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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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15/57619/01

IN THE MATTER OF AN APPLICATION BY MRS MARGARET McQUILLAN  
FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A REVIEW BY THE HISTORICAL INQUIRIES TEAM  
INTO THE CIRCUMSTANCES OF THE DEATH OF MRS JEAN SMYTH  
AND OF OTHER SUSPECTED BRITISH ARMY MILITARY REACTION FORCE  
KILLINGS

AND

IN THE MATTER OF DECISIONS AND ON-GOING FAILURES OF THE  
CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND,  
THE DEPARTMENT OF JUSTICE FOR NORTHERN IRELAND AND  
THE NORTHERN IRELAND OFFICE

AND

IN THE MATTER OF THE FAILURE BY THE CHIEF CONSTABLE AND THE  
POLICE SERVICE OF NORTHERN IRELAND TO PRODUCE THE HISTORIC  
INQUEST FILES

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**MAGUIRE J**

**Introduction**

[1] The applicant in this case is Margaret McQuillan. She is the sister of Jean Smyth. Jean Smyth ("the deceased") was shot dead at Glen Road, Belfast, on 8 June 1972. At the time she was 24 years old and had a daughter aged 6.

[2] Investigation of the deceased's death at the time was desultory, as have been reviews of the investigation since. However in 2014 the family of the deceased received new evidence which has cast the events of 1972 in a new light. This new evidence – which consists principally of the discovery of relevant military logs compiled contemporaneously with events – has been presented to the Police Service for Northern Ireland (“PSNI”), which has indicated that it will investigate it. Hitherto the police posture in respect of the case has been that it was thought that the deceased met her death as a result of a shot fired by IRA terrorists but the new evidence suggests that this might not have been so and opens up other possibilities, especially the possibility that the death may have been at the hands of a soldier under the control of the Ministry of Defence (“MOD”).

[3] The issue which has arisen and which has resulted in this judicial review relates to the applicant's conviction that, in the broad circumstances described, the PSNI ought not themselves investigate the case further on the basis that, as a force, it is not to be viewed as independent of those whose actions would be under investigation. Rather any further investigation should be carried out by a wholly impartial, objective and autonomous agency without links to the MOD. In these circumstances, what is sought from the court is a declaration that it would be unlawful for the PSNI further to deal with the investigation of the case.

[4] After a contested hearing, the court granted leave to apply for judicial review in this case on 4 December 2015. It now has before it a very substantial volume of materials relating to the case. But it is important from the outset that the court makes it clear that the task which it is engaged in is not concerned with the court itself determining where the truth lies in respect of the many factual issues in dispute as to how the death occurred. The court, in short, is not sitting as a coroner or as a finder of primary facts. The court's role, it needs to be understood, is different and relates only to the issue of whether or not it would be unlawful at this time for the PSNI to perform the function of investigator, as is its intention to do so.

### **The background**

[5] It has been 45 years since the death of the deceased. The court can only provide a basic account of what has occurred in respect of the deceased's death over this period. The account the court is about to give is taken from statements which were given at the time. This does not mean that every detail necessarily is correct in every respect.

[6] It appears that on the night of 8 June 1972 the deceased, who was estranged from her husband, had been out for a drink with a boyfriend, John Carlin. At the time the deceased was living with her daughter at her parents' house at Tardree Park, Belfast. Mr Carlin collected the deceased in his green Austin 1100 car and they went to a public house on the Glen Road called the Glenowen Inn. There they met up with some work colleagues from their common place of employment at the Bass Brewery on the Glen Road. At the end of the night, Mr Carlin offered one of their

colleagues a lift home. This meant taking him to the Lenadoon estate. Mr Carlin then drove back to the Glen Road where he turned round using a bus terminus near to Oliver Plunkett School. This meant that the car, after the turn, was facing in a citywards direction. Throughout the deceased had been in the front passenger seat during the car's journey. At a point, which may have been around 11.30 pm, Mr Carlin thought he heard a noise like a tyre bursting. He got out of the car to look around. It was dark. He then returned to the car. On doing so, he found the deceased lying in a prone position inside the car, having been shot.

[7] After this discovery, Mr Carlin flagged down a passing taxi. The driver of the taxi was a Mr Brown. With the help of others who arrived at the scene, Mrs Smyth was transferred to the taxi which then left the scene with her in it, intending, it would appear, to take her to the Royal Victoria Hospital ("RVH"). In the event, the taxi was driven to Andersonstown Police Station which was on the route to the RVH. However, it is probable that by the time of the taxi's arrival at the police station, if not before, Mrs Smyth had already died.

[8] Meanwhile Mr Carlin left the scene at the Glen Road in his car and drove to the deceased's family home at Tardree Park. At this stage it would probably have been unclear to him whether Mrs Smyth was alive or not. When he arrived at Tardree Park, Mr Carlin spoke with Mr Campbell, Mrs Smyth's father, and they left in Mr Carlin's car to go to the RVH. They travelled there directly as they were unaware that the taxi had stopped at Andersonstown Police Station.

[9] It appears that the taxi, together with Mrs Smyth's body, remained at Andersonstown Police Station for some time.

### **The initial police investigation**

[10] Following the death of the deceased a police investigation, conducted by members of the Royal Ulster Constabulary ("RUC"), began. In the course of this, statements were taken from Mr Carlin, Mr Brown (the taxi driver), Mr Campbell (the deceased's father), Mr Desmond Smyth (the deceased's estranged husband) who identified the body, and a number of police witnesses.

[11] Having driven to the police station, Mr Brown, who at the time of the transfer of Mrs Smyth to his taxi could see that she had a severe injury to her head, once he knew the deceased was dead, left to take his wife, who had been with him, to the RVH for treatment, as she was in shock. There Mr Brown met up with Mr Carlin and Mr Campbell who had travelled to the hospital from Tardree Park. Mr Brown explained to them that he believed Mrs Smyth was probably already dead when she had been transferred to his taxi at the scene.

[12] In the statements which are available there are a number from Scenes of Crime officers ("SOCOs"). One of these was Constable Robert Taylor. He examined Mr Carlin's car at 01.30 am on the following day (9 June 1972). At this time it was at

the RVH. He found the rear off-side window to be smashed. On the edge of the remaining glass, about one third of a circumference of a hole 8 mm in diameter, was showing. This, he believed, was an entrance hole caused by a high velocity bullet travelling from the rear off-side of the vehicle towards the quarter light of the front nearside passenger's window. The quarter light on the front passenger's door was also shattered. Constable Taylor found blood under the seat.

[13] Constable Taylor on the same day at 03.00 am examined Mr Brown's taxi which was at Andersonstown Police Station. The deceased's body was present on the floor between the driver's partition and the passenger's seat. She was lying across the floor with both legs bent. There was a large hole on the right side of her face.

[14] Constable Taylor also attended, on the same day, a post mortem of the body carried out by Dr Carson, Assistant State Pathologist. It appears that this post mortem report is not presently available.

[15] After the incident another constable also examined Mr Carlin's car. The date of examination is unclear. By this time the vehicle had been taken to Springfield Road Police Station. The officer was able to collect a number of bullet fragments from the door pillar separating the front passenger's seat door and the front windscreen. The officer noted that the front passenger door fan light was shattered but intact. Other bullet fragments were found in the front of the front passenger seat. He noted that no exit holes were found in the car. The officer recorded that he had "formed the opinion that the deceased was killed by a bullet which entered the car through the rear window in the door behind the driver's door and travelling at an angle towards the front passenger seat, struck the deceased in the head, shattering on impact". He added:

"Nothing else of significance was noted other than the fact that no other holes or bullet strike marks were found on the outside or inside of the car."

[16] From the statements just referred to, it seems clear that in respect of Constable Taylor's examination of the vehicles, he was accompanied by a police photographer, Constable Sinclair, who was also present at the post mortem. Within the papers now before the court there are a number of photographs of the Austin 1100 car which, in what they show, tend to support the view that the description of the damage depicted in the statements of SOCOs just referred to is broadly accurate, though the court adds that this is contested by the applicant and other family members.

### **The inquest**

[17] An inquest was held into the death of the deceased on 9 November 1972. An open verdict was recorded. The statements to which reference has already been

made, appear to have formed the evidence before the inquest, though it is possible that there were further statements which the court has not seen.

[18] At the hearing of these proceedings a number of points were raised about the way in which what appears to be the inquest papers had come to be provided to the court. There were also issues raised about other documents which allegedly demonstrated that counsel had been retained by the Crown Solicitor's Office to appear on behalf of the security forces at the inquest. The question was posed as to why this had been thought necessary if the killing was being attributed to IRA terrorists. While the court notes these points, it does not seek to resolve them.

### **The Belfast Telegraph article**

[19] The next notable event was the publication of an article in the Belfast Telegraph newspaper of 22 October 1973. This article related to the death of the deceased and was headed "Was Jean Smyth Shot by Mistake?". The article refers to the deceased being killed by a single shot. After she was struck, the author referred to "a crowd of youths gathering around the car". The deceased, the article goes on, was placed in a taxi. It was said that Mrs Smyth was either dead when she was put in the taxi or died very soon afterwards. There is a suggestion that a youth at the scene shouted that it was the UVF which had been shooting. This, the journalist remarked, was unlikely. A still further suggestion was in the following terms:

"There is another theory and it concerns the controversial Military Reaction Force ("MRF"). It appears to hold more water, especially when some later events are taken into account."

[20] The article then goes on to describe an incident a fortnight after the deceased's killing at or about the same general location. During this incident four men were shot and seriously injured. They were shot, the article explains, by an Army sergeant who later faced charges in respect of the incident. In June 1973, he was, however, acquitted of the charges. The article went on: "[the sergeant] claimed in court that he had seen a man with binoculars, another with a pistol and a third with what he took to be a M1 carbine. There were several shots and [the sergeant] returned fire with a Thompson sub-machine gun in three bursts, discharging about ten shots".

[21] In the course of his trial, the sergeant had explained his duties in the Army. He said he commanded one of the squads in the Army's undercover Military Reaction Force ("MRF") and that it was their duty to carry out observations in circumstances where it was difficult for uniformed troops to travel freely. Andersonstown was one of those areas. He said there were about 40 men in the Force in June 1972 and that he had 15 in his squad.

[22] Later the article went on to say that the sergeant had revealed that the MRF had been in operation in the area around the time of Mrs Smyth's death.

[23] The author went on to refer to Mrs Smyth's death being shrouded in mystery. It was likely that she had been shot by mistake. It was stated:

“It would appear that a unit of the Provisional IRA fired on the car thinking it was carrying Army personnel.”

[24] Reference was also made to their being “no reports at the time of the Army being in the area.”

### **The 1975 Intelligence Report**

[25] In 1975 it appears that the police received what is described as “an intelligence report” which touched upon the death. Its source is unclear but what was put forward in it was that two named members of the Provisional IRA were responsible for Mrs Smyth's death. Those persons were supposedly conducting vigilante patrols in the area when “shots were fired from a car on the Glen Road. When the two men arrived at the bus terminus an 1100 car turned into the terminus. One of the men fired at the car killing the woman occupant.” The male from the car allegedly ran off. After the shooting, the two men, it was suggested, stopped a taxi and ordered the driver to take the woman to hospital.

[26] There is no sign that this report led to any further action on the part of the police.

### **The involvement of the Historic Enquiries Team**

[27] The Historical Enquiries Team (“HET”) was founded in 2005 with the function of reviewing deaths arising from the conflict in Northern Ireland which had occurred in the period 1968-1998.

[28] It carried out a review of the death of Mrs Smyth. This spanned a period from 2006-2008. Their work culminated in the publication to the family on 21 July 2008 of a Review Summary Report (“RSR”). It would appear that this RSR was principally based on the materials referred to above which had derived from the inquest file, together with open source material and the intelligence report just referred to.

[29] The original police investigation was described in the report as “relatively basic” but it was noted that it “must be judged in the context of the times”. In particular, “police enquiries, which would be commonplace by today's standards, were not always possible, and resources devoted to incidents were substantially less than would be the case today”.

[30] The report records that there is no record of anyone being arrested or interviewed in connection with the death.

[31] The RSR referred to 25 exhibits to which the team had had access but there were no photographic albums available in the case papers. This was commented upon as it was the family's belief that "the car was bullet ridden". Notwithstanding this, the team indicated that the case papers and the examination by SOCOs suggested that only one round had been fired.

[32] In considering the question of future lines of enquiry, the team recorded that it had not proved possible to identify the type of weapon used in the attack and that no new forensic opportunities had been identified. It is also recorded that there was no intelligence prior to the incident which would have prevented the death.

[33] Overall, the murder was described as a random killing.

[34] In respect of the open source material, it is clear that the team had seen the "Lost Lives" entry in respect of the death and had also seen the Belfast Telegraph article referred to above. There was, however, no reference in the report to the theory that the MRF might have been involved. The report does, however, quote what had been said in the Belfast Telegraph article about the Provisional IRA firing on the car thinking it was carrying Army personnel.

[35] In the report, which was discussed with family members, it was stated that the team had considered the possibility of re-interviewing Mr Carlin whose address had been traced. The team decided against this. However, as a result of dialogue with family members, this decision was reconsidered.

### **The re-interview of Mr Carlin**

[36] This occurred on 10 September 2008. Mr Carlin, by this time, was in poor health. The re-interview took place at his home in Andersonstown. Mr Carlin read his earlier statement with a magnifying glass. He then agreed that his statement was correct and was a true account of what had occurred that night. His description of the incident, provided orally, was said to be virtually identical to his original statement.

### **The Panorama programme**

[37] On 21 November 2013 an edition of the BBC's current affairs programme, Panorama, was broadcast featuring the activities of the MRF in Northern Ireland in the early 1970s. As is clear from the above, the activities of the MRF as an undercover military unit operating in Northern Ireland had been known about at the time, as the Belfast Telegraph article exemplified. But what was less known was the extent of its operations and the details of its methods. According to this programme, the MRF operated over a period of some 14 months mostly in Belfast. It would

certainly have been operating at the time of the deceased's death and in the area where it occurred. Panorama claimed that some members of the unit operated outside the law and fired at and killed unarmed civilians. To a degree, interviews broadcast with former MRF members lent support to this view, and the programme therefore attracted significant public attention.

[38] The case of the deceased's death is not referred to in the broadcast and the court suspects that at the date of its showing only a person with a very detailed knowledge of the circumstances of the deceased's death would have made a connection with the theme pursued by Panorama.

### **The discovery of military logs**

[39] The discovery in 2014 of military logs which, *inter alia*, contained contemporaneous records of radio traffic on the Army communications net for the period 8 June-9 June 1972, has proved to be of great importance in this case.

[40] The logs were located in the National Archives at Kew in London in June 2014. A researcher, working for an organisation called "Paper Trail", found them while in the course of conducting legacy archive research. Eight documents were recovered from a file entitled "Commander's Diary, Headquarters, Northern Ireland, June 1972". The documents take the form of operational log sheets which recorded radio traffic.

[41] For ease of reference the court will set out in tabular form the significant entries for present purposes. The court has, however, considered all of the entries.

Serial 8539 Bde 2340	SUFFOLK 1x7.62 returned. 2345 2xHV at KP 19
Serial 87BN	Police are dealing with a dead girl found in the taxi. It is known that SF claimed a hit in K19 shooting.
Serial 8839 Bde 2351 2FD Regt	Stopped taxi in Andersonstown taxi contains dead girl. Follow up report to come.
Serial 500.30 39 Bde	Re girl's body at 23.40 hours approx. a taxi driver James Brown ... was driving along Glen Road with a PAX. They were stopped outside Oliver Plunkett School by three men who took a woman from a car and pushed her into the taxi next to Pas. Driver told to drive nearest hospital. Instead he went to



RUC ATown arriving 23.47 hours. The woman is Ms J Smith 4 Tardree Pk.

Serial 7 014439 Bde

John Carlin 75 Ladybrook Pk damaged from flying glass (see Serial 3 re man with GSW).

Serial 8 014539 Bde

Mrs Jane Smith was passenger in a car travelling through Atown and was at roundabout when it was machine gunned. No front licence plate. Back one reads 6214KZ therefore it appears that neither of the men involved with SF.

Serial 11 021739 Bde

Glenveagh woman accusing SF of murder. 0140 MRF travelling W along Glen Road 300 metres short of Oliver Plunkett School E and they saw two gunmen hiding behind a hedge. Patrol fired 10x9 mm rounds and claimed one hit. One gunman had a rifle. Re taxi James Brown the taxi driver is known to RUC re explosives. Brown and his wife who was passenger are both in RVH.

Serial 13 024139 Bde  
At 23.22 2xHV at KP 19.

Sanger from waste ground to the south. 3x7.62 returned and one hit claimed. Another gunman was seen in the garden of 43 Glenveigh Park he fired one by HV at KP 1x7.62 ret. no hit.

Serial 14 024539 Bde

WILLIAM CAMPBELL was also in the car they were going along the Glen Road by OP school. They thought they had a puncture. Burst of auto fire woman hit.

Serial 16 RUC CO 03.17

Mrs Jean Smith (24) 4 Tardree Park (separated from husband). John Carlin 75 Ladybrook took her to Glenowen for a few drinks. They met William Campbell. At 22.30 hours they drove to Lenadoon Avenue where they dropped him off. They drove to Glen Road, he turned to the car and he heard a bang. He thought he had a puncture. He got out and there was a burst of fire which hit the car. He stopped the

taxi asked for the girl to be taken to HOSP or SF whilst he went to tell girl's father. Taxi went to RUC Carlin went to hospital and to RUC.

[42] While what is contained in the entries is largely self-explanatory, there is plainly some support in the logs for a number of possible interpretations. The court will repeat that it is not for it in these proceedings to try and decide which of the interpretations is to be preferred but it will be of value, in short form, to identify the thrust of the possibilities opened up by the logs.

[43] Firstly, the logs provide a measure of support for the previously expressed view of family members that there was more than one shot fired at the car. For example, there is reference to the car being "machine gunned" and there are at least two references to a "burst" of automatic fire in the context of a woman being hit.

[44] Secondly, the logs disclose an incident involving "KP19". This, the court understands, is a code for a sanger located near an electricity sub-station further along the Glen Road going countrywards. At the time this sanger was manned by a soldier or soldiers. The first two entries above might lend support to the view that a soldier or soldiers in the sanger was/were fired on by a person or persons unknown and that he fired a 7.62 mm round, claiming a hit.

[45] Thirdly, the log contained a reference to the MRF travelling west along the Glen Road. The time is given as 0140 hours. This, in itself, might be viewed as pointing against the suggestion that the MRF may have been involved in the death of the deceased. But there is some room for doubt especially as the time might relate simply to the time of a later communication. The content of this entry would not be consistent with the incident involving the deceased as it hitherto had been understood, as it refers to an exchange of fire between gunmen hiding behind a hedge and MRF members. It is, therefore possible, that the entry relates to a separate and later incident in or about the same or a similar location in the early hours of 9 June 1972. It is of interest, however, that the MRF is identified as operating in the area and at this general location. The description given of the incident involving the MRF, it may be noted, abrades with what is known about the causality of the deceased's death based on the SOCO examinations. The MRF appeared to have fired towards the target in front of them as they would have seen it *i.e.* looking countrywards which would be in conflict with the trajectory described by the SOCOs.

[46] Fourthly, in one of the logs there are three men described as placing the deceased in a taxi and the driver being told to drive to the hospital. This might be capable of being viewed as not discordant with the intelligence received in 1975 which had also referred to three men performing vigilante patrolling.

[47] Whatever may be the correct interpretation of what is contained in the logs, they were provided by the applicant's solicitors to the police in October 2014. It was asserted in the accompanying letter that Mrs Smyth's death was attributable to the MRF.

### **Events since the discovery of the military logs**

[48] Since October 2014 it appears that the PSNI has considered the material provided to it. An officer reviewed the logs but it was not considered that they supported the view that the MRF was involved. However the view was taken that the possibility of military involvement in the deceased's death did exist as a result of the reference to an incident at the KP19 sanger. A decision was made by the PSNI in December 2015 that the death should be further reviewed within its Legacy Investigation Branch ("LIB") which by this time had taken over the functions hitherto performed by the HET.

[49] Some new materials have emerged in recent times as a result of this judicial review challenge. These include some additional material in respect of the SOCO examination of the cars (this is simply confirmatory material of what had already been stated earlier in the statement of SOCOs); some further military logs; and some photographs of the Austin 1100 car.

[50] The further military logs found contained the following entries:

- |       |  |
|-------|--|
| 23.42 | Total of five RDS 7.62 at gunman in garden of 43 Glenveagh Park. No hits, no CAS. Total of RDS at us. Ref KP19.  |
| 23.51 | Taxi stopped at RUC Andersonstown. Dead girl inside.   |
| 23.59 | Taxi Glen/Shaws. Three men stopped taxi and said take woman to hosp. Taxi reported to Andersonstown RUC station on his own accord. Poss in shooting KP RED19. People creeping around RED19. Women have been involved before. |
| 00.07 | Woman dead. Police are dealing as CID case. We think we have a hit at KP19.  |
| 01.40 | C/S MRF travelling W along Glen Road saw two gunmen in hedge 300m from Oliver Plunkett Sch on E side of Glen Road. Fired on by MRF. One hit claimed because man fell backwards. MRF fired 10 RDS .                           |

[51] The current position of the PSNI in respect of the death of the deceased is that if, in the course of a review, LIB identify any indication that wrongdoing or a

criminal offence may have been committed by a police officer, whether from the RUC or PSNI, the case will be immediately referred to the Police Ombudsman for Northern Ireland in order to carry out any investigation which it considers to be appropriate. Otherwise, the PSNI will carry out any investigation required.

### **The applicable law**

[52] There is no dispute between the parties in this case that Article 2 of the ECHR applies to the circumstances now before the court. There is general agreement that whether or not Article 2 could enter the case by other routes, it enters it by means of the operation of the approach adopted by the European Court of Human Rights in Brecknell v United Kingdom (2008) 46 EHRR 957.

[53] Brecknell was a case concerning a police investigation in Northern Ireland. The central issue before the court related to whether the State's obligations to investigate under Article 2 could be revived in circumstances where the original investigation had run its course but, at a later time, information, casting new light on the circumstances, became available. At paragraph [71] the court recorded its view:

“... 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.”

[54] In the present case the parties all accept that Article 2 has been revived because of the uncovering of the military logs. The consequence is that the authorities find themselves under an obligation to investigate.

[55] In an ordinary Article 2 case, an investigation into an alleged unlawful killing by State agents includes the requirement that those carrying out the investigation must be independent and impartial: see Nachova v Bulgaria (2006) 42 EHRR 43 at paragraph 112.

[56] A question which arises is whether the passage of time may affect any such requirement in a Brecknell type of case. This question was considered in Brecknell itself. At paragraph [72] the court said:

“The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will depend on the particular circumstances of the case, and may well be influenced by the passage of time as stated above. Where the

assertion or new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged.”

[57] In this case, as will be discussed later, the respondent accepts that the requirement of independence applies to any police investigation in the future in respect of Mrs Smyth’s death.

[58] The issue of what is required to meet the criterion of independence also arises. In a recent decision of the Court of Appeal in England and Wales this issue arose: see R (Mousa) v Secretary of State for Defence [2012] HRLR 6. The court held that it was not necessary to prove that some element or person actually lacked independence. A function of independence was the need to ensure public confidence and, in this context, perception was important.

[59] Under the heading “The Law on Independent Investigations” Kay LJ referred to Jordan v United Kingdom (2003) 37 EHRR 2 (itself an Article 2 case) where it was stated at paragraph [106] that:

“... 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. This means not only a lack of hierarchical or institutional connection but also a practical independence.”

[60] Dealing with the issue of the purposes of the investigation Kay LJ went on to cite the words of Lord Bingham in R (Amin) v Secretary of State for the Home Department [2004] 1 AC 635 at [31]. These purposes were:

“... to ensure as far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their loved ones may at least have the satisfaction of knowing that lessons learned from the death may save the lives of others.”

[61] Mousa was not a Brecknell type case and was an Article 3 case rather than an Article 2 one (though this was not material to the reasoning) but it does shed light on the approach which ought to be taken where the question of independence of the investigating authority is live. In that case the investigating authority was the Iraq Historic Allegations Team (“IHAT”). The emphasis in the judgment of the court

was on “the reality of the situation on the ground in Iraq and the extent to which it may impact on the practical independence of IHAT ...” (paragraph 34). Two points, in particular, were singled out for consideration:

“First, there is no evidence that any individual member of the Provost Branch [a branch with IHAT] was involved in reprehensible conduct towards detainees or internees in Iraq. The parameters of this case are that ostensibly credible allegations of mistreatment by British soldiers have been made; that they require investigation; and that the investigation must bear the hallmark of independence to which I have referred. Secondly, for the appellant to succeed in establishing a lack of independence, it is not necessary for him to prove that some element or person in IHAT actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellate Committee in Lawal v Northern Spirit Limited [2003] ICR 856, albeit in a different context [at [14]]:

‘Public perception of the possibility of unconscious bias is the key’.”

### **The applicant’s case**

[62] As has already been commented on, the issue in this judicial review is whether the LIB as part of the PSNI lack independence today to investigate the case of the deceased’s death.

[63] This lack of independence, according to Mr Southey QC, who appeared with Ms Ni Ghralaigh BL, for the applicant, was supported by two main arguments. Firstly, it was argued that there was a particular need in this case for independent investigation because the truth had in the past been concealed and previous investigations displayed a lack of impartiality. Consequently there had been an undermining of public confidence caused by the failures of the original police investigation by members of the RUC which was compounded by the later shortcomings of the HET review process. In standing back and considering the position, as it is now, a fair-minded and impartial observer would weigh the record of investigations to date in the balance. Secondly, Mr Southey argued that there were particular problems associated with the work of the HET in cases where there was the possibility of military involvement in a death. These problems had been identified in two reports issued by Her Majesty’s Inspector of Constabulary (“HMIC”) in 2013 and 2015, following academic research which had drawn attention

to the issue. Most recently a Joint Committee on Human Rights made up of MPs and peers had, as recently as 11 March 2015, asserted that the LIB could not satisfy the standard of independence required by Article 2 of the ECHR.

[64] When both of the above aspects were considered together, it was submitted that a fair-minded and impartial observer would have to conclude that the continued investigation of the death should not be carried out by the PSNI *via* LIB.

[65] Mr Southey set out his arguments in considerable detail. The court will therefore seek in what follows to provide, in summary form, the main thrust of his submissions under the heads above.

### **Investigative failings - the initial investigation**

[66] Counsel was critical of the original police investigation in this case. The following main points were advanced:

- (i) The initial police investigation did not engage sufficiently with the question of whether the death arose from a single or multiple shots fired at the car. Rather the RUC appears to have accepted that this was a case of a single shot being fired.
- (ii) The initial police investigation appears not to have considered the question of whether a State agency, in particular the MOD, may have been involved in this incident, notwithstanding that the RUC must have been aware that in June 1972 soldiers were operating in west Belfast.
- (iii) Equally there is no sign of any attempt made by the initial investigation to obtain documentary evidence from the RUC and/or the MOD relating to events in this part of Belfast on 8/9 June 1972. Whether this was a deliberate decision on the part of the RUC investigators or not, this was a serious shortcoming in the investigation, as it is now known that there were logs of radio communications kept by the MOD which would have shed light on what had been going on at or about the relevant location on the night of the deceased's death.
- (iv) It is also the case that the investigators did not explore the question of whether or not there were radio communication logs maintained by the RUC over the period in question.
- (v) There was also an initial failure in the investigation on the basis that simple investigative steps were not taken. Such steps include house to house enquiries; and the investigation of other incidents which occurred in the same vicinity that night/morning.

- (vi) The issue of whether the MRF was operating in the area that night/morning, so far as is known, was not investigated or even considered. Why this is so is unclear.
- (vii) The issue of whether a shot or shots was fired by any other soldier does not, as far as is known, appear to have been investigated. Again why this is so is unclear.

[67] In counsel's submissions the above failings create concern as to the independence of the original police investigation as they are consistent with the RUC turning a blind eye to the possible involvement of soldiers and to sources of evidence which might serve to depict what was occurring that night in terms of police/military activity. Such sources of evidence were not exploited. Even when in 1973 there was a newspaper report of potential military (MRF) involvement in the events of that night, there does not appear to have been any follow up step taken.

#### **Investigative failures - The HET Review**

[68] The HET review, in Mr Southey's submissions, strangely failed to take the investigation forward to any significant degree. This was and is surprising as, in counsel's submission, by 2006-2008 there would have been a greater appreciation of the need for independent inquiry and the need to guard against collusion between the RUC and the Army.

[69] Nonetheless, the review carried out suffered from many of the same deficiencies as the original RUC investigation. In particular:

- (i) There was no attempt to consider the question of whether this was properly to be viewed as a single shot as against a multiple shot case (an issue about which it was clear by this time the family was concerned). While reference was made to past views expressed on this issue, there was no real investigation.
- (ii) There was no inquiry into potential military involvement in the killing.
- (iii) In the context of the discovery of new investigative opportunities, there was no engagement with the issue of obtaining relevant contemporaneous documentation from the files of the RUC or Army.
- (iv) There was a reluctance to re-interview witnesses as was evident from the HET's original decision not to re-interview Mr Carlin.
- (v) When eventually, at the insistence of the family of the deceased, Mr Carlin was re-interviewed, there was no attempt to probe the



account he had given or to measure its content against other known factors in the case.

[70] In counsel's submission, the HET review was a missed opportunity to rectify some of the failings in the original investigation. It would have been reasonably expected that the HET would have taken that chance. The fact that they did not, feeds into concern about the outlook of the HET and its willingness to look at all of the possibilities in terms of what occurred at the time of the deceased's death. In this context, the HET was operating within the hierarchical system of the PSNI which was the successor body to the RUC. A fair-minded observer would not view the HET as being sufficiently independent from the interests of the security forces in Northern Ireland as a whole, including the MOD.

### **Problems as to how the HET operated at the time**

[71] This aspect of the matter is well documented and Mr Southey drew the court's attention to four papers or reports which dealt with it.

[72] Firstly, he drew attention to an academic paper published by Dr Patricia Lundy in April 2012. This, in fact, had been a follow up paper to earlier work of the author's. In her paper, based on a study of HET reviews of cases in which the Royal Military Police had investigated military involvement in deaths in Northern Ireland, Dr Lundy claimed that a variety of concerns about practices followed by the HET give rise to an issue of the HET's independence in these cases. There was evidence which suggested that the HET treated cases of military involvement differently and less rigorously than it treated other investigations. For example, the HET carried out informal interviews with soldiers and adopted what was described as a pragmatic approach in military cases; it also failed to administer cautions to soldiers which in other cases would have been the norm; and it accepted alleged illness on the part of soldiers as a reason for not interviewing them, without sufficient verification. There were also other issues. Military personnel, who were interviewed, it was alleged, enjoyed over generous pre-interview disclosure. All of this, in the author's mind, raised issues of overly favourable treatment for soldiers and a lack of impartiality on the part of the HET.

[73] These criticisms did not pass unnoticed and led on, counsel advised, to the Minister of Justice deciding to commission a report from Her Majesty's Inspectorate of Constabulary ("HMIC") under section 41 of the Police Act (Northern Ireland) 1998 in relation to the work of the HET. The review was carried out in the period November 2012-May 2013 with the report being published later in 2013.

[74] When published, the report raised issues about the HET's independence in State involvement cases, principally those historically concerned with the involvement of soldiers in civilian deaths. While the teams used by the HET in these cases were staffed by individuals who had not previously worked for the RUC/PSNI, there were nevertheless difficulties highlighted. It was indicated that

the HET's ability to demonstrate independence in respect of intelligence information was undermined by the involvement of former RUC and PSNI officers working for the HET in the management of the information which derived from the Special Branch of the police (C3 Intelligence Branch). Similar problems were also found in respect of how the HET was dealing with soldiers suspected of involvement in deaths, as those voiced by Dr Lundy. Moreover, this was so even though in 2010 the Chief Constable had directed that the HET should review cases only and should refer all cases which required investigation to the PSNI. A series of other issues also was said by HMIC to give rise to concern about HET independence. These included, what was described as the 'self-declaration' process under which HET staff were obliged to declare any institutional or past interest they might have in respect of cases under investigation. HMIC noted that these declarations were not subject to any system of formal check or verification. There was also a problem with HET Intelligence Units being staffed largely by former employees of the RUC/PSNI. Moreover, some of the staff at PSNI Intelligence Branch, who were the gatekeepers of intelligence, were former Special Branch officers. It was these people who were involved in passing on intelligence to HET. In the view of HMIC, HET "needs to do everything it can to make sure its independence is safeguarded". In particular, there was a need for the institution of an independent procedure for guaranteeing that all relevant intelligence in every case was transmitted for the purpose of a review. A continued concern was expressed as to the HET's differential treatment of those involved in State involvement cases as against other cases. In particular, the conclusion was reached that "HET's approach to State involvement cases is inconsistent with the United Kingdom's obligations under Article 2". In this respect reference was made to inconsistency in the way that State involvement cases were being dealt with so undermining the effectiveness of the review process in Article 2 terms. "In addition", the report went on, "the deployment of former RUC and PSNI officers in State involvement cases easily gives rise to the view that the process lacks independence".

[75] In the light of the criticisms made, HMIC set forth a series of recommendations.

[76] Mr Southey brought the court to a second HMIC report dated June 2015. This, it was pointed out, demonstrated that there were continuing problems with the independence of HET, but at this stage HMIC were reporting in circumstances where the HET, mostly for budgetary reasons, had been wound up at the end of 2014 and the responsibility for its work had passed on 1 January 2015 to the LIB. The content of the second HMIC report, which concentrated on considering whether the recommendations of the first report had been implemented, produced a somewhat mixed picture. However, it is clear that the HMIC were dissatisfied with the progress which had been made in respect of the issues of vetting of staff; self-declarations; and the handling of intelligence information. The principle involved was, however, alluded to in clear terms at paragraph 2.208 where HMIC stated:

“In Northern Ireland we have learned over two inspections that perceptions are as important as reality. In dealing with such sensitive issues as death caused by military ... it is absolutely essential that, as far as possible, the relevant institutions show themselves to be independent in order to secure or retain the confidence of those affected by their work and of the public at large.”

[77] It is also clear from the second report that the authors were of the view that the movement of responsibility for these cases to LIB created further rather than fewer difficulties in terms of actual/perceived independence: see paragraph 4.30.

[78] Finally, counsel also made reference to the most recent report in this area which is that of the joint Lords/Commons Committee on Human Rights published in March 2015 – The Seventh Report of Session 2014-2015. In this report there were references to what were described as the McKerr group of cases – which comprise six cases from Northern Ireland which had resulted in findings by the Strasbourg Court against the United Kingdom and which raised similar issues about the investigation of the use of lethal force by the security forces. An on-going concern, the report indicates, continued to be the independence of police investigations. On this matter the Committee’s view was expressed forthrightly where it referred to the HET functions now being carried out by LIB. It stated:

“As well as having fewer resources at its disposal than its predecessor the Legacy Investigation Branch cannot satisfy the requirements of Article 2 ECHR because of the lack of independence of the Police Service.”

[79] It is right to record that the above view is expressed without significant accompanying reasoning but it seems likely that this view was expressed with full knowledge of the HMIC reports.

[80] The cumulative impact of the investigative failings in the present case when allied with the problems faced in recent years by the HET, which are yet to resolved, strongly, in counsel’s submissions, supported the conclusion that the current position under which this case rests with the LIB for investigation breaches the requirement of independence as regards compliance with Article 2 ECHR.

### **Other issues**

[81] There were other facts which the applicant’s team drew attention to in support of their argument but it seems to the court that these are generally less significant than the two major matters which the court has already recounted.

Nonetheless the court will refer briefly to the main factors referred to in this way though it has considered all of them.

[82] As already indicated, the applicant raised issues about the extent of the disclosure made in this case in respect of the inquest file. In short, it was claimed that documents had not been disclosed, most obviously the post mortem report. Additionally, the inquest documents disclosed, or some of them, were said to have emerged with a Special Branch identifier on them. This, it was suggested, demonstrated the involvement of Special Branch in the case which should give rise to concern, as there appears to be no reason why this should be so if the case is viewed as simply being concerned with a murder committed by a paramilitary group. The court has already referred to the point made about the security forces being represented at the inquest, notwithstanding that the belief at the time officially appears to have been that the death was at the hands of terrorists.

[83] The court's attention was also drawn to the fact that subsequent to the discovery of the military logs at Kew this type of record for Northern Ireland was allegedly withdrawn altogether from the National Archives. It was suggested that this was consistent with an attempt by the MOD to cover up its actions.

[84] The making of certain remarks by a senior police officer was also referred to during the hearing on behalf of the applicant. The officer was, it was stated, an Assistant Chief Constable in 2007 "who had the final say over HET reports". It is alleged by the applicant in her affidavit that this officer in 2014 in the course of another inquest had said, as the holder then of the position of Deputy Chief Constable, that the "PSNI is determined to play our part in the defence of the RUC" and that "the bedrock of what we are trying to do is to protect the reputation of the organisation". The applicant exhibited an extract of a cross-examination of the senior officer in the context of the inquest in question. However the transcript does not record the senior officer using the language which is quoted in the applicant's affidavit. In these circumstances the court would be slow to place much reliance on this aspect of the matter.

### **The respondent's case**

[85] As already noted, the respondent accepts that as a result of the operation of the approach found in the Brecknell case there is an obligation on the police to take such further investigative steps as are reasonable in the circumstances, taking account of the available evidence, which includes that which has become available as a result of this litigation, the opportunity to identify potential perpetrators and what the realistic prospects of prosecution are.

[86] Of some general importance, the respondent has also accepted that the requirement of independence applies to such investigative measures as are undertaken pursuant to the engagement of Article 2. Hence it is not disputed that

the persons carrying out the investigation must be independent of those implicated in the events.

[87] In essence, therefore, it was the respondent's case that the present position in which the LIB is charged with investigating further breaches neither the requirement of a lack of hierarchical or institutional connection nor the requirement of practical independence. In this regard, it was asserted that the PSNI is independent of the military in every sense.

[88] The respondent has placed heavy reliance on the approach of the Strasbourg institutions in respect of this sort of case in Northern Ireland. It was submitted by Mr McGleenan QC (who appeared with Mr McLaughlin BL) for the respondent that the position of the PSNI has, in recent times, been the subject of consideration in the context of legacy investigations, such as that involved here, by both the Committee of Ministers within the Convention system and the European Court of Human Rights.

[89] As a result this court was bound, when considering the matter, to take into account any decision made by the Committee of Ministers under Article 46 ECHR and any relevant decision of the Strasbourg Court. Recent domestic jurisprudence, it was argued, pointed firmly in the direction that a United Kingdom court should ordinarily follow a Committee of Ministers/Strasbourg Court decision provided that either formed part of a clear and consistent line of authority and was not inconsistent with fundamental principles of domestic law.

[90] With this in mind, Mr McGleenan took the court through the various stages of the consideration given by the Council of Ministers to the McKerr group of cases, as they dealt, *inter alia* with the issue of police independence. It was argued that it was accepted by the Council of Ministers that the work of HET could not alone fulfil the requisite Article 2 obligations which arose, but that nonetheless the operation of the HET had provided improved safeguards for the operation of independent investigations. In particular, in 2008, the HET was described by the Secretariat of the Council of Ministers as "a useful model for bringing a measure of resolution to those affected in long lasting conflicts". Notwithstanding that some of the HET staff consisted of retired RUC staff, the Secretariat stated that the HET was independent.

[91] These references, moreover, were all the stronger, counsel argued, as in the 2008 report the Secretariat had demonstrated that it was aware of Dr Patricia Lundy's research work and its contents which had been available in draft. However this did not detract from the level of welcome and approval offered by the Committee of Ministers to the HET.

[92] Evidence of continued approval could be seen in the 2009 report as at that time a decision was made by the Council of Ministers to close its examination of the independence issue and leave the HET to get on with its work.

[93] Even after the HMIC reported in 2013, when the matter was before the Council of Ministers in 2014, Mr McGleenan pointed out that there was still reference to the HET playing an important and positive role, albeit that, by this stage, its work had been suspended and the Committee of Ministers were welcoming the prospect of the proposal for a Historical Inquiries Unit (“HIU”), separate altogether from the police, being put in place to deal with reviews and investigations into historic cases involving State involvement.

[94] Finally, even in 2015, when the matter next came before the Committee of Ministers, there was no proposal to re-open issues. At this stage the historic cases under discussion had been transferred to the LIB but there remained an expectation that the HIU would be established as a consequence of the Stormont House Agreement.

[95] Turning to the question of the approach of the Strasbourg Court, it was submitted to the court that the issue now under consideration of the institutional independence of PSNI from the RUC had been considered in the Brecknell case.

[96] In Brecknell there had been an issue over the independence of a police investigation into a historic death in which police officers themselves had been implicated. The Strasbourg Court held that in respect of the period in which the RUC had been the investigator, the case of absence of independence should be sustained as the officers under investigation had been members of the RUC. However that absence of independence did not survive the PSNI’s establishment as the Police Service of Northern Ireland in November 2001. The court said:

“[76] The court would observe that the initial enquiries were carried out by the RUC, which was itself implicated in Weir’s allegations as their own officers had allegedly been heavily involved. They cannot be regarded as disclosing the requisite independence (see Ramasahai v Netherlands (2007) ECHR 52391/99 at paras 333-341). It was the RUC which carried out the interviews with those named by Weir and which was entrusted with the initial assessment of the credibility of his allegations. This must be regarded as tainting the early stages of the inquiries. The court recalls that the PSNI took over from the RUC in November 2001. It is satisfied that the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources. It observed that the applicant has not expressed any doubts about the independence of the teams which took over from 2004 (the Senior Criminal Review Team and HET). However this does not in the circumstances detract from the fact that for a

considerable period the case lay under the responsibility and control of the RUC. In this respect, therefore, there has been a failure to comply with the requirements of Article 2 of the Convention.”

[97] In view of the court’s approach in Brecknell, it was submitted that there was recognition of the institutionally distinct nature of the PSNI. This was supported by a range of measures which had been brought in at the time when the PSNI took over the policing function in Northern Ireland – measures such as the establishment of the Police Ombudsman for Northern Ireland to investigate complaints against members of the Police Service; new accountability arrangements *via* the Northern Ireland Policing Board; and the involvement of the Department of Justice in terms of the long term objectives of policy in Northern Ireland in respect of the policing and other matters.

[98] Accordingly Mr McGleenan argued that an entirely new legal framework to that which had governed the operation of the RUC had been put in place which had obtained recognition by the European Court of Human Rights in Brecknell. Moreover it was suggested that the same legal structure persists to this day.

[99] For the above reasons, the present case was neither a case of hierarchical or institutional connection as between the former RUC and the PSNI nor a case of a police force lacking practical independence.

[100] In making these submissions, Mr McGleenan did not overlook the various problems which had been identified in the Lundy academic study or later in the HMIC reports. He pointed out that the present case was not one which strictly came within the parameters of the Lundy study as the death here was not at any time the subject of an investigation by the Royal Military Police which had been an important factor in all of the cases which Dr Lundy considered. But, insofar as the HMIC had identified similar problems in 2013, the PSNI had responded and put in place arrangements designed to meet the concerns referred to: such as a new and thorough process of conflict of interest declarations from each member of staff at the outset of every case on which that member might have to work; an analysis of each employee’s employment history; and the building up of the profile of employment history for staff members from independent sources. In the area of the handling of intelligence, a new verification arrangement had been put in place involving a detective inspector undertaking this task full-time.

[101] In the light of these changes a fair-minded and informed observer would not regard there as being in operation any real possibility of bias on the part of the PSNI and likewise there would be no basis for a public perception of prejudice in the conduct by the LIB of its review function in respect of historic cases.

## **Factual observations**

[102] While much of the respondent's response to the applicant's submissions advanced legal reasons why the applicant's case should fail, as just recounted, it should not be thought that the respondent did not make submissions also on the facts and individual circumstances relating to the death of Mrs Smyth.

[103] In a brief summary, the following main points were advanced:

- (i) No evidence at the time was offered during the initial investigation phase by any of the witnesses interviewed that multiple shots had been fired at the car. The primary witnesses simply did not support this. It follows that witness statements such as that of Mr Carlin and Mr Campbell, which do not refer to multiple shots or the car being riddled with bullets, would have to be wrong if the applicant and other family members' accounts (provided some considerable time later) were correct.
- (ii) There was no suggestion that a police officer was in any way responsible for Mrs Smyth death.
- (iii) There is no credible case that SOCOs had colluded in any way. As up to three SOCOs were involved in the examination and photographing of the scene it would take a substantial conspiracy to have been arranged on the part of these officers, within a short window of time, for the multiple shots allegation to get off the ground.
- (iv) The first MRF discharge recorded in the logs was at 0140 hours - substantially after the deceased's death.
- (v) For a MRF member or members to have fired the round which hit the deceased, the shot would have had to have been fired from a position countrywards of where the car was. The log suggests the contrary was the position *viz* that the MRF fired from a citywards position at their target which was countrywards of their position.
- (vi) It is speculative to suggest that the RUC knew that the MRF was operating in the area. The fact that the MRF is referenced in the military log does not mean that the RUC were aware of this.
- (vii) The fact that Mr Brown stopped at Andersonstown Police Station should not be read as him being stopped by the police. There is no basis for any such suggestion in the papers.

### **The Department of Justice ("DOJ")**

[104] Mr Coll QC appeared before the court on behalf of the DOJ. Its overall stance was supportive of the position adopted by the PSNI. Consequently, Mr Coll's



submissions echoed, to a large extent, those made by Mr McGleenan. Reference was made by Mr Coll to two decisions which the court has taken into account. The first was the Strasbourg case of Ramsahai v Netherlands (2008) 46 EHRR 43 and the second was the domestic law case of Mousa v Secretary of State for Defence (No 2) [2013] HRLR 32. Both of these cases dealt with the issue of independent investigation and illustrate the operation of the doctrine in the individual factual circumstances under consideration. It is unnecessary to set them out in detail in this judgment.

### **The court's assessment**

[105] The court in this case considers that the arguments made by Mr Southey on behalf of the applicant are generally persuasive and lead to the conclusion that the LIB at this time lacks the necessary element of independence to enable it to pursue the issue of further investigations into the death of the deceased.

[106] First of all, the court is anxious to stress that in the context of a challenge of this kind what is of paramount importance is the need to have regard to public perception. In the court's opinion, this was rightly underlined in the first Mousa case and is the guiding light. It is therefore not a matter of the court having to be satisfied that any particular person within the PSNI or LIB lacks impartiality or would, in fact, bring a conscious bias to the investigation. The court is not of the view that, on the evidence it has considered, it has been established that there is an officer or officers against whom such a bias has been established.

[107] Rather the issue is about how the matter is reasonably perceived and, in particular, whether a fair minded and informed observer would conclude that there was a real possibility of institutional or practical lack of independence.

[108] In reaching its conclusion the court has sought to concentrate on the facts and circumstances of this case.

[109] In this regard it must be acknowledged that there is no evidence to suggest that the deceased was other than a wholly innocent person who was in the wrong place at the wrong time. However the awkward truth in this case is that the system for investigating serious crime has let her and her family down over a period of decades now.

[110] On any view, the initial investigation in this case was perfunctory. Why this was so is a difficult question to answer. There are, however, possible explanations. Some of these the court views as benign and some are not. Those which fall within the former category may be viewed as concentrating on the horror of events in 1972 and the un-readiness of the then police force to deal with them. It may be that the police approach to investigations at that time lacked sophistication and was elementary. It may be that the sheer work load of the day overwhelmed the police so that little time, thought or resources could be given over to an effective inquiry. But

it is also necessary to consider whether they could have been other influences at work. Might this be a case where, for one reason or another, there was no appetite on the part of those charged with the task to investigate? Might it be that it suited the authorities to project the case as simply amounting to another terrorist atrocity? Might it be that common interests between different branches of the security forces dictated that it might have been unwise to scrutinise the events of that night/morning too closely or critically?

[111] The court does not know the answer to the above questions and, as it has been at pains to point out, it is not in a position to find definitively what the true facts of this death are. The law, however, compels it to consider the issue of reasonable public perception: what view a fair minded and informed observer would form standing back and considering the initial investigation. Such an observer would take into account the various possibilities and would seek objectively to weigh them up.

[112] Mr Southey put forward a critique of the initial investigation which the court has summarised above at paragraph [66]. The court does not consider that all of the points referred to are well made. But, in the court's estimation, some of the points are well made. The overwhelming impression which the court is left with is that the initial investigation lacked rigour and left out of account the need to inquire into the source of the gunfire which resulted in the deceased's death. With the benefit which the military logs now provide, it is obvious that this was a case where the investigation should have focussed, *inter alia*, on the scenario that the deceased may have died as a result of a shot fired from a military source.

[113] The court has asked itself whether it knows of any good reason why it would not have been possible to have explored this scenario but none has come to mind or has been suggested.

[114] In these circumstances the court forms the opinion that a fair minded and informed observer would conclude that there is a real possibility that the investigation was carried out superficially and ineffectively by reason of (at least) unconscious bias. A reasonable perception would be that the investigation lacked the hallmark of independence.

[115] Given this conclusion it might have been expected that by 2006 when the HET became involved in this case, there would have been an imperative to ensure that lines of inquiry which had been left out of account during the original investigation would be sought out and considered. After all, a primary purpose of the HET's role was to ensure that all investigative and evidential opportunities had been identified and examined. This, however, did not happen and, as is clear, the HET themselves did not look at the possibility that soldiers could have been involved in the deceased's death. There was, for example, no attempt to seek to find any police or military records which could bear what had occurred. As before, the question which arises is why and, as before, there are a range of possibilities, both benign and otherwise. One way of looking at it might be to suggest that the key lies in

considering the parameters of what constituted 'a review' for the purpose of the function which the HET was performing. A narrow interpretation of what was required of a review might give rise to the view that the reviewer should stay within the limits set by the original investigation. This could be a benign reason why the HET's RSR was written in the way it was, though it has to be said that the court suspects there were other HET reviews which were not carried out under the influence of such a restricted view of their remit. The court also acknowledges that it is possible that those carrying out the review may have taken the view that there simply was no realistic prospect of obtaining the sort of evidence later found at Kew in 2014, though there is no reference to this line of thinking in the RSR itself. On the other hand, however, there may have been in play reasons which reflected an absence of enthusiasm to introduce the possibility that the death might have been attributable to a source other than a terrorist one. Why introduce a possibility which traduces the reputation of the security forces unless strictly unavoidable?

[116] It seems to the court that the fair minded and informed observer would approach the matter in the same fashion as he or she approached the initial investigation and would reach the same conclusion *viz* that there is a real possibility that the HET investigation was carried out in the way in which it was by reason of (at least) unconscious bias and without the hallmark of independence.

[117] In fact such a conclusion in respect of the HET review is much easier to reach today than it might have been in the past. This is because of the materials in the two HMIC reports which are now available. These support the notion that there was a culture in the HET of preferential treatment for soldiers who were under investigation in relation to civilian deaths. A fair minded and informed observer, it seems to the court, would take this into account and would acknowledge that there is a real possibility that, for whatever reason, there may have been a limited desire within the HET critically to examine military involvement in cases of this nature, especially if the original investigation had not encompassed this possibility, as was the position here.

[118] As is clear, the case now rests with the LIB which is an integral part of the PSNI. The PSNI was established with a view to a new era in policing in Northern Ireland beginning. But the question remains, against the above background, should it investigate this case?

[119] It seems to the court that the answer to this question cannot be arrived at in the abstract and without regard to the conclusions the court has reached above. It would be inconceivable that a fair minded and informed observer would not have regard to the past history of a case in assessing the possibilities to-day. That observer would surely take account of such factors as public confidence in looking at how the proposal for the LIB to investigate this case now is to be perceived.

[120] In other words, in today's context, the failures of the past in such a sensitive area as this, cannot be ignored as those failures themselves have eroded public

confidence. The absence of an effective investigation of Mrs Smyth's death at the time was bad enough but it has been compounded by the poor quality of the review carried out by the HET, which itself had been designed to be insulated to a substantial degree from association with the interests of the PSNI, as successor to the RUC. Yet the proposal now is that the HET's role, far from being invested in a person or body independent from PSNI, is being subsumed into the PSNI. Moreover, this is taking place in circumstances where the HMIC have continued to express concerns in the areas such as the provision of intelligence information to the investigator and the vetting of relevant staff to a sufficiently high standard, albeit that the police have been seeking to find ways of alleviating these problems.

[121] Matters in a way have gone full circle. The investigation of Mrs Smyth's death originally carried out by the Northern Ireland police has ended up back with them, notwithstanding the context of the death and the current level of suspicion that, after all, it may have been the security forces, of which the RUC formed part, which might be responsible for it. In the meantime the investigatory agency which had been designed to carry out a substantially independent investigation of the case, the HET, has been wound up though, in this particular case, it now would be viewed as having carried out its role in a manner which was marred by a real possibility of bias.

[122] The court must return to how all of the above would be viewed by the fair minded and informed observer.

[123] In the court's opinion, that observer would conclude that for the investigation to go forward now under the auspices of the LIB would be wrong as in the circumstances the PSNI would not be perceived as passing the test for independence for this purpose.

[124] In reaching its conclusions, the court has considered carefully Mr McGleenan's submissions based on the views expressed in Brecknell and the views expressed by the Council of Ministers in the McKerr and Others cases.

[125] As regards the Brecknell case, the court does not view it as establishing for all time that there cannot be a case in which the PSNI can be viewed as lacking independence where it is involved in an investigation of a death which might be attributable to soldiers operating in Northern Ireland. The Strasbourg court itself, in the past, has viewed the connection between the police and the army, both as parts of the security forces, as meaning that the former lacks independence to investigate a death suspected to be at the hands of the latter: see such cases as McShane v United Kingdom (2002) 35 EHRR 23 and Kelly v United Kingdom (2000) 30 EHRR CD223. While these cases involved the RUC as the investigator, the principle involved is not in dispute. Brecknell, in the court's view, depends on its particular facts and circumstances, just as the present case does. The court is considering the present case against the evidential base it has discussed. It cannot be the situation that as a matter of law Brecknell precludes the operation of doctrine of independent

investigation from applying to this sort of case because the identity of the investigator is the PSNI. Certainly, the court does not read it that way. It is notable, as Mr Southey pointed out, that the court in Brecknell explicitly stated that the independence of the Serious Crime Review Team and the HET were not under challenge in that case. Consequently, there is a contrast between that case and the present where there is such a challenge.

[126] While the views of the Secretariat of the Council of Ministers are interesting the court is of the opinion that there is nothing in them which preclude the court from reaching the conclusions which it has expressed in this case. The role the Council is performing is not the same as the role this court is performing and it seems to the court that the general sentiments expressed in the Council's various reports reflect, in large part, the hopes and aspirations of the Council for effective progress in this area in Northern Ireland.

### **Conclusion**

[127] For the reasons the court has given, it will grant a declaration that the proposed investigation by the LIB of Mrs Smyth's death conflicts with the requirements of Article 2 ECHR as the LIB lack the requisite independence required to perform an Article 2 compliant investigation in respect of this death.