

Neutral Citation No: [2023] NIKB 64

Ref: HUM12162

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 17/05/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY COLM CAMERON
FOR JUDICIAL REVIEW (No. 2)

Hugh Southey KC and Stephen Toal (instructed by KRW Law) for the Applicant
Simon McKay (instructed by the Police Ombudsman of Northern Ireland) for the
Respondent

HUMPHREYS J

Introduction

[1] This is a second application for judicial review brought by the applicant arising out of the investigation into the brutal murder of his father, James Cameron, on 26 October 1993.

[2] Mr Cameron was shot dead at the Belfast City Council Cleansing Depot at Kennedy Way by members of the Ulster Freedom Fighters ('UFF').

[3] I have given judgment in an application which sought to challenge the acts and omissions of the PSNI concerning the investigation into the murder.

[4] In this application, the applicant challenges the failure by the respondent, the Police Ombudsman for Northern Ireland ('PONI'), to carry out an investigation in relation to a complaint lodged by the applicant in 2008. Leave was granted on the papers on 19 January 2023 and the two applications were heard together.

The Evidence

[5] The circumstances of the murder of Mr Cameron are set out in my judgment in *Re Cameron's Application (No. 1)*.

[6] The complaint submitted by the applicant to PONI raised, inter alia, the following issues:

- (i) The absence of any vehicle check points in the vicinity of Kennedy Way on the morning of the attack;
- (ii) The existence of a threat against 'Catholic depots' made on 25 October 1993;
- (iii) The alleged inadequacies in the police investigation;
- (iv) The potential role of informers;
- (v) The fact that a balaclava recovered from the scene could no longer be traced;
- (vi) The importation of VZ58 weapons, one of which was used in the attack.

The evidence in the case reveals that PONI received a complaint from the applicant on 16 April 2008. This was the subject of a preliminary assessment by the respondent on 16 March 2012 and, following the receipt of further information, the complaint was formally accepted. The subject matter of the complaint was alleged collusion in relation to the murder.

[7] The former Police Ombudsman, Dr Michael Maguire, determined that the applicant's complaint should be incorporated into a thematic investigation named 'Operation Medfield.' This is an investigative operation into some 54 murders attributed to the UDA or UFF in which allegations have been made that police officers either collaborated with the terrorists or protected those responsible for the murders.

[8] PONI has formed the view that thematic investigations represent an effective strategy for addressing complaints which have connections in terms of individuals, evidential and intelligence links.

[9] Operation Medfield is itself divided into six groups, labelled A to F. Group E concerns murders attributed to the UDA or UFF and which occurred in the West Belfast area between 1988 and 1994. The murder of James Cameron falls into that group.

[10] In order to manage resources, PONI proposes to investigate the grouped cases sequentially. The investigations commenced on 21 July 2016 with Group A, relating to murders between 1972 and 1975.

[11] As a result of pressures on resources Operation Medfield was suspended between 2020 and early 2022. The evidence of Paul Holmes, Senior Director of PONI Investigations, is that the Group E investigation is unlikely to commence prior to

2026, but an unequivocal commitment to the pursuit and conclusion of the Operation has been provided, subject to any statutory intervention.

The Grounds for Judicial Review

[12] The applicant contends that the respondent's failure to deal with his complaint within a reasonable time is unlawful on a single ground, namely that it represents a breach of the state's investigatory obligation pursuant to article 2 of the ECHR.

The Engagement of Article 2

[13] The applicant accepts that there is no basis to distinguish between the engagement of article 2 in this case and in the context of the related judicial review concerning the PSNI. There could be no principled distinction since either article 2 is engaged upon the facts of a particular case or it is not; the means by which the obligation, if applicable, is satisfied may involve either the PSNI, PONI or both.

[14] In *Re Cameron's Application (No. 1)*, I found that article 2 is not engaged in this case and provided detailed reasons for so concluding. It is not necessary for these to be rehearsed in detail in this judgment but in summary:

- (i) Article 2 ECHR imposes an investigative obligation on the state and such investigation must comply with the requirements of effectiveness, promptness, independence and public scrutiny;
- (ii) The critical date for the purposes of the ECHR is 2 October 2000 and the HRA is not retrospective;
- (iii) Where an investigation is closed, the article 2 obligation may be revived when the *Brecknell* test or trigger is met;
- (iv) This involves the identification of some new plausible or credible piece of evidence or information relevant to the identification and prosecution of the perpetrator of an unlawful killing;
- (v) This test will not be lightly satisfied – in the Supreme Court's analysis the material should be "weighty" and "compelling";
- (vi) If such material is identified, the second question is whether the genuine connection or Convention values tests are met on the facts of the case;
- (vii) The genuine connection test requires firstly that the killing occurred within a reasonably short time of the critical date, normally not more than ten years;

(viii) If this is satisfied, then one must ask if the major part of the investigation was completed or ought to have been completed after the critical date.

[15] In *Re Cameron's Application (No. 1)* I have set out why, in my analysis, none of the material relied upon by the applicant in this case either individually or collectively satisfies the *Brecknell* test. Even if new evidence were identified, on the basis of the facts known at this stage the genuine connection test would also not be met in that the major part of the investigation took place well before the critical date, culminating as it did in a criminal trial and conviction of two accused.

[16] Given that article 2 is not engaged, it is inevitable therefore that this judicial review must be dismissed.

The Role of PONI

[17] Although it is not necessary to do so for the purposes of this application, the role of PONI in article 2 compliant investigations was raised in argument and I propose to consider same.

[18] In *Re Jordan's Applications* [2014] NIQB 11, Stephens J analysed the manner in which the state may comply with its article 2 investigatory obligation and commented:

“The form of such an investigation may vary in different circumstances. The Strasbourg Court did not specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. The aims of fact finding, criminal investigation and prosecution can be carried out or shared between several authorities, as in Northern Ireland, and the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. However the available procedures have to strike the right balance.”
[para 78(b)]

[19] The applicant contends that both PONI and PSNI carry out investigations which form part of the steps taken by the UK to comply with article 2. Indeed, it is argued:

“PSNI and PONI have linked responsibility to investigate collusion.”

[20] The respondent submits that it is not open to PONI to make a finding of collusion in light of the decision of the Court of Appeal in *Re Hawthorne's Application* [2020] NICA 33. The court analysed the legislative framework of Police (Northern Ireland) Act 1998 and concluded:

“[40] It is clear that the principal role of the Ombudsman is investigatory. The complaint defines the contours of the investigation and in this case informed the terms of reference about which no complaint has been made. There is no power or duty created by the statute for the Ombudsman to assert a conclusion in respect of criminal offences or disciplinary misconduct by police officers. The Ombudsman is required to provide recommendations to the DPP if he considers that a criminal offence has been committed. Such a recommendation is a decision which could form part of a PS. Once he makes such a recommendation, he has no role thereafter apart from supplying information on request.

[41] When making a report to the disciplinary authority he is again required to make a recommendation as to whether proceedings should be brought and a statement of his reasons for making the recommendation. When he recommends proceedings, he must provide particulars. Thereafter, his only role is in communicating the outcome to the complainant. In respect of complaints about criminal proceedings and disciplinary misconduct he is not, therefore, given power to make any determination about the complaint.”

[21] In light of the limited nature of the functions exercisable by PONI under statute it is submitted that this role does not form part of the means available to the state to comply with the article 2 investigative obligation. However, this argument was firmly rejected by the Court of Appeal in *Hawthorne*:

“[47] The investigative role of the Ombudsman was expressly relied upon by the United Kingdom Government and referred to in the Joint Committee on Human Rights Seventh Report of Session 2014/15. The relevant passage is set out by the judge at [60]. The procedural obligation under Article 2 requires that an effective and independent investigation is conducted and that there is a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. As the papers show the

Ombudsman has published a PS on a significant number of occasions, some of which have demonstrated by investigation that concerns about the commission of offences or misconduct were misplaced. In other cases recommendations about future conduct have been highlighted. Many of these are examples of contribution to the satisfaction of the Article 2 obligation.”

[22] Thus, whilst PONI’s investigations and reports may not directly result in the identification or prosecution of offenders, it has nonetheless been recognised that it can and does provide an important contribution to the satisfaction of the article 2 obligation. It provides an element of public accountability and may represent the start of a process which could lead to the identification of perpetrators or the discipline of those charged with investigation. This is reflected in the views of the Committee of Ministers of the Council of Europe who, in considering the execution of judgments against the UK in the *McKerr* group of cases have taken into account steps being taken by PONI (see CM/Del/Dec(2021) 1419/H46-44).

[23] I therefore reject the argument advanced by the respondent in relation to the role of PONI in cases where the article 2 obligation is in play.

[24] I also heard arguments in relation to the question of delay and the allocation of resources. Since I have found that article 2 is not engaged, this question is academic although as the parties correctly noted I have already held in *Re McEvoy’s Application* [2022] NIKB 10 that, where article 2 is in play, it is a matter for the state to allocate its resources in such a manner as to comply with Convention obligations (see para [49]). The facts of this case, as well as the legal consequences, are, of course, quite different from those in *McEvoy*.

Conclusion

[25] For the reasons set out above, and in *Re Cameron’s Application (No. 1)*, the application for judicial review is dismissed.

[26] I will hear the parties on the question of costs.