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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY PATRICIA BURNS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Desmond Hutton QC (instructed by Harte Coyle Collins) for the Applicant
Paul McLaughlin QC (instructed by the Attorney General's Office) for the proposed Respondent

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HUMPHREYS J

Introduction

[1] On 13 July 1972 Thomas Aquinas Burns was shot and killed by a member of the British Army outside the Glenpark Social Club in North Belfast. An inquest was held on 3 April 1973 at which a jury returned a verdict of misadventure.

[2] The applicant, who is the daughter of the deceased, instructed solicitors who wrote to the Attorney General's Office ('AGO') on 12 October 2015 seeking a direction for a fresh inquest pursuant to the powers of the Attorney General ('AG') under section 14 of the Coroners Act (Northern Ireland) 1959 ('the 1959 Act').

[3] Correspondence ensued which resulted in a final decision on 7 June 2019 whereby the then AG, John Larkin QC, refused the applicant's request and did not direct a new inquest. It is this decision which is under challenge in these proceedings.

Background

[4] The evidence presented at the original inquest reveals that the deceased and his friends were leaving the social club in the early hours of 13 July. There had been shooting in the area earlier which had delayed their departure. The area in question

was under observation by soldiers from the Royal Regiment of Wales from two different vantage points, one at 70 Louisa Street and another at 1A Glenpark Street. The latter was closer to the social club and the properties were physically separated by large sheets of corrugated iron.

[5] The area was lit up by arc lighting from the Army position on Glenpark Street and those leaving the club were in the habit of asking the soldiers to temporarily switch off the light to allow them to make their way home since to do so otherwise would potentially leave them vulnerable to attack by loyalist gunmen. The deceased made such a request that night but shortly afterwards he was fatally wounded by a shot fired by one of the soldiers.

[6] The incident was the subject of an 'investigation' by the Royal Military Police ('RMP'). In Northern Ireland in 1972 there existed a wholly improper and illegal arrangement whereby crimes allegedly committed by British Army soldiers were investigated by the Army itself rather than by the police. In *R v Soldier A and Soldier C* [2021] NICC 3 O'Hara J commented:

> *"The problem with investigating the killing of Mr McCann does not date back to 2010, it dates back to 1972. In large part that was because of the agreement between the RUC and Army which lasted until 1973 and which precluded the police from questioning soldiers. Many judges before me have condemned that practice. I join them in doing so."*

[7] The product of the RMP investigation was a number of statements, taken by a Corporal Nairn, in the names of Soldiers A, B and C. Soldier B was the 'shooter' and claimed to have been in position at 70 Louisa Street with Soldier C. He stated that he saw a gunman with a pistol in hand outside the club, firing at the observation post at 1A Glenpark Street. He fired twice at the gunman and hit him. Soldier C was the 'witness' and whilst he did not say in his statement that the gunman was firing at the other post, he did say that Soldier B shot twice and struck the deceased. Soldier A came on the scene afterwards and attended at the club.

[8] By contrast, the statements taken from civilian witnesses Malachy Fanning and Noel Donaghy were to the effect that the deceased was not involved in any shooting and did not have a gun but simply asked for the Army arc lighting to be turned off whereupon he was shot.

The Original Inquest

[9] The papers from the original inquest indicate that it was held before the Coroner, Mr Elliott, at Crumlin Road Courthouse on 3 April 1973. The widow of the deceased and the Army were each represented by solicitors and counsel. Depositions were taken from Mr Fanning and Mr Donaghy. Corporal Nairn was also sworn and testified that he made enquiries and took statements from soldiers.

The statements of those soldiers were handed to the coroner in a sealed envelope. None of the soldiers involved in the shooting attended or gave evidence. The deceased was found to have died as a result of haemorrhage caused by a laceration to the left lung due to a gunshot wound. The verdict of misadventure was signed by the coroner and the seven members of the jury.

[10] From 1963 to 1980 in Northern Ireland[1], juries were advised that they should use one of the following in recording their verdict:

(i) "Died from natural causes";
(ii) "Died as the result of an accident/misadventure";
(iii) "Died by his own act";
(iv) "Execution of sentence of death"; or
(v) "Open verdict."

[11] In 1980 the Coroners Rules were amended whereby those specific verdicts were replaced by findings. In coronial law, the terms 'accident' and 'misadventure' are effectively synonymous. Blackstone defined 'misadventure' as:

> *"Where a man, doing a lawful act, without any intention of hurt, unfortunately kills another"* [4 Bl. Comm. 182]

[12] It is quite apparent that the verdict delivered in this inquest was wrong in law. Where none of the verdicts (i) to (iv) were applicable, the only option for an inquest jury was to return an open verdict. Unlike the position in England & Wales, there was no scope for the jury to deliver a verdict of lawful or unlawful killing.

The HET Report

[13] Many years later, the death of Mr Burns came for review by the Historical Enquiries Team ('HET'). During the course of this process, the family of the deceased were advised that one of the soldiers (believed to the 'witness', Soldier C) had informed the HET that the statement given to the inquest was not his and did not represent a true account of events. In particular, he said that neither he nor the shooter were at Louisa Street at the time of the shooting. This gave rise to the obvious concern that evidence given to the inquest was wrong or fabricated and precipitated the request to the AG for a fresh inquest.

[14] Subsequently an HET Report was produced. The report records what was previously told to the family, that the witness soldier now says that he and the shooter were not at Louisa Street but 1A Glenpark Street and that he was not the author of the 1972 statement. It also states the witness's recollection that the shooter fired through a wooden wall at the social club at a target whom he could not see at the relevant time.

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[1] **Schedule 3 to the Coroners (Practice and Procedure) Rules (NI) 1963**

[15] There are a number of obvious and important flaws with the HET report:

(i) The report asserts, quite inexplicably, that the inquest returned an open verdict;

(ii) It confuses the ciphers attributed to the soldiers throughout, ascribing the cipher A to the shooter, B to the witness and C to the soldier who attended after the event;

(iii) Despite the fact that they had sworn evidence from the civilian witnesses which was repeated in the course of the HET review, the conclusion is reached that:

> *"he was aiming at a gunman who had just discharged a number of rounds from a low velocity pistol…"*

(iv) The report does not seek to address how or why the evidence of the civilian witnesses on this issue was rejected or why the case advanced in a statement in 1972, of now dubious origin, could be preferred when the purported author of the statement declined to co-operate with the review;

(v) Having noted that 'Tommy's friends' gave evidence in contradiction to the soldiers' evidence, this striking conclusion is drawn:

> *"There remains no evidence, despite this review, to counter the assertion that in his mind and at that crucial moment, he genuinely thought he was under immediate threat of attack"*

The Application to the Attorney General

[16] Following sight of the HET report, the solicitors for the applicant wrote again to the AGO and also to the DPP. The AG also wrote to the DPP asking him to consider reviewing the original decision not to prosecute any military personnel in relation to the killing. The DPP stated, on 1 December 2015:

> *"No file was ever submitted to the DPP for consideration so there is no original decision to review. On present evidence I do not consider that there is any prospect of a conviction."*

[17] The AGO also raised a query in relation to any civil proceedings or criminal injury claim relating to the deceased's death. It was confirmed that, following a contested court hearing, the deceased's widow was awarded £13,075 under the criminal injuries compensation scheme.

[18] On 24 July 2017 the AGO communicated that the AG did not consider that a new inquest was advisable at that stage. He concluded that the article 2 investigative obligation had not been revived and that there had been a detailed examination of events by the HET team. On that basis, he did not see that there would be any utility in a further inquest.

[19] Further detailed submissions followed whereby the AG was asked to review his original decision. In particular, in correspondence dated 1 August 2017, the applicant's solicitors asserted that the AG had failed to engage with the submissions being made in relation to the evidence of the soldiers, both in relation to its veracity and its validity. In a reply dated 12 March 2018 the AGO states:

> *"…the Attorney has, in fact, considered all your submissions. For the avoidance of doubt, this included the issue relating to whether the two principal military witnesses, including the soldier who fired the relevant shot, were positioned in one army observation post…or in another nearby"*

[20] The same correspondence states that whilst the identities of the military personnel can be ascertained, it did not appear to be ascertainable who fired the fatal shot. It also referenced the AG's conclusion that the "main civilian witness" was deceased.

[21] A pre-action protocol letter was then sent on 22 March 2019 and, on foot of this, the AG agreed to reconsider his decision. On 7 June 2019 the outcome of that reconsideration was communicated to the applicant's solicitors. Again, the AG concluded that an inquest was not advisable. In summary the letter states:

(i) The verdict returned at the original inquest was wrong in law and this represented a *"powerful factor pointing in favour of a new inquest"* and an open verdict ought to have been returned;

(ii) The outcome of the criminal injury compensation proceedings made it explicit that the deceased had died as a result of unlawful killing either when the solider was firing with no justification or where he was firing in response to a gunman, who could not have been the deceased;

(iii) An erroneous verdict does not require a new inquest if there is no real prospect of establishing what happened beyond the parameters of the criminal injury proceedings;

(iv) At an inquest the 'shooter' would be entitled to decline to answer any questions which he reasonably considers may incriminate him;

(v) The gunman who was firing from the social club has never been identified;

(vi) For these reasons, it would be difficult for a new inquest to find facts establishing what did actually happen and hence there was no utility in directing an inquest;

(vii) In the context of the claimed revival of the article 2 investigative obligation, the prospect of a successful prosecution could be taken into account and the views of the DPP were alluded to.

The Test for Leave

[22] In this jurisdiction it is well-established that the test for leave to apply for judicial review requires an applicant to show *"an arguable ground for judicial review on which there is a realistic prospect of success"*, per Nicholson LJ in *Re Omagh District Council's Application* [2004] NICA 10.

The Grounds of Challenge

[23] In an amended Order 53 Statement, the applicant contends that the decision ought to be set aside for the following reasons:

(i) The AG misdirected himself in law and asked the wrong question;

(ii) The AG failed to take into account material considerations, including the article 2 investigative duty;

(iii) The AG took into account an immaterial consideration, namely the opinion of the DPP.

Justiciability

[24] The proposed respondent asserts, in reliance on *Gouriet v Union of Post Office Workers* [1978] AC 435, that the decisions made by the AG not are susceptible to judicial review. *Gouriet* concerned a decision by the AG in England & Wales not to consent to a relator action. The Law Lords held that such a decision was not amenable to review by the courts. In the opinion of Lord Edmund-Davies:

> *"…the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts"*

[25] In *R v Attorney General ex p. Ferrante* [1995] 2 WLUK 121 Popplewell J held that the scope of the *Gouriet* principle was not limited to consent to relator actions

[26] However, in the Northern Ireland context, the courts have taken the view that certain decisions of the AG are amenable to judicial review, albeit that the intensity of review may vary. In *Re Forde's Application* [2009] NICA 66, the Court of Appeal

proceeded on the basis that judicial review could lie against an AG's decision to decline to make a direction under section 14 of the 1959 Act, albeit that it did not interfere on the facts of that case.

[27] Maguire J considered a further section 14 case in *Re Johnstone's Application* (unreported, 17.6.16) and held:

> *"Whatever the merits of the Ferrante case, it seems clear that this is an area where the law is not static. In this jurisdiction in Shuker the court did not hold that the AG could not ever be judicially reviewed and leave had been granted in that case. Likewise in Forde neither at first instance nor on appeal was any point taken by counsel or the court that the latter lacked jurisdiction. In these circumstances, the court considers the point arguable which is sufficient for the purpose of this leave judgment"*

[28] Maguire J did go on to hold that the form of review was of the 'light touch' variety, recognising the statutory discretion given to the AG to exercise his personal judgment on the issue. When the application came for full hearing by Deeny J, the AG opted to defend the decision without reliance on the argument that he was immune from review.

[29] The question of the reviewability of the decision of the AG in this field is clearly arguable in light of the authorities referred to and I do not need to say more for the purposes of this leave application.

Illegality

[30] Section 14 of the 1959 Act states:

> *"Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner…to conduct an inquest into the death of that person"*

[31] The test is therefore one of 'advisability' and this is expressly a matter for the AG's opinion. This represents a broad discretion and one which permits, on the case law, only of a light touch review by the courts.

[32] The applicant asserts that the AG erred in not ordering a fresh inquest in circumstances where the original verdict was wrong in law. In asking himself whether there was a real prospect of a particular narrative verdict establishing what happened, it is argued that the AG misdirected himself on the test to be applied.

[33] In simple terms, 'advisable' means prudent or sensible. In order to make such a judgment, it must be permissible to examine not only the circumstances of the original inquest (if there has been one) but also the circumstances which now prevail. As such, the AG's examination of the utility of holding a fresh inquest is an entirely legitimate and appropriate line of enquiry. The nature and source of any new evidence which has come to light would be central to this assessment of utility.

[34] In the instant case, the HET report revealed two key aspects of the new evidence: firstly, as to the location of the soldiers when shots were fired and secondly, as to the provenance of the statements taken by the RMP. The conclusion of the AG was that it would be difficult for a new inquest to find facts establishing what did actually happen and hence there was no utility in directing an inquest, applying a 'real prospect' test.

[35] The statutory provision in England & Wales whereby the findings of an inquest may be quashed and a new investigation ordered is section 13 of the Coroners Act 1988 which now provides:

> *"(1) This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner…*
>
> *(b) where an inquest or an investigation has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that an investigation (or as the case may by, another investigation) should be held"*

[36] There are material differences in the legislative language and the procedure between section 13 of the English Act and section 14 in Northern Ireland. However, it is difficult to envisage circumstances where the holding of a fresh investigation (being the language of the Coroners and Justice Act 2009) would be 'desirable in the interests of justice' in one jurisdiction but not be 'advisable' in the other. It is at least arguable that the tests to be applied should be similar.

[37] The learned authors of Jervis on Coroners (14th Ed) say at 19-18:

> *"Where there is new evidence the courts in recent times have in substance relied on the test of whether there was a 'real possibility' of a different verdict"*[2]

[2] Citing, inter alia, *Mulholland v St Pancras Coroner* [2003] EWHC 2612 (Admin) and *North West Wales Coroner –v- Hartley* [2005] EWHC 2343 (Admin)

[38] I am therefore satisfied that it is at least arguable, in circumstances where it is accepted that the original inquest verdict was unlawful, that the test to be applied in relation to fresh evidence is whether there was a real possibility of a different verdict. I therefore grant leave to seek a judicial review of the decision of the AG on the first ground of challenge.

Material Considerations

[39] It is striking that nowhere in the detailed correspondence passing between the applicant's solicitors and the AGO does the latter address the issue of the alleged fabrication of statements on behalf of soldiers. On that basis, and despite the claim that all submissions were taken into account, I have determined that there is an arguable case to be made that the AG failed to take into account a material consideration, namely that one of the soldiers now says that a statement was falsely attributed to him and handed into the coroner at the original inquest. This not only calls the version of events into doubt but also calls for further investigation in its own right.

[40] The decision of the AG is also based on the proposition that the 'shooter' would be entitled to invoke the privilege against self-incrimination and decline to answer questions. This is, of course, a feature of any inquest involving a violent death and is a matter with which coroners are familiar. As the Court of Appeal recently held in *M4 –v- Coroners Service* [2022] NICA 6, the proper course of action is for a witness to be compelled to attend to give evidence and the privilege invoked, if sought, at an appropriate time. This does not mean that someone who is suspected of causing a death cannot given important and material evidence to a coroner charged with carrying out an inquest. I am satisfied that there is an arguable case that the AG failed to take into account this feature of the potential evidence which could be presented to a fresh inquest.

[41] The AG has also asserted that the 'gunman' firing from the social club has never been identified. This proposition appears to emanate from the same flawed analysis as the HET Report and does not recognise that, on the sworn evidence of the civilian witnesses, there was no such gunman. There is also therefore an arguable case that the AG had failed to have proper regard to the evidence as a whole, both that which was given at the original inquest and the new material generated through the HET process.

[42] There is no discrete article 2 challenge advanced in the applicant's case but it is argued that the AG failed to take into account the State's article 2 investigative duty in arriving at his decision.

[43] In light of the UKSC decision in *Re McQuillan* [2021] UKSC 55, this is an argument doomed to fail. The killing in the instant case occurred in 1972, some 28 years before the Human Rights Act came into force. There is no 'genuine connection' between the death and the statutory enactment sufficient to satisfy the

test laid down in *McQuillan*, with its outer time limit of 10-12 years. The applicant therefore seeks to argue, by reference to *Brecknell v UK* [2008] 46 EHRR 42, that the article 2 obligation has been revived by virtue of the additional evidence identified through the HET process.

[44] In *McQuillan* Lord Reed analysed the matter as follows:

> *"177. In view of our conclusion that the "critical date" for the purposes of application of the genuine connection test in the context of section 6(1) of the HRA is 2 October 2000, it must follow in the McQuillan case that the relevant public authorities are not subject to any article 2 investigative obligation under section 6(1). In Janowiec , para 144 (quoted above), the Grand Chamber made it clear that if the triggering event for an article 2 investigative obligation "lies outside the Court's jurisdiction ratione temporis, the discovery of new material after the critical date may give rise to a fresh obligation to investigate [pursuant to the revival principle in Brecknell] only if either the 'genuine connection' test or the 'Convention values' test … has been met." In other words, the revival of an article 2/3 investigative obligation pursuant to the principle in Brecknell is subject to either the genuine connection test or the Convention values test being satisfied in respect of the relevant trigger event (death or alleged ill-treatment, as the case may be) in the particular case. By analogy, the same approach applies in relation to section 6(1) of the HRA, with the "critical date" for that purpose being 2 October 2000. As we have explained, neither of those tests is satisfied in the McQuillan case, so there is no scope for application of the Brecknell principle in that case.*
>
> *178. With respect to the Court of Appeal in the McQuillan case, they overlooked this part of the judgment of the Grand Chamber in Janowiec. They fell into error by ruling, in effect, that the 'genuine connection' test is subject to the Brecknell test, which is the opposite of the ruling in Janowiec, para 144. That paragraph reflects the logic of the Grand Chamber's reasoning in Silih , as explained in Janowiec. In the light of that reasoning, Sir James Eadie rightly pointed out that the Court of Appeal's approach is wrong in principle. If correct, it would have the effect that in any Brecknell-type case where new evidence emerges in relation to a suspicious death or alleged ill-treatment going back decades, perhaps to the promulgation of the Convention in 1950, the article 2/3 investigative obligation would apply; but that would be destructive of the legal certainty which the Grand Chamber was concerned to achieve by its judgments in Silih and Janowiec and would be contrary to the statements in those judgments that the investigative obligation*

in relation to deaths that occur before the relevant 'critical date' for any contracting state is not open-ended."

[45] It is clear therefore that the *Brecknell* test is itself subject to the test of genuine connection or, alternatively, the Convention values test. As a result, no article 2 obligation can be said to arise on the facts of the instant case. Whilst it can be said that new evidence has come to light as a result of the HET inquiry, it is not possible to establish a genuine connection with a death occurring in 1972.

[46] On this basis, it cannot be argued that the AG was wrong in law in failing to take into account any article 2 investigative obligation. Leave to apply for judicial review on this ground is refused.

Immaterial Consideration

[47] The only immaterial consideration relied upon by the applicant is the pronouncement of the DPP in relation to the prospect of a conviction in the case. A proper reading of the letter from the AGO dated 7 June 2019 reveals that the views of the DPP were only taken into account in relation to the *Brecknell* article 2 issue. Since I have held that no such obligation arises on the facts of this case, the relevance of this point falls away.

[48] It is not arguable that this consideration played any role in the AG's determination and I therefore refuse leave on this ground.

Conclusion

[49] For the reasons set out, I grant leave to apply for a judicial review of the AG's decision under section 14 of the 1959 Act on the grounds of illegality and the failure to take material considerations into account.

[50] I will hear the parties in relation to directions for the future conduct of the litigation.