

**Neutral Citation No. [2004] NIQB 72**

*Ref:* **KERC5130**

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

*Delivered:* **19/11/04**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY TERESA KELLY FOR**

**JUDICIAL REVIEW**

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**KERR LCJ**

*Introduction*

[1] This is an application by Teresa Kelly for judicial review of the decision of the Police Service of Northern Ireland (PSNI) not to appoint an external police force to conduct a fresh investigation into the death of Patrick Kelly, the applicant's husband, who was murdered in July 1974. The applicant claims that the investigation should be conducted by a police force that is wholly independent of PSNI because, she says, there was security force collusion in the murder of her husband.

[2] The respondent does not accept that there is any evidence of collusion. It submits that the new investigation team is sufficiently independent as it is headed by a senior police officer seconded from an English police force, Detective Superintendent Hunter. This senior officer is assisted by an inquiry team drawn from officers of the PSNI; none of these officers was in the service of the Royal Ulster Constabulary (RUC), the former police force of Northern Ireland, at the time of Mr Kelly's murder; none of the officers engaged in the current inquiry served during the 1970s or 1980s in the area where Mr Kelly was murdered; and none has a close connection with the area.

### *Factual background*

[3] Patrick Kelly failed to return home after leaving the public house where he worked in Trillick, County Fermanagh, some time after 12.15am on 24 July 1974. Gunshots were heard in the area at around 12.30 am. Halfway between the bar and Mr Kelly's home, blood and a number of shirt buttons were found on the road. His car was found burnt out on 25 July 1974 approximately ten miles from what subsequently was identified as the murder scene. It was not until 10 August, however, that fishermen found his body in Lough Eyes near Lisbellaw, County Fermanagh, fifteen miles from the bar where Mr Kelly worked. In order to deposit the body in the lough, it would have been necessary, the applicant claims, for the murderers to avoid a number of security force checkpoints in the area.

[4] A nylon rope and a 56lb weight were attached to the body. The post mortem found that Mr Kelly had been shot six times; four bullets were recovered from his chest. There were lacerations to his scalp and an abrasion or burn to his left wrist and forearm. A fracture of the voice box such as occurs in strangulation was also found although this may have occurred after death. It was the opinion of the pathologist that Mr Kelly probably died soon after he was last seen on 24 July 1974.

[5] Exactly seven months before Mr Kelly was murdered a part-time Ulster Defence Regiment (UDR) soldier had been murdered by the IRA who shot him as he alighted from a bus a few miles outside Trillick. Mrs Kelly believes that her husband was murdered in revenge for the murder of the UDR soldier and that members of the UDR were involved.

### *Police investigation*

[6] A police investigation began after Mr Kelly was reported missing on 24 July 1974. At that stage the officer in charge of the investigation, Detective Inspector Pickard, assumed that Mr Kelly had been abducted and murdered. An inquiry team consisting of ten officers was assembled and a major search operation began. All customers identified as present at the bar where Mr Kelly worked on the evening of 23 July 1974 were interviewed. House to house inquiries were also carried out. Two witnesses stated that they had heard five to six shots in the area shortly after midnight on 24 July 1974.

[7] On 25 July 1974 Mr Kelly's car was found burnt out about 11 miles from Trillick. A witness from the vicinity stated that he had observed a large ball of flame at 2.30am on 24 July 1974. An over-flight confirmed that the position of the fire corresponded with the location of Mr Kelly's burnt out car. Four further witnesses either saw or heard two cars travelling together coming

from the Trillick direction towards the scene where the burnt out car was found.

[8] According to Detective Inspector Pickard, it was during joint police and civilian searches for Mr Kelly's body that suggestions were made by those engaged in the searches that Ulster Defence Regiment soldiers might have been involved in the abduction and murder of Mr Kelly. One name in particular was mentioned, that of a local part time UDR member, Oliver Gibson. As a result witness statements, containing accounts of their movements during the evening of 23 July 1974 and the morning of 24 July 1974 were taken from Mr Gibson and eighteen of his colleagues who lived or worked in the area. Detective Inspector Pickard has said that he did not believe that the information provided any firm basis for suspecting the involvement of UDR personnel.

[9] During post mortem examination bullets were retrieved determined to be .455 calibre which had been fired from a revolver; the revolver had no previous history of use. No one was arrested for the murder of Mr Kelly but the file remained open. According to the respondent, no evidence emerged sufficient to implicate any individual or to support a case of UDR involvement and the investigation did not progress further.

[10] In January 1976 police inquiries were resumed after anonymous telephone calls were received which named Oliver Gibson, as being involved in the murder with others. It was decided that this information was unreliable. Neither Mr Gibson nor anyone else was interviewed. Matters remained thus until September 1992 when a Mr Bridge was interviewed after he had alleged that three serving UDR soldiers had been involved in the murder of Mr Kelly. Mr Bridge withdrew his allegations in November 1992 and the police were satisfied that his evidence lacked credibility. Again the investigation did not progress.

[11] In January 1999 inquiries were reopened following allegations in a Sunday newspaper that a former UDR soldier, David Jordan, had broken down in a bar and confessed that he and other UDR soldiers had been involved in the murder of Mr Kelly. Reports about other matters connected with the murder were also current at this time but again no firm evidence was forthcoming, according to the respondent. David Jordan died on 26 October 1999. He was never interviewed by the RUC. It was claimed that police were unaware of his identity until after his death.

[12] On 2 May 1999 an article appeared in the newspaper, *Ireland on Sunday*, which referred to an anonymous letter dated 1 August 1974 written on the back of an RUC form and purporting to come from "serving officers". The authors alleged that certain named persons were involved in Mr Kelly's death

and in other offences. It appears that the police did not undertake any investigations into the article.

[13] On 22 August 2001 police officers met the applicant's solicitor, Mr Patrick Fahy. The purpose of the meeting was said to be to allay some of the appellant's concerns in relation to the investigation. During the meeting a Detective Superintendent McArthur told Mr Fahy that certain papers could not be found. These included statements of persons interviewed during house-to-house enquiries, police log books, and records and details of interviews of UDR personnel at an army camp in 1974. During the meeting Mr Fahy mentioned that David Jordan was the former UDR member who had confessed involvement in the death and expressed his incredulity that the police had not made their own enquiries. The superintendent confirmed that there were no plans to re-open the inquiry but that he would look into the David Jordan matter. By that time, of course, Mr Jordan was dead.

[14] On 1 April 2001 Assistant Chief Constable Samuel Kincaid, on taking up his post, reviewed correspondence between Mr McArthur and Mr Fahy. He made the search for all the investigation papers in relation to Mr Kelly's death a priority. Further papers were found and on 26 November 2001 ACC Kincaid directed that a review of the case be carried out to discover whether any further lines of inquiry could usefully be pursued. Detective Inspector Harkness and a team of detectives undertook this review.

[15] On 17 April 2002 ACC Kincaid and D/Insp Harkness met Mrs Kelly, her sons Patsy Kelly and Brendan Kelly, Mr Fahy and Ms Jane Winter of British/Irish Watch. The purpose of this meeting was to go over information that D/Supt McArthur had provided to Mr Fahy and to bring Mr Fahy and Mrs Kelly up to date on the progress of the review. All aspects of the case were discussed. D/Insp Harkness told the group that there was nothing to confirm that Oliver Gibson, or other members of the UDR were ever interviewed about the murder of Mr Kelly. He also stated that when Mr Gibson was interviewed in relation to his stolen car, an alibi was provided for him by a police officer from Beragh Police Station. ACC Kincaid informed Mrs Kelly and the others that within the next few days there would be interviews with people about why they did or did not give an alibi for Mr Gibson and that the police officer who dealt with the report of Mr Gibson's car being stolen would be interviewed. D/Insp Harkness said that they would be checking out the alibis given by the UDR men. In relation to Mr Jordan ACC Kincaid stated that they wanted to interview the two witnesses who heard Mr Jordan confessing to his involvement in the murder and that they intended to speak to the Jordan family. At the end of the meeting ACC Kincaid stated that D/Insp Harkness would provide a report recommending that certain actions be taken and a team would be formed to take the matter further. He assured Mrs Kelly that his presence at the meeting reflected the

fact that significant issues about the death of Mr Kelly required to be looked at again and that he would try to be as transparent as possible.

[16] On 25 June 2002 ACC Kincaid wrote to Mr Fahy to inform him that he intended to establish a complete re-investigation of the death in light of the review carried out by D/Insp Harkness. Mr Harkness provided his review report on 6 September 2002. Having considered the report, ACC Kincaid decided that as a matter of good police practice and in order to ensure maximum support from the public in respect of the re-investigation the detectives involved in the re-investigation should fulfil a number of criteria, namely: he/she must not (i) have served before in the area in question; (ii) have had a working relationship with any of the original inquiry team; and (iii) not have been a serving member of RUC at the date of the deceased's death.

[17] On the basis of D/Insp Harkness's review, ACC Kincaid concluded that there was no reason to suspect police involvement in the murder of Patrick Kelly nor was there evidence of collusion on the part of police in the deceased's death. He also decided that there was nothing to suggest a lack of impartiality in the police investigation of the death. He has averred, however, that he has not discounted any line of inquiry that might be prompted by the further investigation that he has decided should take place.

[18] On 2 June 2003 ACC Kincaid appointed Detective Superintendent Hunter to command the police team to be set up to re-investigate Mr Kelly's murder. A new inquiry team was appointed on 7 July 2003 and the inquiry was launched on 28 July 2003. On 4 September 2003 D/Supt Hunter and D/Insp Harkness met Mr Fahy to bring him up to date with the progress of the new inquiry.

#### *Shortcomings of the investigation*

[19] The applicant is heavily critical of the original investigation, pointing to a number of what she says are obvious shortcomings in the manner in which it was conducted and in relation to the matters that it failed to address. She suggests that these are clearly indicative of collusion by RUC with the murderers. The respondent accepts that there were some shortcomings in the original investigation up to the review stage but does not accept that these shortcomings point to collusion.

[20] The shortcomings of the original investigation highlighted by the applicant include the following:-

- Failure to recover UDR footwear for forensic matching with a footwear impression made at the scene of the murder either by a wellington boot or boots of a type worn by security forces. The applicant says that this

was particularly suspicious because a UDR patrol was said to have been in the area on the night of the murder and one part-time UDR soldier in particular, Oliver Gibson, was the object of suspicion at the time.

- Members of the UDR patrol were interviewed at the local army barracks and were not interviewed under caution. Their duty rosters were not obtained even though some of them claimed to have been on duty on the night in question. Their lockers were not searched.
- Failure to disclose to the inquest any reference to the forensic report on the boot-print that suggested security force connection.
- Failure to disclose to the inquest or to the Kelly family the existence of a DNA sample from a fingerprint found on the exterior of Mr Kelly's car.
- Conflicting and misleading information on whether Mr Gibson was interviewed and the nature of any alibi provided by the police.
- Failure to recover the car rug from the car belonging Oliver Gibson for forensic examination. This car was reported stolen around the time of the murder and was found burnt out about ten miles from the murder scene. The car rug is no longer available for forensic examination.
- Failure to have handkerchiefs which were recovered at the scene where Mr Kelly's body was recovered from Lough Eyes sent for forensic examination.
- Failure to account for missing documents and photographs including the police report about the theft and burning of Mr Gibson's car, photographs of the boat used to dispose of Mr Kelly's body, and any alibi statement from Mr Gibson's alibi.

[21] The applicant asserts that the current investigation has the following shortcomings:-

- The investigation is proceeding on the basis that there was no collusion between RUC and the killers of Mr Kelly and this demonstrates a reluctance to accept prima facie evidence of UDR involvement and the possibility that RUC officers may have colluded in covering up the murder.
- It is not independent. D/Supt Hunter was already on secondment to PSNI before he was appointed to head the investigation team. The team is made up officers from PSNI which is, the applicant claims, in effect the same as RUC. The applicant asserts that the close ties between UDR and RUC give rise to a real risk that details of the investigation could be leaked to the actual suspects.
- The applicant claims that the failure of reviews and the loss and destruction of evidence are further indicators of the need for an external police force to conduct the fresh investigation.

[22] The applicant is also concerned that it was only when the judicial review opened on 26 September 2003 that it was revealed that there had been no re-investigation during 1993 into the murder. A letter dated 27 November 2001 from a Detective Inspector Green to the applicant had stated that there had been a re-investigation during 1993. Following the launch of the judicial review application the respondent filed three affidavits from Mr Kincaid. In none of these did he say that there had not been such an investigation. D/Insp Green now says that the errors in his letter were made in good faith; that he wrote the letter in haste having been requested to do so when he was on annual leave; and that he did not have sufficient opportunity to examine the contents of the documents. The applicant challenges this explanation, pointing out that at a meeting with the applicant's solicitor on 4 September 2003 vD/Supt Hunter suggested that D/Insp Green could offer no explanation for the misleading information provided in his letter of 27 November 2001.

#### *The judicial review challenge*

[23] The applicant's principal challenge is to the decision of the PSNI not to invite an external police force to investigate the death was in breach of article 2 of ECHR. It is claimed that PSNI failed to have regard to the shortcomings and flawed nature of the original investigation by the RUC in 1974 in deciding whether to invite an investigation by an independent external police force. The applicant therefore seeks an order of mandamus compelling PSNI to invite an independent external police force to investigate the murder of Mr Kelly. She also seeks a declaration that the respondent has failed to carry out effective and prompt independent investigations into the murder of Patrick Kelly in accordance with article 2.

[24] The applicant also claims that the decision not to engage an external police force to carry out the necessary investigation is irrational, given the flaws that have been identified in the previous investigations and the overwhelming evidence of collusion.

[25] The respondent resists the applicant's claim founded on article 2 of the Convention primarily on the basis that the effect of the decision of the House of Lords in *Re McKerr's Application* [2004] NI 212 is that there was no obligation to hold an article 2 inquiry into a death occurring before the coming into force of the Human Rights Act 1998 (on 2 October 2000). It is also submitted, however, that, if article 2 is engaged, it has not been breached. The appointment of Detective Superintendent Hunter satisfies all the requirements of independence necessary for article 2 purposes.

[26] The applicant's riposte to the respondent's argument that article 2 is not engaged, is based on the judgments delivered by the Court of Appeal in this jurisdiction in *Re Hugh Jordan's application for judicial review* [2004] NICA 29. In that case the court held that where an inquest had not been completed by

the time the Human Rights Act came into force, the effect of section 3 was to require the court to re-interpret the relevant provisions in the Coroners Act (Northern Ireland) 1959 so as to ensure that the inquest was article 2 compliant. Mr Treacy QC for the applicant submitted that this reasoning applied *mutatis mutandis* to the situation where an investigation into the circumstances of the death was renewed.

### *Conclusions*

[27] It is unnecessary for me to decide whether PSNI is obliged to hold an article 2 inquiry into Mr Kelly's murder because I am satisfied that, if article 2 is engaged, no breach has yet been established. D/Supt Hunter's investigation has not been completed. It is true that he has indicated that he is not prepared to proceed on the basis that there is *prima facie* evidence of collusion but it is clear that he will be expected to approach the investigation with an open mind and to inquire into any matter that is relevant to the circumstances of the death. Certain averments of ACC Kincaid are relevant in this context. In his first affidavit he said:-

"My comments should not, however, be read as if I am in advance discounting any particular line of enquiry. This is certainly not the case and the officers who I propose will conduct the further investigation will, I am completely confident, approach the task in a rigorous and professional manner."

And in his final affidavit:-

"The existence of the Office of the Police Ombudsman presents an option to the Chief Constable not currently available to other UK police forces. The Ombudsman has carried out investigations into matters that elsewhere in the UK could give rise to a call-in of an outside force under the Police Act 1996. The Chief Constable shall refer to the Ombudsman any matter which appears to him to indicate that conduct of a member of the Police Force may have resulted in the death of some other person. He may also refer to the Ombudsman any matter which appears to indicate that a member of the Police Force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings..."



Should a line of inquiry develop in any investigation indicating that a police officer, serving or retired, is suspected of an offence the Chief Constable will act consistently with the above provisions.”

[28] At present there is no reason to conclude that the investigation will be other than rigorous and thorough. Mr Treacy submitted that if a police force other than PSNI was not engaged, the inquiry could never be article 2 compliant but I do not accept that argument. In a series of cases ECtHR has recognised that the independence of the police force investigating the death may be a critical element of article 2 compliance but it has not been suggested that in every case where collusion is alleged that an independent police force must be engaged.

[29] In *Shanaghan v United Kingdom* (Application No. 37715/97) ECtHR, dealing with the requirements of article 2 in terms of the nature of the inquiry to be conducted, said:-

“89. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. *Güleç v. Turkey* judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Öğür v. Turkey*, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the case of *Ergi v. Turkey* judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).”

[30] It is clear from later passages in the judgment that the court concentrated on the actual investigation and the manner in which it was in fact carried out, in order to determine whether there had been a breach of article 2 – see, in particular, paragraphs 103 and 104 of the judgment. It seems to me clear that such an examination would also be required in the present case before one could conclude that the actual investigation was not sufficiently independent. Until the investigation has been conducted and one has an opportunity to gauge whether the detective superintendent has demonstrated sufficient zeal in pursuing relevant lines of inquiry it is impossible to say that it will not be

independent. It certainly has the capacity to be so if the investigation is conducted rigorously and fairly.

[31] A similar fact based approach was adopted by ECtHR in the related cases of *McKerr v United Kingdom* (Application no. 28883/95) (paragraphs 127 and 128); *Jordan v United Kingdom* (Application no. 24746/94) (paragraph 120); and *Kelly and others v United Kingdom* (Application no. 30054/96) (paragraph 114). In each of these cases the court examined the actual investigation procedures and the connection between, on the one hand, the police officers or other members of the security forces who were under suspicion of being involved in the killing or of colluding with the killers and, on the other hand, those charged with the investigation. This was, of course, a *post hoc* examination of the investigations and in each case the court found that the procedural requirements of article 2 were not satisfied. By contrast with those cases, however, in this instance the investigation team is headed by an officer from an outside force and none of the officers who will be involved in the investigation has any connection with the area or with the events surrounding Mr Kelly's death.

[32] Ultimately, a decision on whether the inquiry that is currently taking place will satisfy the procedural requirements of article 2 must depend on an evaluation of all the circumstances of the actual investigation, not least the outcome that it produces. At present, however, I am of the clear view that, as constituted, the investigation has the *capacity* to fulfil those procedural requirements. Whether it does so must await its completion.

[33] The argument that the decision not to engage an external force was irrational can be dealt with briefly. This was an operational decision taken by the Chief Constable in light of the particular circumstances of Mr Kelly's murder and the shortcomings of the inquiries into it. The courts have recognised that an appropriate area of discretionary judgment must be allowed the police authorities in their choice of policing strategies and operational decisions – see, in this context *Re A's application for judicial review* [2001] NI 335, 345. In the present case it is impossible to say that the decision taken by the Chief Constable lay outside the range of reasonable choices that might be made.

[34] There is ample reason for deep concern about the adequacy of investigations into the death of Mr Kelly to date. Without expressing any concluded view on the alleged shortcomings, these give rise to substantial disquiet as to the effectiveness of the inquiry into Mr Kelly's death so far. It would be wrong, however, to assume that because the investigations that have already taken place may prove in the final analysis to be pitifully insufficient, the present investigation will be similarly afflicted. As I have said, if properly conducted, the inquiry has the potential to ensure that the procedural requirements of article 2 can be fulfilled. I do not believe that it

would be right to anticipate that that potential will not be realised. The application for judicial review must therefore be dismissed.