common law breach of the substantive legitimate expectation the applicant submitted that the law is clear that the applicant has an enforceable common law right to mandamus as the court accepted that (i) the applicant has established that promises were made that were "*clear unambiguous and devoid of relevant conditions*"; (ii) the remedy at stake "*concerns a small and identifiable number of persons*" and does not "*lie in the macro-political field*" and , (iii) in so far as the degree of unfairness is a mandatory relevant consideration, the Court found that the current situation is unfair in the "*extreme*" (paras206-207).

[13] I agree with the applicant that domestic jurisprudence establishes that having established the legitimate expectation the onus then passes to the party seeking to justify its frustration to point to an overriding public interest, which the Court must then balance against the gravity of the unfairness identified: *Re Geraldine Finucane* [2017] NICA 7 p70. As the Privy Council put it in *United Policyholders Group v AG of Trinidad and Tobago* [2016] 1 WLR 3383 p121 (per Lord Carnworth), at that juncture "*the court will require [the promise] to be honoured, unless the authority is able to show good reasons, judged by the Court to be proportionate, to resile from it*".

Conclusion

[14] In the present case the Chief Constable has not demonstrated good reasons judged by the court to be proportionate. His case was that there was no such substantive legitimate expectation/public commitment and therefore nothing to justify. Ordinarily, before a decision maker could begin to justify resiling from a substantive legitimate expectation he would have to appreciate in the first instance that he had given a commitment of this nature. In other words the decision maker has to appreciate at the time he makes the impugned decision that he is in fact resiling from such a commitment. In this case the Chief Constable failed to appreciate that such a commitment had been generated. Thus the hugely significant issue of resiling from a commitment simply did not arise since in the decision maker's view he considered that no such commitment had been given. In this case the argument of the respondent's is based on the absence of any such commitment. But the court has firmly rejected this argument and made detailed findings that such a commitment was given in writing and orally, to families, civil society groups, the Committee of Ministers and the Baron Committee in the Republic of Ireland [see paras 132-133, 138, 139, 147, 152, 160, 169-170]. The respondent produced no evidence prior to the hearings, or in the aftermath of this judgment, to discharge the burden of showing good proportionate reasons for resiling from the public commitment that the court has found (but which the respondent denied and therefore, on his case, failed to appreciate). Once the substantive legitimate expectation has been established, as here, the court will, in the words of Lord Carnworth quoted above, require the [promise] to be honoured. No good reasons having been established in this case I thus consider that mandamus is appropriate. Before drafting the terms of the Order I would like assistance from the respondent on a number of matters: **(i) confirmation that there are no minutes or documents regarding the adoption of the new terms of reference or the decisions of the Chief Constable and the ACC referred to in para 190 of the judgment; (ii) the respondent's proposed draft of an Order for Mandamus in light of the court's judgment.**

[15] I enquired of the respondent's counsel what steps his client had taken or was going to take to implement the substantive findings of this judgment. The short answer is 'none'. I was informed that the court's decision is to be appealed and it hardly needs stating that that is the right and entitlement of any disappointed party. Cases involving wider issues of alleged state involvement traditionally inspire appeals to the Court of Appeal and the Supreme Court resulting in inevitable delays and at huge public expense whether the appeal is brought by the state or by the families of the deceased. These cases have been legally complex because of the perceived divergence between the requirements of the common law and the ECHR in cases involving, principally, the use of lethal force by state agents or allegations of collusion. The issue of the retrospectivity of art 2 ECHR, for example, has been a fertile source of combat in the higher courts and they look set to trouble the superior courts for years to come. Some commentators no doubt wonder why the minimum requirements for investigating deaths in which the state is involved or suspected of being involved allegedly differ so much as between the common law and the Convention. It would be surprising if the common law now offered any less protection than the Convention in this area. That they do differ or are perceived to differ appears to be what drives the appellate train. It used to be said that the common law marches with the Convention. In the area of the right to life I should

have thought that this is in fact the case and that the common law might be expected to match if not exceed the minimum requirements of the Convention. If not an explanation should be provided as to why the common law falls short, in what precise ways and who, if anyone, benefits from the shortfall. The very sad inescapable fact is that while these debates rage at huge public expense the victims' families' languish with no end in sight and the ever increasing realisation that nothing much may happen in their lifetime. As the court recognised at para 209 of its judgment "…the principal unresolved concern of the families is to have identified and addressed the issues and questions regarding the nature, scope and extent of any collusion on the part of State actors in this series of atrocities including whether they could be regarded, as the applicant argued, as part of a 'State practice'. I have no doubt that for some families their confidence has been undermined by delays which they believe are inimical to addressing their principal unresolved concerns. While legal appeals are being pursued witnesses or potential witnesses die as do members of the families of the deceased with their unresolved issues. And the anxiety of the surviving family members is not only undimmed but exacerbated by the delays of a system that appears powerless to stop it.