Neutral Citation No. [2017] NIQB 7 | *Ref:* **TRE10161**

Judgment: approved by the Court for handing down | *Delivered:* **17/01/2017**
*(subject to editorial corrections)**

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 WILLIAM HOLDEN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] The applicant, William Holden, has sought disclosure of an inquest file held by the Public Record Office of Northern Ireland ("PRO"). He seeks leave to judicially review decisions of the PRO regarding their request that his solicitor sign an undertaking before any disclosure is made pursuant to an undertaking procedure. It is envisaged that the undertaking procedure will be widely operated and will afford an applicant more disclosure than the statutory route available through application of the Freedom of Information Act 2000 ("the 2000 Act").

[2] The applicant also challenges the redaction of certain information from the disclosure under the 2000 Act where that information was already in the public domain.

Factual Background

[3] The applicant was arrested on 16 October 1972, when aged 17, by members of the British army. He was detained and questioned by the military in respect of the murder of Private Frank Bell. He was subsequently transferred to police custody, wherein he is said to have signed a short statement confessing to the murder.

[4] The applicant pleaded not guilty at trial. He relied on alibi evidence at the trial. The admissibility of the confession was also at issue at trial. The applicant contended that while in military custody he was ill-treated, assaulted, subjected to water torture/boarding and threatened with death at gunpoint. The applicant was convicted of murder on 15 April 1973 and sentenced to death. The death penalty

was subsequently commuted to a life sentence. The applicant spent 17 years in prison, prior to his release on life licence.

[5] Following the making of representations to the Criminal Cases Review Commission ("CCRC"), the Applicant's convictions were referred to the Northern Ireland Court of Appeal on the basis that they were unsafe. The representations cited the work of an investigative journalist and the evidence he could provide in support of the applicant's contentions on the use of water torture/boarding. The representations also relied on new evidence from a former member of the British army and medical orderly who arrived at the scene of the shooting in the immediate aftermath and indicated that the trajectory of the shot relied upon by the prosecution at the trial could not have been correct. This man had provided an account to a local journalist.

[6] The CCRC decided to refer the appellant's conviction to the Court of Appeal and the basis upon which they decided to refer the decision is in reliance on information which "could not have been obtained by Mr Holden or his representatives". This material has been provided to the Court of Appeal by way of a confidential annex. The contents of the confidential annex were such that the CCRC took the view that there was a real possibility that, as per paragraph 94 of the CCRC decision:

(a) The court will be unable to conclude that the new evidence would not have made any difference to Lord Lowry CJ's ruling on the admissibility of the admissions to the Army and/or the confessions of the RUC.

(b) The court will be unable to conclude that the confessions to the Army and/or the RUC, if admitted, would have resulted in a verdict of guilty had the jury been told of the new evidence.

(c) The court will consider that the new evidence and the circumstances of Mr Holden's arrest and detention provide *prima facie* grounds for concluding that his convictions are unsafe and that there are no sufficiently countervailing factors to displace this *prima facie* conclusion.

[7] Ultimately, the defence had disclosed to them 2 documents from the Confidential Annex which the Court ruled were relevant. These were the Blue Card Rules applicable in 1972 (which governed the circumstances in which someone could be arrested and questioned by the military) and a statement of evidence from a soldier, which confirmed that the military had been proactively seeking the applicant. The convictions were quashed by the Court of Appeal on 21 June 2012 on the basis that the non-disclosure impacted on the safety of the applicant's conviction and could have supported an application to exclude the confession evidence.

[8] Additionally, the applicant complained of issues in relation to his ill-treatment and the circumstances of his confession that did not form the basis of his referral, as set out above.

[9] Since his conviction was quashed the applicant has pursued a claim for compensation as a consequence of miscarriage of justice pursuant to section 133 of the Criminal Justice Act 1988. The statutory scheme places the onus on the applicant to submit proofs. The applicant has also issued civil proceedings against the Ministry of Defence and Chief Constable of the Police Service of Northern Ireland.

Request for the Inquest File

[10] In furtherance of the above, the applicant's solicitors corresponded with PRO seeking access to the documentation used during and generated as a consequence of the inquest in respect of Private Bell, including all statements of evidence, post-mortem evidence, medical and engineering reports, maps, photographs and the inquest findings ("the inquest file"). PRO has confirmed that they hold an inquest file. Given the allegations which had been made against him, the applicant would have been entitled to status as an Interested Party before any inquest.

[11] Amongst the information sought are details in relation to the trajectory of the shooting, any ballistic evidence and the relevant post-mortem report, which documentation may assist in supporting an application for compensation, inasmuch as it supports the conclusion that the applicant suffered a 'miscarriage of justice'.

[12] PRO responded to the applicant's solicitors' request for disclosure by proposing to deal with the matter partially by way of undertaking, binding the signatory to keep the disclosed documentation in the strictest confidence. A prohibition on sharing the documentation with any third party, without the express permission of PRO, with an exclusive exception for the purpose of obtaining legal advice or 'relevant expert opinion required in connection with the formulation of any such advice' or for making an application to the Attorney General that he direct that an inquest be conducted, is contained in the relevant undertaking.

[13] The applicant seeks leave to judicially review decisions of PRO regarding their request that he and his solicitors sign an undertaking before any disclosure is made pursuant to an undertaking procedure operated by PRO. His solicitors wrote to PRONI challenging the application of the undertaking scheme and seeking disclosure of the full inquest file.

[14] Pursuant to his request for disclosure of the inquest file, documentation has been disclosed to the applicant's solicitor after application of the Freedom of Information Act 2000 and the Data Protection Act 1998.

[15] The applicant was concerned that the documentation received does not represent the full inquest file given the indications of PRO that the undertaking

scheme operates to afford an undertaking applicant greater access to material than that which would be available to an applicant who declines to sign the undertaking, but pursues a statutory route to accessing documentation. This appears from correspondence dated 30 January 2015 and 13 February 2015.

[16] It was subsequently confirmed that the documentation provided pursuant to the 2000 and 1998 Acts represented the full file and no further documentation would have been provided had the applicant's solicitor provided the undertaking.

[17] The applicant remained concerned that had the undertaking been provided he would have received fuller information in the sense that there would have been fewer redactions to the materials. PRO reviewed the redactions to the documentation provided and released a revised version with fewer redactions. Three categories of redaction remained in the revised file being:

(a) Redactions under section 31 of the FOIA ("Law Enforcement"). Following a balancing exercise the Department of Culture, Arts and Leisure Minister accepted that this exception was engaged in relation to the weapon serial number and concluded that the public interest lay in not disclosing that information.

(b) Redactions under section 40 FOIA ("Personal Information"). The minister concluded that this exemption was engaged in relation to *'names and/or addresses of individuals or other personal identifiers'*.

(c) Redactions under section 41 FOIA ("Information Provided in Confidence"). This is an absolute exemption concerned with preventing the disclosure of information which otherwise would be construed as being a breach of confidence. The information redacted under this head related to medical treatment administered to Private Bell.

Relief Sought

[18] The applicant seeks the following relief:

(a) A declaration that the undertaking that the PRO seeks is unreasonable, unlawful, ultra vires and of no force or effect.

(b) An order of certiorari to quash the continuing decision of the PRO to refuse to provide disclosure of the full inquest file in the absence of receipt of the signed undertaking.

(c) An order of certiorari quashing the decision of the PRO refusing to provide disclosure of all such information as is in the public domain and further quashing the decision to redact information which is in the public domain.

(d) An order abridging time for service of the notice of motion and an expedited hearing.

Grounds for Relief

[19] The applicant seeks the said relief on the following grounds:

(a) The impugned undertaking is unlawful and should be so declared and quashed because it is irrational. It explicitly acts to frustrate and undermine the pursuit of legitimate legal remedies by introducing a prohibition on the use of disclosed documentation in court cases without the permission of the PRO. Furthermore, the permission of the PRO must be obtained before any disclosure may be shared or used in litigation, including in circumstances where one might wish to bring proceedings against the PRO.

(b) The impugned undertaking unreasonably obstructs access to justice by denying access to material that should assist in achieving this objective.

(c) The impugned undertaking unreasonably affords an applicant for disclosure more disclosure than the statutory route available through application of the 2000 Act.

(d) In operating the undertaking procedure, the PRO has erred in law and misdirected itself as to the legislative requirements and nature of its statutory duty.

(e) The decision of the PRO in seeking to apply the undertaking procedure is *Wednesbury* unreasonable and the PRO has reached a conclusion which no reasonable public authority, properly directing itself, could, in the instant circumstances, have reached.

(f) The PRO has failed to take all relevant and/or material considerations into account (or gave them appropriate weight) and, in particular, take into account:

(i) Rule 38 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, as amended, which provides that the applicant as a properly interested person within the meaning of the coronial legislation would automatically have had an entitlement to view the papers, without charge, and, for a small charge, obtain copies of the papers.

(ii) The fact that mere transfer of the inquest file to the PRO, the purpose of which was to preserve the papers, should not operate to obstruct an entitlement to access to the papers.

(iii) That the depositions making up the inquest file are prepared in the knowledge that the information contained within them is likely to be the subject of oral evidence in a public court and the operative presumption is that the statements will go into the public domain. Furthermore, that many, if not all, of the depositions will in fact have gone into the public domain, in that those persons who gave the information contained in the depositions will have been called to give evidence and the material is, in effect, therefore, already in the public domain.

(iv) The fact that in other like circumstances, such as where disclosure is provided with confidentiality conditions to an accused in a criminal case, there is ordinarily no prohibition on the use of the material in other court proceedings, for instance in judicial review applications.

(v) That the impugned undertaking compromises the ability of the solicitor to properly represent and act for the client. In this case, in preparation for the successful appeal, the applicant's solicitors were required to engage with non-experts, including those in the field of journalism, in order to properly represent the applicant. These engagements were necessary and proved most fruitful. The inquest file may disclose information that would require the pursuance of lines of enquiry with non-experts and thus necessitate the disclosure of information contained in the inquest file to persons not envisaged in the undertaking.

(g) Further or in the alternative, the PRO misdirected itself and/or acted unlawfully in refusing to disclose material to the applicant, which material is in the public domain, because of the applicant's refusal to sign an undertaking.

Applicable Legislation

Rule 38 Coroners (Practice and Procedure) Rules 1963

> "(1) A coroner may, on application and without charge, permit any person who, in the opinion of the coroner, is a properly interested person to inspect any report of a post-mortem examination, or any notes of evidence or any document put in evidence at an inquest.
>
> (2) A coroner may, on application and on payment of a fee of £1.00 per sheet, furnish to any properly interested person a copy (including an electronic copy or copy made by photography or other similar process) of all or part of the record of the evidence at an inquest including any

report of a post-mortem examination, or any other document put in evidence."

Arguments

Applicant's Written Submissions

[20] The applicant submits that he is a properly interested person within the meaning of the coronial legislation. Consequently, had the Coroner's Service retained the inquest file, the applicant would automatically have had an entitlement to view the papers, without charge and, for a small charge, obtain copies of the papers. The applicant further submits that the proposition that the transfer of the papers to PRO, particularly when the purpose of the transfer was to preserve the papers, would operate to obstruct an entitlement to access the papers is untenable. The applicant had a legal entitlement to obtain the documentation from the Coroner's Service and the mere act of transferring the papers to PRONI for preservation should not obstruct the applicant's entitlement to sight of the documents.

[21] The applicant argues that a reasoned explanation as to why, when such material could have been obtained from the Coroner's Service, it could now be refused without signing an undertaking has not been provided by PRO.

General Propositions in Relation to the Inquest File

[22] While an inquest file is prepared from the file submitted by the police to the coroner, the inquest file and the depositions contained therein are the property of the coroner, and not the police. The coroner prepares depositions from statements made by the police in circumstances where he considers that the statements contain material relevant to his function, the conduct of the inquest. Whilst the original statements may have been police property, the depositions prepared by the Coroner's Service for the purpose of the inquest are not.

[23] The depositions are prepared in the knowledge that the information contained within them is likely to be the subject of oral evidence in a public court, a coroner's court. The expectation of those who make statements to the coroner, or for that matter to the police in the course of a criminal investigation, is that in due course they may be called to give evidence, either in a criminal trial, or in a coroner's inquest. The operative presumption is that the statements will go into the public domain, through one or other procedure.

[24] Many, if not all, of the depositions will in fact have gone into the public domain, in that those persons who gave the information contained in the depositions will have been called in to give evidence. The material is, therefore, already in the public domain.

[25] The applicant contends that PRO ought to have had regard to the aforementioned factors before reaching its decision and that these factors do not appear to have been factored into its decision-making.

The Impugned Undertaking

[26] The applicant argues that the undertaking is unlawful and should be so declared and quashed because it is irrational. It explicitly acts to frustrate and undermine the pursuit of legitimate legal remedies by introducing a prohibition on the use of disclosed documentation in court cases without the permission of PRO. Furthermore, the permission of PRO must be obtained before any disclosure may be shared or used in litigation, including in circumstances where one might wish to bring proceedings against PRO.

[27] Signatories to the undertaking must undertake not to publish or disseminate the information released to them, to keep the information confidential, not to copy the documentation, save for when instructing counsel or legal representatives with a view to obtaining advice or making submissions to the Attorney General and not to use the documentation in court cases without the express permission of PRO.

[28] The undertaking unreasonably obstructs access to justice by denying access to material that should assist in achieving this objective.

[29] In this particular case, in preparation for making submissions to the CCRC and for the successful appeal, the applicant's solicitors were required to engage with many people, including those in the field of journalism, in order to properly represent the applicant. These engagements were necessary and proved most fruitful. The inquest file may disclose information that would require the pursuance of lines of enquiry with non-experts and thus necessitate the disclosure of information contained in the inquest file to persons not envisaged in the undertaking. The undertaking compromises the ability of the applicant's solicitors to properly represent and act for the applicant, their client.

[30] Further, the wording of the undertaking on the face of it, at least, appears to act to fetter the ability of the applicant's solicitor to share disclosed documentation with the applicant, her client, in the absence of him too signing the undertaking. The client is not listed as a person to whom the undertaker may disclose documentation. This may be inadvertent but it illustrates the breadth and irrationality of the terms of the undertaking.

[31] The undertaking unreasonably affords an applicant for disclosure more disclosure than the statutory route available through application of the 2000 Act. In correspondence dated 30 January 2014 PRONI stated that: *'since you have chosen not to invoke the extra statutory procedure for disclosure of information held by PRONI, it is proposed to address the issue of disclosure of the inquest file to you pursuant to the provisions of the Data Protection Act and Freedom of Information Act'*. The correspondence also

states that the Applicant's solicitor *'fails to appreciate that the undertaking procedure… is designed to facilitate properly interested persons in obtaining such documentation* ***to a greater extent than would be the case if the documents were subject to release (and redaction) pursuant to the Freedom of Information Act.'***

[32] Clarification was sought about the statement that the undertaking procedure will operate to afford an undertaking applicant greater access to material than that which would be available to an applicant who declines to sign the undertaking, but pursues a statutory route to accessing documentation by relying on the provisions of the 2000 Act. In the event that such distinctions, including those relating to release and redaction, would be made between applicants who pursue the undertaking and those who decline to do so, a reasoned explanation for the drawing of those distinctions was sought. It was contended that the operation of a two tier disclosure regime is unreasonable and unlawful.

[33] PRO confirmed in correspondence dated 13 February 2015 that the undertaking is about *'giving effect to the Minister's wish that inquest and other relevant records should be voluntarily made available to those properly interested persons who have a valid reason for wishing to view or obtain such records'.* It is conceded by PRO that the level of disclosure provided under the undertaking procedure may be greater than that provided under the 2000 Act as there may be a large number of potential exceptions to disclosure when applying the 2000 Act.

[34] It is submitted that in operating the undertaking procedure, PRO has erred in law and misdirected itself as to the legislative requirements and nature of its statutory duty.

[35] The decision of the PRO in seeking to apply the undertaking procedure is *Wednesbury* unreasonable and the PRO has reached a conclusion which no reasonable public authority, properly directing itself, could, in the instant circumstances, have reached.

[36] The PRO has failed to take all relevant and/or material considerations into account (or gave them appropriate weight) and, in particular, take into account:

(a) Rule 38 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963, as amended, which provides that the Applicant as a properly interested person within the meaning of the coronial legislation would automatically have had an entitlement to view the papers, without charge, and, for a small charge, obtain copies of the papers.

(b) The fact that mere transfer of the inquest file to the PRO, the purpose of which was to preserve the papers, should not operate to obstruct an entitlement to access to the papers.

(c) That the depositions making up the inquest file are prepared in the knowledge that the information contained within them is likely to be the subject of oral evidence in a public court and the operative presumption is that the statements will go into the public domain. Furthermore, that many, if not all, of the depositions will in fact have gone into the public domain, in that those persons who gave the information contained in the depositions will have been called to give evidence and the material is, in effect, therefore, already in the public domain.

(d) The fact that in other like circumstances, such as where disclosure is provided with confidentiality conditions to an accused in a criminal case, there is ordinarily no prohibition on the use of the material in other court proceedings, for instance in judicial review applications.

(e) That the impugned undertaking compromises the ability of the solicitor to properly represent and act for the client. In this case, in preparation for the successful appeal, the applicant's solicitors were required to engage with non-experts, including those in the field of journalism, in order to properly represent the applicant. These engagements were necessary and proved most fruitful. The inquest file may disclose information that would require the pursuance of lines of enquiry with non-experts and thus necessitate the disclosure of information contained in the inquest file to persons not envisaged in the undertaking.

(f) That the outworking of the undertaking is such that it would act to fetter the ability of the applicant's solicitor to share disclosed documentation with the applicant in the absence of him too signing the undertaking. The client is not listed as a person to whom the undertaker may disclose documentation. In such circumstances, the undertaking may undermine the professional relationship between solicitor and client and interfere with the discharge of a solicitor's professional obligations to the client.

(g) The fact that the denial of access to the full inquest file is likely to materially affect both the conduct of and the outcome of civil proceedings against the Ministry of Defence and Chief Constable of the Police Service of Northern Ireland.

(h) The fact that the applicant is being caused distress and inconvenience by his inability to access the full file.

The Leave Hearing

Applicant's Arguments

[37] The applicant noted that the redacted information had been in the public domain both in the context of the 2012 Court of Appeal proceedings and in the context of the original criminal trial.

[38] The core of the applicant's complaint was that, had the information been provided pursuant to the Minister's pilot scheme it would not have been subject to the redactions made pursuant to the Freedom of Information Act. The applicant was then in a Catch-22, either he and his solicitors sign the undertaking in which case, were PRONI to object to the use of the materials in proceedings the materials would be useless, or rely solely on the redacted material.

[39] While by this stage it was clear that the applicant in fact had the entire inquest file and, by reference to the Court of Appeal judgment and the applicant's own copy of the papers for the original criminal trial, was able to work out all the redacted content, the applicant argued that there was a fundamental issue about the process whereby redactions were made of material that was already in the public domain.

Respondent's Arguments

[40] The respondent argued that the applicant's rights to access information held by PRONI are prescribed by the Freedom of Information Act 2000 and the Data Protection Act 1998. Counsel noted that the release of information under those acts is subject to a number of exemptions. In particular it was noted that release of information pursuant to the 2000 Act rendered that information public information to which anyone could subsequently have access to. Apart from these two Acts the respondent argued that the applicant had no other right to gain access to documents held by PRO.

[41] The respondent argued that Rule 38 of the Coroners Rules did not create a right to access of information by the applicant as an interested person, it merely permitted the coroner to provide such information in appropriate cases.

[42] The respondent argued that the undertaking was not perpetual, irrevocable and forever. In this context counsel for the respondent noted that any material provided which went beyond what an applicant might be entitled to under the 2000 and 1998 Acts was given voluntarily. There was no obligation to provide that additional information (if any). Counsel argued that it was in this context that the undertaking was requested and further that PRO had noted in correspondence that, as a public authority, if a request was made to use the materials subject to the undertaking in court proceedings, it would be obliged to consider any such applicant's article 6 rights when deciding whether or not to consent to such a use.

[43] The respondent argued that where the Minister took it upon herself to create a voluntary scheme of this nature she is entitled to set the parameters and the terms on which it is delivered up because it is outside of statute.

[44] The respondent argued that the redactions made pursuant to the 2000 Act were proper and reasonable.

[45] The respondent argued that the purpose of the scheme was not to hamper the taking of proceedings but to provide a greater amount of information more quickly than would be available by the statutory routes.

Subsequent Developments

[46] The respondent continues to argue that the proceedings are now academic because the pilot scheme has now been replaced by The Court Files Privileged Access Rules (Northern Ireland) 2016 and the applicant in fact continues to have all available information.

Discussion

[47] I accept that the proceedings are academic as between the parties, however I find that leave should be granted because there is a good reason in the public interest for hearing it. I reach this conclusion for the following reasons:

(a) While the pilot scheme has now been replaced by the 2016 rules, applications continue to be considered under the pre-existing scheme and there may therefore be other individuals who will be or have been affected by the undertaking requirement.

(b) In any event, there is a similar undertaking required by the new rules.

(c) The Freedom of Information Act continues in force and it is in the public interest to see that redactions made to information supplied under that act are properly made.

(d) It does not appear that the hearing of the case would involve a complex exercise in terms of the preparation of evidence and its consideration by court.

[48] For these reasons leave is granted.