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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 21/12/2017

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 FRANCIS McGUIGAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY MARY McKENNA FOR JUDICIAL REVIEW

APPLICATION UNDER SECTION 12 OF THE ADMINISTRATION OF JUSTICE ACT 1969

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MAGUIRE J

[1] This court gave judgment in respect of the above entitled cases on 27 October 2017. The judgment provides a range of conclusions in respect of a myriad of issues which were before the court. These included a consideration of what the Strasbourg court would have done on the facts of these cases; a decision in respect of whether the Convention values test was met; a decision in respect of whether the Brecknell test was met; a decision in respect of whether In Re McKerr is still good law; a decision in respect of the potential operation of the independence doctrine in the context of police investigations into the events under scrutiny in this case; a decision in respect of the issue of the rationality of the conclusion reached by the police; and consideration of a number of other issues.

[2] Ultimately, the court decided that a decision made by the PSNI in October 2014 to take no further investigative steps to investigate whether anyone should be held criminally responsible for the events with which the decision of the court was concerned should be quashed. On all other grounds the judicial review failed. However, it is important to recognise that the basis upon which other grounds failed was the view taken by the court in relation to the question of whether the House of Lords decision in McKerr remained good law and precluded reliance upon Articles 2 and 3 as a matter of domestic law. Were it not for the conclusion of the court in

respect of that issue, it seems clear that the court would have reached other conclusions favourable to the applicants.

[3] The court has before it an application by the applicants in this case to grant a certificate under section 12 of the Administration of Justice Act 1969. If a certificate is granted, the effect will be that the applicants can seek leave to appeal directly from the Supreme Court.

[4] The relevant provisions contained in section 12 are as follows:

> "(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied -
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> (a) that the relevant conditions are fulfilled in relation to his decision in those proceedings, and
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> (b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal,
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> (c) that all parties to the proceedings consent to the grant of a certificate under this section,
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> the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.
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> (2) This section applies to any civil proceedings in the High Court which are …
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> (a) proceedings before a single judge of the High Court.
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> (3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that that point of law either -
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> (a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or

(b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the Supreme Court in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the Supreme Court (as the case may be) in those previous proceedings."

[5] The court, having heard submissions from the parties, has considered carefully the relevant conditions referred to above. It is grateful to the parties for their helpful skeleton arguments and oral submissions. In respect of them, the court notes that the position of each applicant is not exactly the same. The first applicant makes no reference in terms to what the issue of general public importance, with which the certificate sought would be concerned, actually is. His application states that he seeks the court's certificate in respect of 'the court's judgment'. On the other hand, the second applicant's application identifies a number or issues and questions which, in her view, require the court to issue a certificate. These issues raise, in the second applicant's view, multiple points of general public importance. Her application formulates several questions which are said to fall into this category and also refers to six other specific findings of the court. The approach of the respondents does not address the specific wording used by either applicant. Rather it indicates by way of a broad statement that they consent to the applicant's application. The court is not clear as to whether this means, for example, that the respondents agree to the multi-issue approach of the second named applicant or the wide and unspecific language approach of the first applicant. The respondents go on to identify the issue of general public importance as being concerned with the interpretation of section 22(4) of the Human Rights Act 1998 and whether it applies to "pre-commencement deaths". Interestingly, there is an assertion by the respondents that this court considered itself bound *inter alia* by Finucane, a point which surely requires qualification in view of what in fact the court stated at paragraph [270] of its judgment.

[6] The court is far from certain that the conditions which must be met for the granting of a certificate are in fact met in this case. But it need not decide this point definitively for present purposes as, even if the conditions were met, the court is of the clear view that this is a case where it should exercise its discretion against the issue of a certificate.

[7] The language of section 12(1), in the court's opinion, is clear in conferring upon the court a discretion to issue or not issue a certificate even if all of the conditions in the relevant provisions are met. It appears to the court that there will often be cases which may not be suitable for a certificate for the very reason that the case is one where it would be beneficial, should the matter go ultimately to the Supreme Court, for that court to receive the considered view of the Northern Ireland Court of Appeal in respect of the issue or issues under consideration. After all, this would be the normal situation which arises in the context of appeals to the Supreme

Court. In this court's view, the subject matter of this litigation with its close connection to the history of the conflict in Northern Ireland and the wide range of the issues which have arisen in these cases point towards the benefits which would likely flow from the matter being argued before the most senior court in Northern Ireland. It may very well be that that court will differ from the trial judge; may re-define the issues; or discover new approaches to them. For example, it may be that the Court of Appeal might find that the judgment in McKerr is not in point and does not arise for decision on the facts of this case. In any of these events, even if the Court of Appeal's judgment or judgments do not resolve the litigation, their analysis will, no doubt, be of assistance to the Supreme Court if the matter should ultimately be appealed to them.

[8] There is no authority in Northern Ireland, so far as the court is aware, relating to leapfrog appeals but the court has found of value the views of Megarry J in Inland Revenue Commissioners v Church Commissioners for England [1974] 2 AER 529. In a passage at page 529b he said:

> "I think that where the requirements of the section are satisfied, it is nevertheless within the judicial discretion of the judge whether or not to grant the certificate: for section 12(1) provides that where the requirements are satisfied the judge 'may' grant the certificate, and I can see no grounds for saying that this is one of the limited class of case in which 'may' in effect means 'must'. In the normal course of events, on an appeal the House of Lords has before it the judgments both at first instance and in the Court of Appeal; and I can well imagine cases where on an application for a certificate the judge might consider it desirable that the members of the House of Lords should, in addition to having his own judgment before them, have the benefit of the decision and judgments of the Court of Appeal."

[9] The court finds itself in agreement with the sentiment expressed in the above passage and believes that it would be desirable in the present case for the views of the Court of Appeal in Northern Ireland to be obtained on the range of points which arise in the present context. Accordingly, the court will decline to issue the certificate sought.