Neutral Citation No: [2023] NIKB 40 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **HUM12110** *ICOS No:* *Delivered:* **31/03/2023**

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 JOHN McEVOY
FOR JUDICIAL REVIEW

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Hugh Southey KC and Blinne Ní Ghrálaigh KC (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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REMEDIES

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HUMPHREYS J

Introduction

[1] In my judgment on the application for judicial review, neutral citation [2022] NIKB 10, I found in favour of the applicant and held that the respondent had failed to carry out an article 2 and/or article 3 compliant investigation into the attack at the Thierafurth Inn, Kilcoo, on 19 November 1992. This conclusion arose since I found that the article 2 and 3 obligations had been revived in line with the principles set out in *Brecknell v UK* [2008] 46 EHRR 42, as explained by the Supreme Court in *Re Finucane* [2019] UKSC 7 and *Re McQuillan* [2021] UKSC 55.

[2] This judgment should be read in conjunction with my findings on the substantive issues.

[3] In my conclusion I stated at paragraph [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."

[4] The wording of a suitable declaration was agreed between the parties and the issue of costs disposed of. However, the applicant contends that damages are necessary to ensure just satisfaction for the respondent's breach of his human rights. The respondent says that there is no legal or factual basis for such an award in this case.

Factual findings

[5] The applicant places particular emphasis on the following findings in the primary judgment:

(i) The horrific events of 19 November 1992 and the impact those have had on his life;

(ii) The PONI report on the failings to disseminate intelligence information to investigators;

(iii) The interview with the former police officer contained in the documentary film *No Stone Unturned*;

(iv) The lack of any further investigation since these matters came to light in 2016 and 2017.

[6] The claim for damages is therefore based squarely on the delay on the part of the respondent in complying with its obligations under articles 2 and 3.

The legal framework

[7] Section 8 of the Human Rights Act 1998 ('HRA') provides:

> "(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-

(a) Any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) The consequences of any decision (of that or any other court) in respect of that act,

The court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining-

(a) Whether to award damages, or

(b) The amount of any award.

The court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
…"

[8] In *Greenfield v Secretary of State for the Home Department* [2005] UKHL 14, Lord Bingham stated:

> "The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation." [para 9]

[9] In *Jordan v PSNI* [2019] NICA 61, Morgan LCJ set out the legal principles in *Greenfield a*s follows:

"(i) Domestic courts when exercising their power to award damages under section 8 should not apply domestic scales of damages.

(ii) Damages did not need ordinarily to be awarded to encourage high standards of compliance by member states since they are already bound in international law to perform their duties under the Convention in good faith.

(iii) The court should be satisfied, taking account of all the circumstances of a particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and it follows that an award of damages should be just and appropriate.

(iv) Section 8(4) of the HRA required a domestic court to take into account the principles applied by the ECHR under article 41 not only in determining whether to award damages but also in determining the amount of the award." [para 19]

[10] An award of damages in respect of breach of Convention rights does not therefore flow automatically. It must be necessary in order to afford just satisfaction to the victim. Furthermore, the claimant must show that he has suffered harm which was caused by the breach of right asserted. In *Kingsley v UK* (35605/97), the ECHR held:

> "The court will award financial compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found…" [para 40]

[11] As Lord Reed explained in *Sturnham v Parole Board* [2013] UKSC 23:

> "…the Strasbourg court's approach to this issue reflects its limited fact-finding role…A domestic court is not however restricted in its fact-finding capabilities. In those circumstances, it is not in my view required by section 8 of the 1998 Act to apply a self-denying ordinance, but should establish the facts of the case in the usual way, and apply the normal domestic principle that the claimant has to establish on a balance of probabilities that he has suffered loss." [para 82]

The evidence

[12] The applicant's evidence is that he has never fully recovered from the 1992 attack and suffers from post traumatic stress disorder. In terms of the impact of the delay in investigating, he states in his fourth affidavit:

> "The delay has been frustrating and upsetting and has continued to erode my confidence in the willingness by State bodies to ensure an effective investigation into the

> shooting and to hold to account those responsible…The delay risks our being deprived of the opportunity to ever establish what happened, or to obtain justice."

[13] The applicant also states his belief that those charged with responsibility for the investigation have demonstrated clear disrespect to him and the other survivors and he is horrified by the failure to act on the evidence since 2016.

Consideration

[14] It is the applicant's case that there can be no principled distinction between his situation and that prevailing in *Jordan* wherein separate awards for compensation were made by the ECHR and the domestic courts in respect of distinct periods of delay in carrying out an article 2 compliant investigation.

[15] It is evident from *Jordan* that damages may be award for distress, anxiety and frustration caused by such delays. At first instance [2014] NIQB 71, Stephens J made a finding as follows:

> "The investigation into the death of a close relative, impacts on the next of kin at a fundamental level of human dignity. It is obvious that if unlawful delays occur in an investigation into the death of a close relative that this will cause feelings of frustration, distress and anxiety to the next of kin. The primary facts lead on the balance of probabilities to the inference of feelings of frustration, distress and anxiety. It would be remarkable if any applicant was emotionally indifferent as to whether there was a dilatory investigation into the death of their close relative and such emotional indifference would be entirely inconsistent with an applicant who seeks to obtain relief by way of judicial review proceedings. As a matter of domestic law it would be lamentable if a premium was placed on protestations of misery. At this level of respect for human existence and for the human dignity of the next of kin of those who have died there should be no call for a parade of personal unhappiness, see *H West & Son Limited v Shephard* [1964] AC 326. In short I infer that each of the applicants, regardless as to their age, must have been caused to suffer feelings of frustration, distress and anxiety by the unlawful delays that have occurred." [para 27]

[16] The Court of Appeal held:

> "In our view the frustration and distress caused by such conduct against a background of very lengthy delay made it just and appropriate to afford just satisfaction by way of damages." [para 30, supra]

[17] The instant case does not involve an investigation into the death of a next of kin, it involves an attack on the applicant himself. A fortiori, these considerations must apply to the impact of the want of any adequate investigation in such circumstances.

[18] In light of these authorities, the relevant Strasbourg jurisprudence in respect of compensation under article 41, I have determined that an award of damages is necessary to afford just satisfaction to the applicant and that the applicant has established that he has suffered harm as a result of the violation of article 2 and/or 3.

Quantum of damages

[19] The ECHR caselaw provides little in the way of analytical guidance into the making of such awards of damages for delay. I note that, domestically, a sum of £5,000 was awarded in *Jordan* in respect of a culpable period of 14 months' delay. The family of Patrick Finucane was awarded £7,500 by consent in respect of a delay of some two years and a further £5,000 by Scoffield J in satisfaction of a claim of culpable delay of some 2½ years.

[20] I have concluded that, in addition to the findings in the primary judgment and the declaratory relief which he has obtained, an award of £10,000 damages under section 8 of the HRA is necessary in order to afford just satisfaction to the applicant.