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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOHN McEVOY FOR JUDICIAL REVIEW

Hugh Southey KC and Blinne Ní Ghrálaigh (instructed by Phoenix Law) for the Applicant
Tony McGleenan KC and Ben Thompson (instructed by the Crown Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] On 19 November 1992 loyalist gunmen carried out an attack at the Thierafurth Inn, Kilcoo, Co Down in which one man, Peter McCormack, was killed. The applicant was working at the bar at the time and narrowly escaped injury or death.

[2] It is the applicant's case that, in recent years, evidence has come to light of collusion between the security forces and loyalist paramilitaries who were active in the South Down area. In particular, he refers to the report of the Police Ombudsman ('PONI') into the killings in Loughinisland in 1994, published in 2016, and avers that new material has come to light identifying suspects allegedly responsible for the shooting.

[3] In these proceedings, a challenge is brought to the alleged failure of the Chief Constable of the PSNI to ensure an effective, prompt and independent investigation into the 1992 attack.

[4] Leave to bring an application for judicial review was granted on 8 September 2017 but the proceedings were then stayed pending the decision of the Supreme Court in *Re McQuillan's Application* [2021] UKSC 55.

The Applicant's Evidence

[5] The applicant describes the horrific events of the attack at the bar in November 1992 and how bullets were fired at him at close range, narrowly missing. Not only was Mr McCormack killed, three other customers were seriously injured. The UVF claimed responsibility for the attack, stating that the intended target was a Peter McCarthy, whose family owned the public house.

[6] The applicant also outlines that he has never been able to recover fully from these events and has suffered post traumatic stress disorder.

[7] Reliance is placed on the 2016 PONI report into the Loughinisland shootings which also addressed the events at the Thierafurth Inn. The 1992 attack was investigated by an RUC officer identified as 'Police Officer 4.' In the PONI report he is recorded as having told investigators that the Thierafurth Inn was frequented by "bad people", founded on a belief that it was associated with republican paramilitaries. The PONI report comments that this was suggestive of a lack of objectivity on the part of Police Officer 4.

[8] The report itself states:

> "My investigation established that in mid-1993 police received intelligence implicating Persons A, M, K and I in the conspiracy to murder Peter McCarthy…That intelligence was marked 'NDD/Slow Waltz.'
>
> Police Officer 4 states that he did not receive such intelligence and my investigation has seen no evidence that it was shared with him.
>
> The UVF unit was not the subject of a policing response sufficient to disrupt their attacks. The failure to disseminate information to investigators was, in my view, an attempt to protect the sources of that information. This clearly undermined the investigations."

[9] On 9 June 2016 PONI investigators travelled to the Thierafurth Inn and met with the survivors of the attack and explained their findings. The applicant describes himself as having been shocked by these revelations and says he was previously unaware that suspects had been identified within a year of the attack. He expected there to be a fresh police investigation into the shooting and/or arrests of the suspects concerned.

[10] In August 2016 he instructed solicitors to write to the PSNI asking when an effective and independent investigation would take place. No substantive response was received to that correspondence and a pre action protocol letter was sent on 3 April 2017. On 25 April 2017 a reply was received denying that any investigative obligation arose pursuant to either article 2 or article 3 ECHR.

[11] Reliance has also been placed on a documentary film entitled *No Stone Unturned* made by the renowned director Alex Gibney and which premiered in 2017. It named the suspects in both the Thierafurth Inn and Loughinisland shootings and also suggested the security forces were aware in advance that the attack was to take place. The film refers to a phone call made to a confidential line and an anonymous letter, written to a local politician, both of which named the gunmen in the Thierafurth Inn and Loughinisland attacks, including Person A. The letter purports to be from an individual who was involved in the planning of the murders. Those interviewed for the film state that the individual was Person A's wife, who worked as a civilian for the RUC, and she was brought in for questioning by the Police Officer 4 but never charged.

[12] The documentary also includes an interview with a former police officer, Jimmy Binns, who states that when Person A was arrested, the detective who interviewed him spent most of the time persuading the suspect to shoot and kill an IRA member.

[13] No police investigation has taken place since the publication of this information in 2016 and 2017. There was a review instigated by the Historical Enquiries Team ('HET') but it was not completed prior to its disbandment in 2014.

[14] As such, the case now lies within the remit of the Legacy Investigation Branch ('LIB').

The Respondent's Evidence

[15] The respondent has adduced evidence from Detective Superintendent Ian Harrison who was not himself involved in the original investigation but has carried out a review of the relevant documents. It reveals that the following steps were taken following the 1992 shooting:

(i) Scenes of Crime officers attended, photographs were taken and maps prepared;

(ii) The hijacked car used in the attack was located and recovered;

(iii) Items found in the car were subjected to forensic examination;

(iv) House to house enquiries were conducted and witness statements taken;

(v) One man was arrested on 4 March 1993 but was released after denying involvement;

(vi) It was noted that Mr McCarthy made an allegation in the days following the shooting of security forces involvement, although no further action was taken in this regard.

[16] DS Harrison expresses the view that the initial RUC investigation was 'comprehensive.'

[17] Detective Superintendent Stephen Wright, the Deputy Head of the LIB has sworn an affidavit in which he deposes to the current state of play in respect of this legacy investigation. The attack at the Thierafurth Inn sits within the Case Sequencing Model ('CSM') of the LIB and, as matters stand, there is no indicative date as to when it may be reached. It could be many years away. There are currently over 1100 cases within the CSM. The evidence reveals that provision is made within the CSM for 'contemporary persons of interest', one of a range of factors used to prioritise investigations. The allocation of cases by the CSM is subject to annual review. Since hearing the case, I have been informed that the respondent has launched a review of the CSM in light of the decision in *McQuillan* and, in particular, is considering giving greater priority to those cases which satisfy the article 2 legal tests

[18] The LIB operates a Family Engagement Strategy and, as part of this, the respondent wrote to the applicant's solicitors on 8 April 2022 indicating the measures which were proposed to ensure the practical independence of the LIB review. These include:

(i) Meeting with the families prior to the commencement of any review;

(ii) Addressing any conflicts of interest;

(iii) The appointment of a Departmental Review Officer to compare case records against any conflict of interest declaration; and

(iv) The composition of the LIB team which can exclude any member with RUC service experience and/or military service.

[19] It is intended that these steps will be taken to reassure the applicant and others as to the independence and impartiality of the LIB.

The Grounds for Judicial Review

[20] The applicant contends that the respondent has breached the duty owed to him under section 6 of the Human Rights Act 1998 ('HRA'), read in conjunction with

articles 2 and 3 ECHR, to ensure a prompt, effective and independent investigation into the attack. In particular, it is alleged that the respondent has misdirected itself in determining that no duty arises pursuant to articles 2 and/or 3.

[21] The applicant invites the court to conclude:

(i) There has been no effective investigation to date;

(ii) There has been no police investigation resulting from the identification of the suspects in the 2016 PONI report or the 2017 documentary film;

(iii) There is no current prospect of an investigation being carried out;

(iv) There has been no police investigation into the alleged collusive activities of state actors;

(v) The historic RUC investigation was, in any event, undermined by state collusion as evidenced by, inter alia, the withholding of intelligence information from detectives.

Delay

[22] The respondent raises an issue of delay, citing in support my recent decision in *Re Armstrong's Application* [2022] NIQB 32. However, *Armstrong* was an application for leave whilst, in this case, leave was granted in September 2017. In *R v Criminal Injuries Compensation Board ex p. A* [1999] 2 AC 330, Lord Slynn held:

> "If leave is given, then unless set aside, it does not fall to be reopened at the substantive hearing on the basis that there is no ground for extending time under Ord. 53, r. 4(1)."

[23] The principles in *ex p. A* were followed in this jurisdiction in *Re Turkington's Application* [2014] NIQB 58. It always remains open to the court to take into account any relevant period of delay on the question of relief, but, absent an application to have leave set aside, the issue is not to be re-litigated at the substantive hearing.

The Engagement of Articles 2 and 3

[24] The applicant contends that his attempted murder engages the article 2 and 3 obligations of the state in light of the fact that his life was placed at risk and the nature of the injuries which he has suffered.

[25] In *Re McQuillan*, the Supreme Court considered the question of the application of the article 2 and 3 investigative obligation in the context of deaths which predated the coming into force of the HRA in the UK on 2 October 2000 (the

'critical date'). The court confirmed that the same principles applied whether the obligation arose under article 2 or article 3.

[26] In *Brecknell v UK* [2008] 46 EHRR 42 the ECtHR explained that such investigative obligation may revive, after the closure of an investigation, where some new material comes to light:

> "The court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation" [para 71]

[27] Lady Hale, in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 considered the application of this test to material already known to the relevant authorities:

> "But what is meant by 'new' material and 'coming to light'? It appears from the reference in *Janowiec* to an 'allegation, piece of evidence or item of information' that new material must be construed broadly…In *Harrison v United Kingdom (2014) 59 EHRR SE1*, 'coming to light' was equated with coming 'into the public domain: para 51. The findings of the Hillsborough Independent Panel constituted 'new evidence and information which cast doubt on the effectiveness of the original inquest and criminal investigations': para 53. Those findings were based on all the available documentation which now included newly disclosed documents held by Government departments. Thus, whatever else 'coming to light' may mean, it must encompass the revelation of material which was previously known only to the relevant authorities." [para 297]

[28] The applicant submits that the identification of the suspects in the PONI report and in *No Stone Unturned*, as well as the evidence in relation to state collusion, are sufficient to trigger the revival of the obligation pursuant to *Brecknell*.

[29] The respondent relies on the Supreme Court finding in the Hooded Men case (*Re McGuigan and McKenna*, decided at the same time as *McQuillan*) when it was held that the 'new material' added detail but did not add significantly to the state of knowledge in relation to the matter. The court referred to the ECtHR decision in

Chong v UK [2019] 68 EHRR SE2, where the new material relied upon "merely corroborated the account that the applicants always believed" (paras [128] to [131]).

[30] I have concluded that the new material contained in the PONI report and the documentary are sufficient to trigger the *Brecknell* revival obligation for the following reasons:

(i) Although the identity of the alleged suspects may have been known to certain agencies of the state in 1993, there is evidence that this was not passed on to those charged with the investigation of the crime;

(ii) Whilst the allegations of collusion are not 'new', PONI has concluded that the failure to disseminate information undermined the investigation and this was done to protect sources;

(iii) The PONI report demonstrates what it describes as a lack of objectivity on the part of Police Officer 4;

(iv) The police failed to charge an individual who admitted being involved in the planning of the attack;

(v) The evidence of the interview of the prime suspect as revealed by the documentary gives rise to real concerns about the collusive behaviour of those investigating the attack.

[31] The material relied upon, when taken together, casts real doubt on the ability of the original RUC investigation to bring those responsible to justice. It is not a matter for this court to determine how persuasive or accurate the new material is, but I am satisfied that it is credible, relevant to the identification of perpetrators and capable of undermining previous conclusions. It goes beyond merely the addition of detail or the corroboration of what the applicant and others have previously believed since it represents plausible evidence, from authoritative sources, of significant state collusion in the events under consideration. It therefore meets the criteria set by *Brecknell* in relation to the revival of the investigative obligation.

[32] The matter does not, however, end there since the application of the *Brecknell* test is itself subject to the requirement of 'genuine connection.' Lord Hodge, delivering the judgment of a unanimous court, analysed the decision of the Strasbourg court in *Janowiec v Russia* [2014] 50 EHRR 30, and stated:

> "The Grand Chamber explained that, in accordance with *Šilih* , the Strasbourg court's temporal jurisdiction in relation to such a claim requires either (1) a 'genuine connection' with the death which constitutes the triggering event for the obligation consisting of (a) a reasonably short period of time between the death and

> the entry into force of the Convention for the state in question, not in excess of ten years, and (b) a requirement that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that state, or (2) in extraordinary situations which do not meet the 'genuine connection' test, where there is a need to ensure that the guarantees and the underlying values of the Convention are protected (the 'Convention values' test)." [para 135]
>
> "It is clear that the Grand Chamber had the investigative obligation revival principle in *Brecknell* directly in mind when writing this passage and that in the last sentence of para 144 it specifically intended to limit the operation of that principle in relation to deaths occurring before the critical date by reference to the 'genuine connection' test and the 'Convention values' test." [para 137]

[33] The position following *McQuillan* is that *Brecknell* revival requires not only that some new evidence has emerged but also that either the genuine connection or Convention values test has been met. In this case, the attack occurred in 1992, prior to the coming into force of the HRA but within the "reasonably short period of time" referred to in the jurisprudence. It is not argued in this case that the Convention values test applies. The question which arises therefore is whether the major part of the investigation must have been or ought to have been carried out after the critical date.

[34] In *Janowiec* the Grand Chamber stated that the investigation includes "the conduct of proceedings for determining the cause of the death and holding those responsible to account." *McQuillan* itself related to the killing of Jean Smyth in June 1972. In 2014 military logs were discovered which supported the view that there may have been army involvement in the death. In 2015 a decision was made that the case should be investigated by the LIB although following the decision of the Court of Appeal, responsibility passed to an independent team led by Jon Boutcher.

[35] It was accepted that the military logs met the evidential threshold of the *Brecknell* test, but it was disputed that there was a genuine connection between the death of Ms Smyth and the coming into force of the HRA on the critical date. The UKSC held that the lapse of the period of 28 years between the death in question and the critical date meant that the temporal condition of the genuine connection test was not met. In relation to the second limb, the court held:

> "The investigation of military involvement in the death of Jean Smyth is a major aspect of the case which is potentially decisive for the course of the investigation and which will only be carried out after the relevant critical

> date. In our view, this means that the second condition is satisfied in this case. Para 147 of *Janowiec* also posits a long-stop test, which involves asking whether by reason of "a major part of the proceedings or the most important procedural steps" taking place before the critical date, the court's ability to make an overall assessment of the effectiveness of the investigation is "irretrievably undermine[d]." We do not consider that this can be said to be the case here."

[36] Thus, had the killing of Ms Smyth taken place in 1992, rather than 1972, the genuine connection test would have been met.

[37] In the instant case, the investigation of the material relevant to the issue of collusion and referenced in the PONI report and the documentary will only be carried out long after the critical date. This will necessarily engage with the question as to whether there was state collusion in the attack and/or collusive behaviour in the carrying out of the original investigation. The LIB is charged with carrying out a review and taking any further investigatory steps, none of which has occurred to date. This case is quite different from *Armstrong* where the police investigation was carried out in the 1990's but no *Brecknell* trigger had been identified.

[38] On this basis, I have determined that the genuine connection test is met on the facts of the case.

Breach of the Article 2 and 3 Obligation

[39] What does the requirement to carry out an effective investigation entail? The elements of the investigative obligation under articles 2 and 3 include promptness and reasonable expedition. In *McQuillan* the court cited the ECtHR in *Tunç v Turkey* [2016] Inquest LR 1:

> "…compliance with the procedural requirement of article 2 is assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements are inter-related and each of them, taken separately, does not amount to an end in itself, as is the case in respect of the independence requirement of article 6. They are criteria which, taken jointly, enable the degree of effectiveness of the investigation to be assessed. It is in relation to this purpose of an effective investigation that any issues, including that of independence, must be assessed." [para 225]

[40] In *Re Finucane's Application* [2019] UKSC 7 Lord Kerr said:

> "In *Ramsahai v The Netherlands* (Application No 52391/99) ECHR 2007-II, 191 ECtHR considered what effectiveness in this context means. At para 324, the court said:
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> > 'In order to be 'effective' as this expression is to be understood in the context of article 2 of the Convention, an investigation into a death that engages the responsibility of a contracting party under that article must firstly be adequate. *That is, it must be capable of leading to the identification and punishment of those responsible*. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard.'" [para 128]

[41] Lord Kerr also explained that the assessment of effectiveness does not, of itself, encompass an analysis of the new material which triggered the *Brecknell* revival of the obligation. Rather, the focus must be on the deficiencies in the investigation to date.

[42] The article 2 investigative obligation exists to protect the rights of individual victims but also to secure the wider public interest not only in the exposure of culpable conduct but also the maintenance of confidence in the rule of law. Allegations of collusion by security forces in the deaths of citizens bring this issue into particularly sharp focus. A failure by the state to investigate such allegations, promptly and effectively, can only serve either to reinforce the claims of collusion or, at best, signify a tolerance of collusive behaviour in the past. In this regard, see the decisions of the ECtHR in *El-Masri v Macedonia* [2013] 57 EHRR 25 at paras [191] to [193] and *Al Nashiri v Romania* [2019] 68 EHRR 3 at para [641].

[43] Significantly, in *McQuillan*, the court found that, as a general rule, one should await the outcome of an investigation before ruling on its effectiveness, in line with the decision of Kerr LCJ in *Re Kelly* [2004] NIQB 72. This is subject to the important proviso that the investigation must have the capacity to be effective (see paras [199] and [200]).

[44] The Supreme Court went on to consider the independence of the LIB and concluded that there was no basis to conclude that it lacked hierarchical and

institutional independence from the police and military. That in itself is not conclusive on the question of whether there has been an effective investigation since the particular circumstances of each case must be considered. In *McQuillan* itself it was held that, had article 2 applied, the lack of engagement with the family would have compromised the effectiveness of the investigation, when considered in light of previous flawed investigations.

[45] In light of this authoritative ruling, the applicant's claim of a want of institutional independence on the part of the LIB must fail. However, the criticism of the investigation here focuses on the delay and inactivity on the part of investigating authorities in pursuing the information which came to light as a result of the PONI report and the 2017 documentary. The respondent's answer to these claims is to say:

(i) The CSM is a lawful process for determining the allocation of finite resources; and

(ii) In any event, it cannot be said that the investigation lacks the capacity to be effective.

[46] In respect of the CSM, reliance is placed on the recent Court of Appeal decision in *Re Frizzell* [2022] NICA 14 in which it was recognised there were very many cases competing for the allocation of finite resources and the scheme should avoid the creation of a hierarchy of victims.

[47] In this case, the LIB has corresponded with the applicant in relation to the measures it would propose to take, in conjunction with the family, to ensure that the investigation to be conducted will have the necessary quality of independence. The lack of engagement which led to the criticism of the investigation in *McQuillan* is not therefore present on the facts of this case. There is no evidential basis to conclude that the investigation to be conducted by the LIB will not have the capacity to meet the article 2 or 3 requirement of effectiveness.

[48] The question then arises as to whether delay alone can constitute a breach of the article 2 obligation. In *Finucane*, the majority of the Court of Appeal (Deeny and Horner JJ) [2017] NICA 7 tended to the view that a delay of four years from the publication of the de Silva report during which time the new material identified had not been investigated was itself a fresh breach of article 2. This issue was not considered by the Supreme Court. Whilst the factors which speak to the effectiveness of an investigation are often described as inter-related, I am satisfied that the failure to carry out such an investigation with reasonable promptitude can constitute a free standing breach of article 2. To hold otherwise would be to permit states to defer investigations on the promise of a compliant process indefinitely which would be inimical to the rule of law.

[49] In this case, the new material referred to has been in the public domain for some five to six years and, it would appear, has prompted no action by the state. For

reasons of public confidence, as well as the individual rights of the applicant and others affected by this atrocity, that cannot be an acceptable state of affairs. I am conscious of the need to avoid a hierarchy of victims, and of the finite resources available for investigations into the past. However, it is well established that it is a matter for the state to organise itself so as to be able to comply with Convention requirements – see Buxton LJ in *Noorkoiv v Secretary of State for the Home Department* [2002] EWCA Civ 770 (an article 5 case) and the ECtHR in *Guleç v Turkey* [1998] 28 EHRR 121at para [81] (article 2). Moreover, such considerations could not trump the need to promptly investigate, in particular, allegations of collusion in murder.

[50] In this context, it is relevant that the respondent is already undertaking a review of the CSM in light of recent jurisprudence. As this case illustrates, determining when article 2 or 3 applies to a historic incident is far from a straightforward exercise and it would be unworkable for each case to be subjected to this level of judicial scrutiny.

Conclusions

[51] For the reasons outlined, I have concluded:

(i) The material relied upon by the applicant is sufficient to trigger the *Brecknell* revival of the article 2 and 3 obligations;

(ii) There is a genuine connection between the article 2 and 3 obligations and the attack at Kilcoo in 1992;

(iii) The state has failed to carry out an article 2 or 3 compliant investigation into the attack within a reasonable time;

(iv) I am not satisfied that LIB is incapable of carrying out an effective investigation.

[52] In terms of relief, I am minded to make a declaration only since I am conscious that any mandatory order may result in other deserving investigations being denied or delayed. In light of the indication given by the respondent that a review is being carried out of the CSM in light of the requirements of article 2, declaratory relief ought to be an effective remedy for the breach which I have found. In any event, I will hear counsel on this issue, on the wording of any declaration and on the question of costs.