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| *Judgment: approved by the court for handing down (subject to editorial corrections)** | *Delivered:* **22/05/2023** |

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

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

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**IN THE MATTER OF AN APPLICATION BY PATRICK McAREAVEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

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**Hugh Southey KC and Mark Bassett (instructed by KRW Law) for the Applicant**
**Tony McGleenan KC and Laura Curran (instructed by the Crown Solicitor's Office) for the proposed Respondent**

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**HUMPHREYS J**

*Introduction*

[1] On 6 October 1972 the applicant's brother, Daniel McAreavey, was shot and killed in the lower Falls area of Belfast. An inquest was held on 4 April 1974 at which an open verdict was returned.

[2] By this application for leave to apply for judicial review, the applicant seeks to challenge the decision of the proposed respondent, the Police Service for Northern Ireland ('PSNI'), not to include this killing into an investigation into the activities of the Military Reaction Force ('MRF'). This investigation was instigated following a request made by the Director of Public Prosecutions ('DPP') on 21 November 2013 under section 35(5) of the Justice (Northern Ireland) Act 2002 ('the 2002 Act').

[3] The applicant contends that in arriving at that decision the proposed respondent has acted irrationally in failing to take into account relevant material which, it is said, points firmly in the direction of the MRF being responsible for the death.

*Background*

[4] In *Re Stuart's Application* [2022] NIKB 45 I set out the circumstances which led to the making of the section 35(5) request by the DPP. On 21 November 2013 the

BBC broadcast a Panorama programme which concerned the activities of the MRF, a secret undercover unit within the British Army. It focussed on four separate incidents in which civilians were shot, allegedly by members of the MRF, in Belfast between April and September 1972. The killing of Daniel McAreavey was not mentioned in the programme.

[5] I held that the request made by the DPP was closely connected to the subject matter of the documentary and therefore the killing of a British solider, Telford Stuart, who was himself a member of the MRF was properly regarded as outside the scope of the investigation. At para [24] I stated:

> "The Chief Constable was not being asked to carry out some all-encompassing investigation into all matters connected to the MRF but rather to investigate the activities as represented by the shootings carried out by undercover soldiers."

***The Evidence***

[6] The applicant deposes to the fact that his brother was a member of the Provisional IRA when he was killed. The applicant was with him on the day he was shot, acting as a scout. He states that his brother was shot in the back, the hand and finally the head by a number of soldiers who were not in uniform. He believes it was the MRF who killed his brother in retaliation for the killing of Telford Stuart.

[7] The account of the incident which appears in 'Lost Lives', the chronology of Troubles deaths written by David McKittrick and others is as follows:

> "He was shot at the junction of Bosnia Street and Plevna Street in the lower Falls area following a blast bomb attack. The soldiers were members of a foot patrol passing along Raglan Street, where Daniel McAreavey lived, when they came under fire from a gunman who was seen raising his rifle. A member of D company of the IRA's Belfast battalion his body was later found under a car with a loaded rifle beside him. The republican publication *Belfast Graves* said he was providing cover with an Armalite rifle for an IRA bomb team when a soldier shot him."

[8] The 1974 inquest received statements from soldiers who had been on patrol in the vicinity. Soldier A stated that he heard an explosion in the area of Balkan Street then witnessed a male at the corner of Bosnia Street and Plevna Street open fire in the direction of other soldiers. As a result, Soldier A instructed Soldiers B and C to engage the gunman and he was shot dead. The police report records that these

soldiers were all members of the Royal Anglian Regiment. The inquest took place without the next of kin being made aware of it.

[9] On 2 July 2014 the applicant's solicitors wrote to the DPP, copied to the PSNI, alleging that Mr McAreavey was the victim of a targeted shoot to kill operation carried out by the MRF. Confirmation was sought that this killing was included within the scope of the pending MRF investigation. The PSNI replied in August and September 2014 seeking details as to why it was believed the MRF was involved in the death.

[10] It appears that no substantive reply was sent but rather a pre-action protocol letter dated 5 January 2015 followed which claimed, inter alia, that:

> "The investigation into the killing of Daniel McAreavey should be part of a broader thematic investigation into the activities of the MRF and its involvement in other killings in the early 1970s."

[11] In its pre-action response dated 22 January 2015, the proposed respondent states:

> "The proposed applicant's solicitors have previously asserted that the MRF were involved in Mr McAreavey's death. HET previously requested … that they provide information which might substantiate this claim. We note that no such information has been provided and the pre-action protocol letter does not provide such information. Accordingly, the allegation is without foundation and therefore does not create any investigative obligation on PSNI."

[12] This exchange of pre-action correspondence was not followed by the issue of judicial review proceedings. Some 10 months later, the applicant's solicitors wrote to the Legacy Investigation Branch ('LIB') of the PSNI who, by then, had assumed responsibility for the investigation of historical killings. Again, it was asserted that the MRF was responsible, and conformation was sought that the death in question would be included in the MRF investigation. On 7 January 2016 Detective Sergeant Murphy of the LIB replied as follows:

> "Having considered the circumstances of Mr McAreavey's death, Legacy Investigation Branch does not intend to include it within the investigative scope of the LIB investigation. If your client is possessed of further information which you wish me to consider I would be obliged if you would forward it to me."

[13] The next correspondence issuing from the applicant's solicitors was a second pre-action protocol letter dated 27 January 2020 which states, inter alia:

> "In particular, the applicant challenges the decision of the first proposed respondent to exclude the killing from the PSNI LIB investigation of the activities of the Military Reaction Force (MRF)."

[14] This letter includes, for the first time, reference to a record retrieved from the national archives at Kew which stated:

> "Area ambush in Raglan Street Plevna Street Osman Street Daniel McAreavey shot dead and gunman wounded by SF (Security Forces)"

[15] The author of the letter makes two assertions about the information contained in this document:

(i) The term "area ambush" is military parlance for "kill zone"; and

(ii) The Royal Anglian Regiment did not claim responsibility but rather attributed this to "Security Forces"

[16] This archive material was identified by Paper Trail, a charity which offers services to the victims and survivors of the conflict. It was published online on 30 August 2017 and was the subject of an article in the Irish News. This made it clear that the new material was said to support the claim of MRF involvement in the killing. It seems incongruous, to say the least, that material which was claimed to be of such significance was not taken to the police for its consideration.

[17] The PSNI investigation into the activities of the MRF concluded on 6 February 2020 when a file was sent to the PPS. However, no decision has as yet been forthcoming from the PPS.

[18] The second pre-action protocol response issued on 27 March 2020. It confirms that a scoping exercise was carried out by the LIB in 2016 which excluded the killing of Daniel McAreavey as there were no grounds to believe the MRF was linked. The issue of delay was also raised as no explanation was offered as to why a number of years had elapsed since the LIB decision was made.

[19] On 1 July 2020 the proposed respondent wrote to the applicant's solicitors about a number of cases. In relation to the Daniel McAreavey shooting, it stated:

> "The shooting of Daniel McAreavey was reviewed by the Historical Enquiries Team (Op Solsville). During this review it was established that Patrick *[sic]* was shot by a

> solider from the 2nd Battalion, The Royal Anglian Regiment … Given the facts outlined above, the murder of Daniel McAreavey has not been included in the investigation into the activities of the MRF during the early 1970's."

[20] A third pre-action protocol letter was written on 18 November 2020 which reiterated some of the points previously made, including the reliance on the Kew archive document. In addition, it was asserted that in December 2019 a journalist, Sean McPhilemy, interviewed a member of the MRF, Paul Inman, who claimed that the killing of Daniel McAreavey was carried out by it in retaliation and that information was relayed to the applicant's solicitors. The third pre-action protocol response from the proposed respondent states that in the absence of any copy of information provided by Mr McPhilemy, it was not possible to assess it meaningfully or respond substantively to the claim.

[21] The judicial review proceedings were ultimately commenced on 11 January 2021. These were stayed pending the decision of the Supreme Court in *Re McQuillan's Application* [2021] UKSC 55. This resulted in the grounds of this application being amended and refined. The hearing of the application for leave was further adjourned pending the decisions of the court in *Re Stuart* [supra] and *Re Armstrong's Application* [2022] NIQB 32.

***The Grounds for Judicial Review***

[22] The amended Order 53 statement now challenges the legality of the decision to exclude the killing from the MRF investigation on the sole ground that it was unreasonable so to determine.

[23] The application also seeks an extension of time in the event that the court concludes that it was out of time. Leave is resisted by the proposed respondent both on the grounds of delay and on the basis that the substantive claim is unarguable.

***Delay***

[24] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[25] In *Re Armstrong's Application*, I held that the phrase "within three months of the date when grounds for the application first arose" means:

> "…time runs from when the illegal act first occurs, whether it continues or not" [para 24].

[26] This decision was first made, on the evidence, in 2014 and it prompted the first pre-action protocol letter in January 2015. Once the response was forthcoming from the proposed respondent on 22 January 2015, it was evident that the LIB had determined to exclude the killing from the MRF investigation. If this were somehow unclear, the LIB spelt out the position on 7 January 2016, five years before these proceedings were commenced.

[27] It is well established in public law that it is impermissible to write a subsequent letter and seek to dress the response as a fresh decision – see the judgment of Lewis LJ in *R (AK) v Secretary of State for the Home Department* [2021] EWCA Civ 119.

[28] Equally, the fact that some piece of evidence is identified which is used to ask a public authority to reconsider the decision does not necessarily mean that time begins to run again once the authority declines to reconsider or affirms its earlier decision. If it were otherwise, then the clear public policy behind the tightly drawn time limits in judicial review would be undermined.

[29] I have therefore determined that the grounds to apply for judicial review first arose in this case in 2014, when the original decision was made or, at the latest in January 2016.

[30] If I am wrong in that analysis, and a fresh decision was made by the proposed respondent following the second pre-action protocol letter, then the date of the new decision was 27 March 2020.

[31] On any view, therefore, the application is out of time and, for leave to be granted, an extension of time is required.

[32] The leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated:

> "If there has been delay, the application for leave should include (a) an application to extend time stating the grounds relied on and (b) an affidavit explaining all aspects of the delay."

[33] An application for an extension of time has been advanced. In terms of good reason, the applicant relies on affidavits of Michael Crawford and Gary Duffy, solicitors in KRW Law, sworn on 11 January 2021 and 6 April 2023 respectively. There is no evidence from the applicant himself addressing any period of delay. It is apparent that he believed that the MRF was responsible from at least the time of the Panorama documentary.

[34] Mr Duffy confirms:

(i) The Paper Trail document was publicly posted on 30 August 2017 but says it was not recognised at the time that it may be relevant to the decision taken by the proposed respondent; and

(ii) The report from Mr McPhilemy was made on 7 December 2019.

[35] The evidence is that an application for legal aid was made on 23 June 2020 and refused on 27 August 2020. An appeal was lodged, and it was granted on 4 November 2020. It is specifically averred that the delay was caused "in part" by the restrictions presented by the Covid-19 lockdown. No other reason for the delay is proffered. The proceedings were not issued for over two months after the grant of the certificate.

[36] Practitioners should be well aware that delays in the processing of legal aid applications, whilst a factor to take into account, will not be determinative of any application for an extension of time – see *Re Watterson's Application* [2021] NIQB 16.

[37] The evidence leaves a number of questions outstanding:

(i) Why were proceedings not issued in 2015 when they were first intimated?

(ii) When and by whom was it realised that the Paper Trail document had some relevance? Why did it take nearly two and a half years to bring this to the attention of the police?

(iii) Why was the McPhilemy allegation not communicated for almost a year? Why was it not mentioned in the January 2020 pre-action letter?

(iv) Why was legal aid not sought until 23 June 2020, when the three-month period since 27 March 2020 had almost expired?

(v) What reasons were there, apart from Covid, for the delay in that application being processed?

(vi) Why were proceedings not issued for over two months after the grant of legal aid?

[38] The failure to address these core issues means that the applicant has not satisfied the requirement to explain all relevant periods of delay in order to ground an application for an extension of time. Indeed, there are periods of wholly unexplained delay such that the court could not consider that the test for an extension of time has been evidentially met.

[39] The applicant relies on my decision in *Re Graham's Application* [2022] NIKB 25 in which I granted an extension of time on the basis that there was an important point of law to be resolved which concerned the ability of an applicant in public law proceedings to impugn an alleged failure by the police to investigate crime.

[40] However, these proceedings do not raise a point of law of general importance. The challenge is one based on rationality and is therefore a fact sensitive analysis. There is no reason to extend time on a public interest basis. The investigation into the killing of Daniel McAreavey rests, with many others, within the Case Sequencing Model of the LIB.

[41] By contrast, there is a basis to contend that an extension of time will cause prejudice to good administration since the MRF investigation conducted by the police following the DPP request concluded over three years ago.

[42] I have therefore determined that this application is out of time and that no good reason has been established for an extension of time. On that basis alone the application is dismissed.

***The Merits of the Application***

[43] Having heard full argument, I nonetheless propose to address the question of whether the applicant has met the threshold for the grant of leave to apply for judicial review, namely whether an arguable case with realistic prospects of success has been made out.

[44] The applicant's primary submission is that the decision to exclude the killing of Daniel McAreavey from the MRF investigation in 2014 and 2016 did not take account of legally relevant material in the form of the Paper Trail document and/or the McPhilemy interview.

[45] Whether or not a particular killing fell within the parameters of the MRF investigation was a matter I considered in *Re Stuart*. In that case, I held that the exclusion of the killing of a member of the MRF was rightly excluded but said nothing about how the respondent determined which civilian deaths were properly the subject matter of the investigation.

[46] In this case, the proposed respondent has taken the view, on examining the evidence, that Mr McAreavey was shot by soldiers of the Royal Anglian Regiment, not the MRF. This is based on, inter alia, the material before the inquest and the military logs. It is manifestly not an irrational decision.

[47] The Court of Appeal in *Re Frizzell's Application* [2022] NICA 14 confirmed that the standard of review applicable to operational policing decisions is "obviously a formidable one" which "correlates with the restricted ambit of review in relation to prosecutorial decisions" [paras 24 & 25].

[48] In terms of the 'new' material relied upon, this bears a little scrutiny. There is no evidence from the individual in Paper Trail who draws certain conclusions from the archive entry. In particular, the court has no basis to conclude, even on an arguable basis, that the use of the term "SF (Security Forces)" bears any correlation to the claim that the MRF was responsible. In common parlance, Security Forces is a generic term which does not indicate that any particular unit carried out the killing. If some specialist knowledge were necessary in order to derive this inferential meaning, it was not furnished to the court. There is no basis therefore to conclude that this was a material consideration, let alone one that could possibly have caused the proposed respondent to alter its previously articulated position.

[49] The triple hearsay claim that Mr Inman told Mr McPhilemy who told Mr Winters who told Mr Crawford that the killing was an MRF operation also lacks the quality of materiality. It has been put forward without any interview transcript or notes simply as a bare assertion of the contents of a conversation to which none of the deponents were a party. This cannot constitute a material consideration which could result, even arguably, in the proposed respondent's decision being condemned as irrational.

[50] The proposed respondent has been presented with this new material, many months after it came into existence, and has declined to alter its position that this killing should not be included in the MRF investigation which has, in any event, long since concluded. There is no arguable case with a realistic prospect of success that this decision would be found to be irrational.

[51] I would therefore have dismissed this application for leave in any event, aside from the delay issue.

***Conclusion***

[52] The application for leave to apply for judicial review is dismissed for the reasons set out. The court provisionally takes the view that the usual order for costs should follow, namely no order for costs save for the taxation of the applicant's costs as those of an assisted person.