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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY EAMON CAIRNS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Ms Doherty QC with Mr McGowan BL (instructed by Madden & Finucane) for the applicant
Dr McGleenan QC with Ms Curran BL (instructed by the Crown Solicitor's Office) for the proposed respondent

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McFARLAND J

Introduction

[1] The applicant is the father of two boys who were murdered at their home in County Armagh on the evening of 28th October 1993. The evidence from his daughter, who was present in the house at the time, indicates that two masked men using firearms were involved. There had been an investigation into the murders by the police at the time and a number of individuals were arrested but no person has ever been charged with any offences in connection with the murders. An Inquest into the deaths was convened on the 12th January 1995 determining the cause of death in both cases to be bullet wounds. Further investigations have been carried out in relation to the murders and police conduct. The Police Ombudsman of Northern Ireland reported on the 30th October 2007. The Historic Enquiries Team of the police reported on the 8th June 2011, and the Attorney General on the 22nd February 2012.

[2] On the 15th October 2019 the BBC broadcast a programme in its 'A Secret History' series. During that programme a journalist interviewed a number of people. The tenor of the programme was to suggest as a theory that the murder of the two brothers had been part of a deliberate campaign to target for murder family members of known Republican terrorists or people perceived to be sympathetic to the Republican cause. It asserted that a gang of Loyalist terrorists in the Mid-Ulster area was responsible for this campaign, and that leading figures within the gang had been state agents. One contributor also suggested that this was a deliberate state

organised two fold policy which was to target Republican terrorists and to target families, in an effort to force the terrorists, through a war weariness process, to abandon the terrorist campaign. A more detailed analysis of the content of the programme in the context of the two murders is dealt with below.

[3] At the outset it should be noted and emphasised that neither of the brothers, or indeed their parents or siblings, has been identified as ever having been involved in any terrorist incident, or as members of any terrorist organisation. The BBC programme referred to a possible link as a cousin, Sheena Campbell, who was an active member of Sinn Fein, had also been murdered a year earlier.

[4] Three months after the programme had been broadcast, the applicant's solicitors wrote to the Secretary of State for Northern Ireland ("SofSNI") on the 17th January 2020 demanding that a public inquiry under the Inquiries Act 2005 ("the 2005 Act") be set up to investigate the murders and surrounding circumstances. The Crown Solicitor's Office replied to the applicant's solicitors on the 9th March 2020 indicating that the SofSNI was awaiting an assessment by the police in relation to the broadcast. The letter concluded:

> "*The question of whether Article 2 ECHR requires any further investigative steps in these cases beyond those already completed will be informed by the assessment of the credibility of the information advanced in the Spotlight programme. That task is ongoing and, as such, it is premature to make any specific determination as to what, if any, further investigative procedures would be necessary in order to comply with domestic and ECHR obligations.*"

[5] The applicant now seeks leave to challenge this decision. Dr McGleenan, on behalf of the SofSNI, takes no issue about the fact that the application was made many months after the expiry of the abridged time limit of 14 days to apply for judicial review of a decision not to convene an inquiry (see section 38(1) of the 2005 Act). On this basis the application is dealt with as a challenge to the continuing refusal to convene an inquiry under the 2005 Act.

The Law

[6] The test to be applied for the consideration for the granting of leave is now very well established, see, for example Nicolson LJ in *Omagh District Council* [2004] NICA 10 at [5], and more recently, McCloskey J in *McKee* [2018] NIQB 60 at [17]:

> *"Each of the Applicant's grounds of challenge is to be evaluated through the prism of the well-established test for leave, namely whether there is an arguable case fit for further and more detailed enquiry by the Court and possessing a reasonable prospect of ultimate success."*

[7] Section 1 (1) of the 2005 Act provides:

> *"A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that –*
>
> *(a) particular events have caused, or are capable of causing, public concern, or*
>
> *(b) there is public concern that particular events may have occurred."*

[8] A Minister has a wide discretion when considering setting up an inquiry under the 2005 Act. There is little doubt that if a state was involved in the systematic murder of its citizens it would be a cause for public concern, and would trigger a requirement to ensure that a suitable inquiry is set up to satisfy the state's obligations under Article 2 European Convention rights.

[9] Article 2 provides:

> *"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
>
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
>
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection."*

It is not necessary to rehearse the jurisprudence relating to a state's procedural obligation under Article 2, as it is very well established.

[10] There is no jurisprudence in the United Kingdom or from Strasbourg which indicates the forum by which a state is required to carry out an Article 2 compliant investigation. All the judicial guidance relates to what should be the basic

requirements of such an investigation. Lord Bingham in *Middleton* [2004] UKHL 10 at [7] stated:

> *"The European Court has never expressly ruled what the final product of an official investigation, to satisfy the procedural obligation imposed by article 2 of the Convention, should be. This is because the Court applies principles and does not lay down rules, because the Court pays close attention to the facts of the case before it and because it recognises that different member states seek to discharge their Convention obligations through differing institutions and procedures."*

[11] Lord Phillips in *JL* [2008] UKHL 68 echoed these remarks at [31]:

> *"The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual State to decide how to give effect to the positive obligations imposed by article 2."*

[12] This court is not aware of any case in the United Kingdom of a court directing a Minister to convene an inquiry under the 2005 Act. When asked, Ms Doherty QC, for the applicant, was not aware of any such case either.

[13] The reason for this reticence on the part of the judiciary is explained by Lord Neuberger in *Keyu* [2015] UKSC 69 at [127]. *Keyu* was a case relating to an incident in December 1948 in Malaya which involved British troops. The Minister refused to convene an Inquiry under the 2005 Act. Lord Neuberger stated that although the court had jurisdiction to overrule or quash the exercise of a Minister's discretion, the exercise:

> *"is circumscribed by very well established principles, which are based on self-evident propositions that the member of the executive is the primary decision-maker, and that he or she will often be more fully informed and advised than a judge."*

[14] Lord Neuberger recognised that the power to quash such a decision was only on *Wednesbury* grounds (it being made in excess of jurisdiction, for an improper motive, it was irrational, and/or it took into account irrelevant matters or did not take into account relevant matters).

[15] There are many examples of courts declining to exercise the jurisdiction, the primary reason being that the obligation placed on a state to conduct a human rights compliant investigation places no mandatory requirement as to the nature or form of that investigation. Lord Phillips in *DL* explained that it was not the function of the courts to do so:

> *"I do not believe that it would be appropriate for your Lordships to attempt to prescribe the circumstances in which a D type investigation will be necessary to satisfy article 2."* (at [45]). (The reference to the D type investigation relates to *D* [2006] EWCA Civ 143 which set out basic requirements of such an investigation.)

[16] A stark example of this is *Litinvenko* [2014] EWHC 194. Litinvenko was a Russian author who was murdered in England with suspicion falling on agents of the Russian Federation. The inquest was conducted by a High Court judge and the judge, as coroner, requested the Minister to convert the inquest into an inquiry under the 2005 Act. The Minister refused stating six reasons, and indicated that a 'wait and see' approach should be adopted. Richards LJ comprehensively dismissed the Minister's reasoning (see [74] - "*the deficiencies in the reasons are so substantial that the decision cannot stand*"), but went on at [75] to conclude that the court was not in a position to say that the Minister had no rational option but to set up a statutory inquiry at that time. This opinion was reached after stating that the request from the coroner was "*plainly a strong one*" and the Minister would need "*better reasons than those given*" to refuse an inquiry.

[17] Another example from the English Court of Appeal is *Scholes* [2006] EWCA 1343, with Pill LJ at [72] indicating:

> *"The investigations, assessments and debates in progress are such that, in my judgment, the appellant has not established that the Secretary of State is in breach of Article 2 by failing to convene a public inquiry into this specific case, tragic though it is and serious the issues raised. I am far from persuaded that setting up a public inquiry is the only way in which the obligation under Article 2 can be discharged in this case."*

[18] Before leaving consideration of the law it would be useful to refer to the European Court of Human Rights ("ECtHR") judgment in *Brecknell* (2008) 46 EHRR 42 in some detail as it relates to obligations arising out of journalistic disclosures similar to the disclosures in this case. The applicant's husband had been murdered by Loyalist terrorists in 1975. After a police investigation, no prosecutions followed, and an inquest determined the cause of death. After a later incident in 1978 a reserve police officer was arrested. Subsequent to his conviction, that officer named another police officer who may have been involved in the 1975 murder. This officer in turn stated that he had driven a vehicle that picked up a named person and two other people on the evening in question after the incident, but that he was not aware of what they had done. At or about this time another police officer had been arrested on other matters but had declined to provide information to the police unless he was granted immunity, which was refused. That officer was later convicted of other offences. In 1999 that officer made a statement to a journalist which was published in The Sunday Times. That statement implicated six

individuals in the 1975 murder, as well as other similar murders at the time. (The gang operated out of a farmhouse owned by another police officer in Glennane, and this gang has become known as the 'Glennane Gang').

[19] The family of the deceased commenced judicial review proceedings but these were subsequently withdrawn and they applied to the ECtHR alleging violation of Article 2 rights.

[20] At [68] – [72] the ECtHR dealt specifically with how a state is to deal with a situation which can arise when an original investigation into a death has concluded and further information is later obtained. I do not propose to quote from this section of the judgment in its entirety, but it is highly relevant to this case, and I set out below extensive extracts as they give a flavour of the court's suggested approach –

> *68. …[The] nature and extent of any subsequent investigation required by the procedural obligation would inevitably depend on the circumstances of each particular case and might well differ from that to be expected immediately after a suspicious or violent death has occurred.*
>
> *69. The Court would also comment that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.*
>
> *70. The Court would, however, draw attention to the following considerations. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further … The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely-differing situations that might arise. It is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to the Contracting Parties to provide further protection or guarantees … Lastly, bearing in mind the difficulties involved in policing modern societies and the choices which must be*

made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities…

71. *With those considerations in mind, the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts (see paragraph 65 above), the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results. (Osman, cited above, § 121).*

72. *The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case, and may well be influenced by the passage of time as stated above. Where the assertion or new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged … Promptness will be likely not to come into play in the same way, since, for example, there may be no urgency as regards the securing of a scene of the crime from contamination or in obtaining witness*

> *statements while recollections are sharp. Reasonable expedition will remain a requirement, but what is reasonable is likely to be coloured by the investigative prospects and difficulties which exist at such a late stage.*

[21] Ultimately, the ECtHR made only a limited ruling that the investigation was not Article 2 compliant because the police investigation lacked independence.

[22] Lord Kerr in *Finucane* [2019] UKSC 7 emphasised at [114] and [115] that, following *Brecknell* not every allegation, however trivial, would revive the duty to investigate. However, state authorities had to be sensitive to any information or material which might cast doubt on conclusions reached on foot of earlier investigations. Where there was a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities were under an obligation to take further investigative measures. It should also be borne in mind that the ECtHR in *Jordan* (2003) 37 EHRR 2 at [128] stated that "*investigations into … alleged conspiracies may not be justifiable or necessary*". Before leaving *Finucane* it is also worth noting that despite the Supreme Court finding that there still had not been an Article 2 compliant investigation into the death, it was still for the state to decide, in light of the various inquiries to date, how to meet the procedural requirement of Article 2, and, critically, what form of investigation, if indeed any was now feasible, was required in order to meet that requirement (see paragraph [153]). The Supreme Court offered no advice or direction as to the form of that enquiry.

The submissions

[23] Both parties lodged written submissions which were supplemented by oral submissions at a 'leave' hearing on 10 February 2021.

[24] The applicant's case was that the content of the BBC programme undermined the outcome of all the previous investigations which should now be regarded as flawed, that a failure of any state entity to contact the applicant (or other family members) suggests inaction in relation to this investigation, and that, as a consequence, an inquiry under the 2005 Act is the only alternative option. The challenge to the decision of the SofSNI is on the grounds of a misdirection in respect of the state's obligations under Article 2 and, in particular, the principles in *Brecknell*, a failure to consider the need to investigate wider issues relating to previous investigations, and the failure to consider that any investigation by the police would lack independence. It is further argued that a decision not to convene an inquiry under the 2005 Act was irrational. As a final argument, the applicant asserts that because of the importance of the issues raised, this should result in leave being given.

[25] The SofSNI presented a three-fold argument. Firstly, the SofSNI is not the appropriate respondent. He has no investigative powers and policing and justice are now devolved powers and a matter for the Minister of Justice, as is the need for European Convention compliance. Secondly, the SofSNI has not made any decision not to convene an inquiry. He has indicated that he has referred the matter to the police for investigation, as he has no investigative powers, and he is awaiting the police response. As such, he is following the *Brecknell* guidance. Thirdly, the underlying substance of the claim is the inadequacy of the police inquiry, and as such the application is directed at the wrong institution.

[26] I reject the suggestion that the SofSNI could not be an appropriate respondent. The 2005 Act extends to all jurisdictions of the United Kingdom and 'Minister' includes both Westminster and Stormont ministers. Justice is currently a devolved matter, enabling the Minister of Justice to convene an inquiry. Section 30 of the 2005 Act prevents the Northern Ireland Minister (without the consent of the SofSNI) including in an inquiry's terms of reference an ability to inquire into anything occurring before 2 December 1999. In any event, there is an issue that involves the role of what is described in the BBC programme as the "military", which is presumably a reference to the British Army, which would mean that there is at least one issue involving a non-devolved matter.

The content of the BBC programme

[27] It is necessary to carry out an analysis of what was actually contained in the programme. A closer examination would indicate the following:

a) Maguire did give an oral statement to the journalist but it contained no affirmation as to its truth;

b) Maguire has convictions for multiple murders and for directing terrorism;

c) Maguire expressed no regrets about his conduct;

d) Maguire said nothing about the events of 28 October 1993. It was stated that he was in prison at the time;

e) Maguire referred to an incident which he described as an attempt to murder male members of the Cairns household, which he said was about a year before the actual murders;

f) Maguire said that the people taking part in the 1992 attempt included himself (to carry out the shooting), Robin Jackson, Billy Wright and an unnamed person. All were in a vehicle driving towards the Cairns home when the attack was aborted because of military activity (a helicopter) in the area;

g) Jackson and Wright are both dead;

h) Maguire said the aborted attack had been planned by Jackson but Maguire could not remember what Jackson had said, other than he did most of the talking;

i) In respect of other more general matters, Maguire said that the gang included Wright and Mark Fulton (also deceased);

j) Maguire said he and Wright would scout out targets, but Wright masterminded everything, including targeting;

k) Maguire said that Wright had very good intelligence about potential targets including addresses and motor vehicles;

l) Maguire said that Wright told him that he was working with the police;

m) Maguire said that on a number of occasions Maguire drove Wright to undisclosed locations and Wright disappeared from view into alleyways and returned saying that he had been speaking to police;

n) The journalist said that two unnamed 'senior security sources' had spoken to an unnamed person (presumably connected to the BBC as there is a reference to 'us'). These sources are reported as saying that Wright was working as an agent for the police and the military.

[28] The content of the statements by Maguire and the journalist raise issues that would require further investigation as they have the potential to raise significant concerns about the murders of the two brothers. However even a brief analysis of what was actually revealed by the programme would indicate many potential shortcomings in the reliability of what had been said. Maguire had significant criminal antecedents and would struggle to be considered as a witness of truth. Despite his own convictions for directing terrorism he sought to minimise his own role within the criminal gang. He named three other individuals accusing them of criminal acts. They are all dead. Although Maguire attributed all the masterminding and targeting within the gang exclusively to Wright, he attributed the planning the night of the alleged conspiracy to murder in 1992 entirely to Jackson, a person who was said to have left the gang much earlier. The reference to Wright being a police agent is based on what Maguire said Wright told him. The instances of Wright speaking to a police officer are reported by Maguire in the vaguest of terms, such as Wright getting out of a vehicle and walking to unknown destinations and returning to say he had been talking to a police officer. Like Maguire, Wright has significant criminal antecedents and would struggle to be considered as a witness of truth. The journalist's reference to two senior security sources and what they said, provided no detail about who they were, where they

worked, what rank they held, what they actually said, the context in which they uttered their remarks and to whom.

[29] I have gone into some detail to analyse the relevant content of the programme. The journalist used an expression towards the conclusion of the programme that Maguire's "*testimony proves …*" It was an unfortunate expression as what was broadcast was not testimony, and anything it did prove is based on hearsay statements from unnamed people and a deceased person of extremely dubious credibility. The programme did raise certain serious issues that required further investigation. That investigation has commenced and the SofSNI awaits the results of that investigation. The SofSNI has therefore adopted a 'wait and see' approach.

Discussion

[30] The application stage requires the applicant to show a number of things. Firstly that he has an arguable case fit for further and more detailed enquiry and secondly that he has a realistic prospect of ultimate success. The court did not conduct a "rolled up" hearing, but the "leave" hearing was conducted over 1½ hours on the 10th February 2021, and the issues in the case were fully ventilated by counsel in both their written and oral submissions.

[31] The applicant seeks only one remedy, that is, a mandamus order requiring the SofSNI to set up an inquiry under the 2005 Act. The test for leave is acknowledged to be low, but on a realistic assessment of the applicant's case it is difficult to see how it could be arguable that the SofSNI has actually made a decision not to convene an inquiry under the 2005 Act. An inquiry has not been convened, but the decision, insofar as it has been made, is one to await the result of the police investigation.

[32] It also could not be argued that the SofSNI's approach does not follow the guidance set out in *Brecknell* as to how to deal with new evidence which has the potential to reopen previous enquiries. As the ECtHR stated in *Brecknell* it will only deal with required minimum standards not what is best practice. If anything, the evidence before the court is that the *Brecknell* guidance is being followed along lines suggested by the ECtHR. Lord Kerr in *Finucane* stressed the need for what he described as a "plausible, or credible, allegation, piece of evidence or item of information" which in turn would trigger a further investigation. That in turn may require a more structured inquiry, but even then it may not require a 2005 Act inquiry.

[33] Far from being an irrational decision on the part of the SofSNI, it could be argued with a degree of force that to establish an inquiry under the 2005 Act based on the content of the BBC programme alone would be irrational in itself. The actual probative content of the programme is modest in respect of the central theme being suggested, namely security force involvement in the two murders. Follow up investigations will require the police, or any other investigative body, to conduct a

significant enquiry including interviewing Maguire (almost certainly under caution), the journalist, other people involved in the production, and the security sources, if identified. It is also likely that access to unused material from the programme may be sought. Much will depend on the co-operation of all these parties. If and when they are interviewed, their statements will have to be checked against other evidence to assess credibility. Only at that stage will an informed decision be able to be made.

[33] The one piece of potentially relevant direct evidence contained in the programme is the purported confession by Maguire that he was involved in a conspiracy to murder or an attempted murder in 1992. The court has been advised that the police are investigating the issues raised by the content of the programme, and once the circumstances surrounding the making of that purported confession are ascertained and Maguire has been formally interviewed, all that evidence will inform any decision to bring criminal charges. Ultimately, that will be a matter for the Director of Public Prosecutions. It could not be argued that this aspect of the case requires the convening of an inquiry under the 2005 Act.

Conclusion

[34] For the reasons stated the applicant has not shown that leave should be granted to permit him to apply to the High Court for an order of mandamus requiring the SofSNI to convene an inquiry under the 2005 Act to inquire into the deaths of his sons, and to any circumstances surrounding the deaths.

[35] I will hear the parties in respect of any orders as to costs.