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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 PATRICK FRIZZELL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Mr H Southey QC with Mr N Scott BL (instructed by KRW Law)
for the applicant
Dr T McGleenan QC with Ms L Curran BL (instructed by the Crown Solicitor's Office)
for the proposed respondent the Chief Constable of the Police Service of Northern Ireland

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McFARLAND J

Introduction

[1] This is an application for leave to apply for judicial review.

[2] The applicant Thomas Frizzell ("Mr T Frizzell") is the brother of Brian Frizzell ("Mr B Frizzell") who was killed by gun shots on 28 March 1991 in Lurgan. The investigation of that death is being conducted by the Legacy Investigations Branch of the Police Service of Northern Ireland ("the LIB"). The LIB is a specialist unit of the police and has a case sequencing model ("the CSM") whereby it prioritises its different investigations. The current case-load is in excess of one thousand. By a letter dated 18 November 2020 the Chief Constable wrote to Mr T Frizzell's solicitors stating that the case had being prioritised in accordance with the CSM taking into account all known information about the death. The Chief Constable has declined to state where the investigation is currently placed in the prioritisation and he has failed to give reasons. Mr T Frizzell seeks leave to judicially review the failure to give reasons.

The law relating to granting leave

[3] The test to be applied for the consideration for the granting of leave is very well established (see Nicholson 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."*

Mr P Frizzell's application in relation to the Chief Constable's decision

[4] The challenge is to the legality of the police's decision as to where the investigation into the death of Mr B Frizzell is placed in the CSM. There is no challenge to the legality of the CSM itself. The only challenge relates to a failure to state where it is placed and a failure to give reasons why it is in that place. Mr P Frizzell argues that the lack of reasons prevents him from understanding the approach being adopted by the police and prevents him from making representations should he disagree with the police's approach, and, if necessary, challenge the police's decision by judicial review.

[5] There is a debate as to whether the request is one for information rather than for reasons. I would tend to support the view that the request is for information, but the debate is largely semantic. Where a case is in the sequence is clearly information. The information, if provided, would, in turn, provide the reasons for the sequencing under CSM.

[6] How a police force manages its investigations, and how it prioritises those investigations is a matter well within the discretion of the police, and applying *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 59 EF the discretion, in the absence of compelling evidence, is not subject to judicial review:

> *"A chief officer of police has a wide discretion as to the manner in which [the duty to enforce the criminal law] is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon some matters is such that no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying upon chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged."*

[7] The applicant, in his skeleton argument, has provided several examples of when reasons have been required. The starting point is that at common law there is no duty on a public body to give reasons for its decisions (see Lord Mustill in *Doody* [1993] 3 All ER 92 at 108). However, certain types of cases have been identified when reasons should be given. Firstly, where the subject matter is an interest so highly regarded by the law that fairness requires that reasons to be given as of right and secondly where the decision appears aberrant, and fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and challengeable) or apparent (see *Institute of Dental Surgery* [1994] 1 All ER 651 at 263A). Sedley J in *Institute of Dental Surgery* added that the grant of leave in such cases will depend upon prima facie evidence that something has gone wrong. Brooke LJ in *Wooder* [2003] QB 219 at [22] referred to these two cases and a further case of *Cunningham* [1992] ICR 816, as making up a trilogy of cases in the early 1990s which had stated the law, and it was not necessary to develop it beyond that stage. The courts are primarily concerned with the concept of fairness, whether that is required by the process or if it relates to the decision itself.

[8] The Court of Appeal in *Oakley* [2017] 1 WLR 3765 revisited the matter and acknowledged that there was a tendency increasingly to require reasons rather than not (at [29]), with Elias LJ suggesting at [30] that –

> *"it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so."*

[9] In another planning case, *Dover District Council –v- CPRE Kent* [2017] UKSC 79, the Supreme Court noted with approval the approach taken in *Oakley*.

[10] The Irish Supreme Court in *Mallak –v- Minister for Justice, Equality and Law Reform* [2012] IESC 59 spoke of similar trends in the development of this aspect of the law in the Republic of Ireland.

[11] A review of those cases where courts have stated that reasons are required, clearly indicates that they will involve decisions relating to what could be described as decisions susceptible to review, such as personal liberty, professional regulatory body decisions, planning applications departing from established planning policy, refusal of citizenship etc. The need for reasons is required to establish a fairness to the process, so that an applicant knows why the decision has been made.

[12] The decision in this case is based on an evaluation by the police of the existing evidence and viable lines of enquiry. The gathering of the evidence is a dynamic process and this will require evaluation, and re-evaluation, of the case within the CSM on an ongoing basis. Some of the information is confidential information which the police would not be obliged to disclose, and in fact, would be unwise to disclose into the public domain. For example, the applicant suggests that he should

be told whether a person of interest has been identified and whether there is any forensic material. The police are not required to provide this information during the investigative stage. There is no duty placed on the police to explain what steps they are taking to investigate criminal activity and why they are prioritising one case ahead of another.

[13] Elias LJ in *Oakley* outlined what he described as powerful reasons why it was desirable for administrative bodies to give reasons for their decisions, but acknowledged that the counter-balance to this is the need to avoid over-burdening a decision-maker (see [26] and [27]).

[14] It is not arguable that this is a decision that fairness requires disclosure, and it is not arguable that the sequencing of the case within the CSM is susceptible to judicial review. To borrow Sedley J's phraseology, where the investigation of a murder committed 30 years ago sits in the CSM is not one so highly regarded by the law that fairness requires reasons to be given or that the decision appears aberrant. Where it sits in the model will depend on the extent of the evidence and the ongoing enquiries.

[15] The applicant makes one final argument in relation to an alleged breach of the Victim Charter. This raises a separate issue and is not directly related to the core application. From the evidence made available to the court it is not immediately apparent as to how the police, or the Department of Justice, the body responsible for the Charter, have been in breach of its terms. In any event, should the police be in default, there are other avenues and potential remedies open to the applicant.

[16] For the reasons set out above, Mr P Frizzell's application for leave is therefore refused.

[17] I will hear the parties in respect of any costs orders at this stage.