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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McTasney's (Thomas) Application (Judicial Review) [2016] NIQB 46

IN THE MATTER OF AN APPLICATION BY THOMAS McTASNEY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

COLTON J

INTRODUCTION

[1] The applicant is the brother of Peter McTasney who was brutally murdered by the UVF at his home on 24 February 1991 in the presence of his 3 year old daughter who was also injured in the attack.

[2] I am greatly obliged to the assistance of counsel in this important application as it has evolved for their helpful and detailed written and oral submissions. Mr Devine appeared for the applicant. Mr Paul McLaughlin appeared for the PSNI and Mr Peter Coll QC appeared for the Department of Justice.

[3] A proper understanding of the context of the case requires consideration of a report by the Police Ombudsman known as the "Ballast Report" which was published in January 2007. That report investigated the activities of informers within the UVF together with their management and handling by RUC Special Branch. One of a series of murders it investigated was the murder of the applicant's brother. A central recommendation of the report was that criminal activities of all informants within the UVF in North Belfast and Newtownabbey should be reinvestigated and the Special Branch officers who handled them should be re-interviewed. The report indicated that these officers may have further information about the informants' criminal offences, which has not been officially documented. Further, the report recommended that any indication of criminal behaviour by a serving or retired officer which emerges in the course of the PSNI investigations initiated following this report should be referred to the Police Ombudsman for investigation.

[4] This recommendation was accepted by the Chief Constable. The case of the murder of Raymond McCord Jnr which was the initial focus of the 2007 report was in turn referred to the Historical Enquiries Team which investigated that murder and cases linked to it.

[5] I understand that on 26 August 2009, Gary Haggarty was arrested by the HET in connection with the murder of John Harbinson. He has been formally charged with that murder.

[6] Between 5 and 8 October 2009 Haggarty underwent a scoping procedure as a possible assisting offender under Part 2, Chapter 2, Serious Organised Crime and Police Act 2005 ("SOCPA"). On 13 January 2010 he signed an agreement with the Public Prosecution Service to become an assisting offender.

[7] The investigation which has resulted from the information provided by Mr Haggarty has been known as Operation Stafford. Arising from the Operation Stafford investigation he was reported for a total of 304 offences. He has been charged with 212 offences including 15 murders, attempted murders, conspiracy to murder, firearms offences, explosive offences, drugs offences and armed robbery. Included within the charges is the murder of Peter McTasney.

[8] The information gained in the course of Operation Stafford has also included allegations of serious criminality against police officers which has resulted in a parallel investigation by the Police Ombudsman.

[9] In the affidavit supporting this application Mr McTasney asserts a general concern that:

> "The PSNI and former members of the RUC do not want to see Mr Haggarty giving evidence in court because of fears about what he might say about the former Special Branch handlers he reported to while working as an informer for both the RUC and the PSNI."

He expressly raises concerns in respect of the independence of the PSNI in terms of vigorously and expeditiously investigating matters which involved criticism of the RUC.

[10] Arising from this general concern this application was triggered by the specific assertion that the "PSNI were not retaining the only four full-time investigators involved in the investigation into the criminality of Gary Haggarty." The applicant asserts that he became aware of this in or around 2 March 2015.

[11] In support of these concerns he exhibits an article in the Irish News which reports on comments made by senior police officers to the effect that "the PSNI is determined to play our part in the defence of the RUC." These comments were

allegedly made in the context of coronial hearings into what are known as "legacy inquests". He also refers to the reported comments of the former Ombudsman Dame Nuala O'Loan in a BBC broadcast when she was recorded as saying:

> "On December 31st the PSNI stopped the contracts of a number of agency staff and among those agency staff were four people who were working on this case. My view is that there is a potential to delay this further."

She is further recorded as saying:

> "It's too long, it's too long for the families."

[12] Thus the original Order 53 Statement in this case sought inter alia:

(a) Order of Certiorari to quash the decision of the PSNI to remove the only full-time investigators at a critical time of the investigation.

(b) Order of Mandamus directing the Department of Justice to make adequate funding available so that key personnel do not have to be removed from the investigation.

(c) A declaration that the PSNI respondent has unlawfully removed the four investigators.

[13] In the response to the pre-action letter in this matter, in relation to the issue of the investigators the PSNI indicate as follows:

> "The Chief Constable of the PSNI decided not to renew its contract for the provision of contracted staff when it expired on 31 December 2014. Consequently, no more contracted staff are available as of that date. In terms of the current investigation, this means that four contracted staff who previously worked as researchers are no longer available. Whilst not ideal, this has not had a material adverse impact upon PSNI's ability to conduct an effective investigation into the matters concerned. The investigative resources, in terms of warranted police officers and permanent police staff, available to the investigation have not been reduced and are sufficient to allow it to proceed with reasonable expedition. Even if significant additional resources were to be provided to the investigation at this stage, it would not be likely to result in it being concluded noticeably more quickly. The nature of the investigation, involving different investigative authorities (ie PSNI and PONI) and a

> complicated and novel procedure under SOCPA is such that the length of time it has taken is unavoidable. Any deficiencies in the investigation would rightly be the subject of appropriate action by the court in any criminal proceedings."

[14] The response in a later passage states:

> "As regards the resources available to the investigation, these are determined by the resources allocated to the PSNI. The budgetary difficulties facing PSNI, as well as the entire public sector, are well documented. The Chief Constable is on record as saying that PSNI is likely to be unrecognisable when the latest cuts (which come on top of successive years of reductions) are implemented. PSNI is currently in the process of prioritising the myriad competing obligations, across the entire organisation, incumbent upon us. It is the professional assessment of PSNI that the resources currently devoted to the investigation are sufficient to allow us to discharge our investigative responsibilities. In the event the Senior Investigating Officer considers that he requires further resources, he can bid for such resources. There is no basis in the proposed applicant's suggestion that the contracted staff were removed from the investigation in order to deflect criticism from PSNI. The proposed applicant provides no evidence to support this allegation, which is clearly without foundation in light of the massive resources devoted to it over a number of years."

[15] In any event since the initiation of these proceedings it has been confirmed that preliminary enquiry papers were served on Gary Haggarty in October 2015. Mr McLaughlin informs the court that the PSNI has been ready to commence the prosecution since late 2014. Dates had been requested from the court on 13 October 2014, 8 December 2014 and 2 March 2015, but did not proceed at the request of Haggarty's criminal defence team. In relation to the Ombudsman's investigation the Director of Public Prosecutions has not yet reached a decision on any charges.

[16] Because of this the applicant does not seek any relief in respect of the removal of the four investigators but nonetheless maintains his claim that there has been a failure to conduct the investigation within a reasonable time. There had been a number of amendments to the Order 53 Statement but in the final draft considered by the court the applicant seeks the following relief:

"(a) A declaration that the PSNI has unlawfully failed to discharge its function within a reasonable time without undue delay;

(b) a declaration that the Department of Justice unlawfully disabled the PSNI from discharging their function by failing to make adequate funding available.

(c) Damages.

(d) Such further and other relief as the court may deem appropriate.

(e) Costs."

[17] The grounds on which the said relief is sought are as follows:

"(a) The PSNI unlawfully failed to discharge its implicit statutory obligation to complete its investigation within a reasonable time.

(b) Insofar as under resourcing is relied upon by the PSNI, the PSNI was disabled from discharging a statutory duty to investigate within a reasonable time by the Department of Justice which failed to provide the PSNI with adequate funding in order that they can fulfil their function."

THE CASE AGAINST THE DEPARTMENT OF JUSTICE

[18] The application against the Department of Justice, as is evident from the grounds set out in the Article 53 application, depends on a reliance by the PSNI on under resourcing.

[19] Put simply there is no factual or evidential basis to sustain this contention. Indeed, the only information available to the court is expressly to the contrary. The whole issue of funding was initially predicated on a mis-conceived understanding that "the only 4 full-time investigators" had been removed from the investigation.

[20] In any event the PSNI expressly assert that under resourcing is not an issue in this investigation.

[21] Mr Devine argues that the case should be looked at in the round and that the DOJ may have a "valuable input" should leave be granted but I do not see that this could provide a basis for granting leave against the Department.

[22] Accordingly, I refuse leave against the Department of Justice.

THE CASE AGAINST THE PSNI

[23] In my view properly analysed the remaining grounds boil down to whether or not there has been undue delay in the conduct of the investigation into the murder of the applicant's brother. The application no longer identifies any particular decision action or inaction by the PSNI or DOJ which are the subject of challenge. It seems to me that arguments based on "development of a clear and transparent prioritisation matrix", breaches of Section 32 of the Police (Northern Ireland) 2000, a failure to secure the confidence of the public and the police force and the alleged breach of the applicant's rights under Articles 2, 3 and 6 of the ECHR all boil down to this issue.

[24] What is clear is that the court should not be involved in the supervision of the investigation of a crime by the PSNI under the direction and control of the Chief Constable. This would be completely contrary to the operational independence of the police and in my judgment it would be inappropriate for the court to exercise such jurisdiction in a case such as this, absent some clear breach of public law. Mr McLaughlin submits that the duty imposed by Section 32 of the Police (Northern Ireland) 2000 is a "target" duty. Thus the introductory words state that it shall be the "general duty" of police officers where an offence has been committed "to bring offenders to justice." In doing so it is afforded a substantial degree of latitude.

[25] In support of the applicant's argument Mr Devine has referred me to the case of Re Martin [2012] NIQB 89. In that case the court found a breach of an implied statutory duty on behalf of the Ombudsman to initiate an investigation within a reasonable period of time.

[26] In his judgment setting out the relevant principles Treacy J set out the court's approach to the question of delay simply as follows:

> "[32] I accept that claims in judicial review based squarely on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable (See R (F, H & Ors) v SSHD [2007] EWHC 1571 Admin) per Mr Justice Collins … I further accept that context is a critical factor in the assessment of the legality or otherwise of the delay in cases such as the present."

[27] In that case the court was concerned with the specific mandatory obligation on the Ombudsman to initiate an investigation. That case concerned only the failure to initiate an investigation within a reasonable period and the court made no findings nor did it attempt to intervene in relation to the conduct of that

investigation once commenced. It is right, as Mr Devine points out, that the Ombudsman relied on a lack of resources as a justification for the failure to initiate the investigation but in this case neither of the proposed respondents rely on any lack of funding but rather say there has been no delay or unreasonable delay in the matter.

[28] The issue of delay must also be considered in the context of Article 2 of the ECHR. The applicant alleges that there has been a breach of the procedural obligation under that Article to carry out an investigation with reasonable expedition. Both proposed respondents say that Article 2 is not engaged in this case. They argue that the applicant's brother was murdered in 1991, approximately 9 years prior to the commencement of the Human Rights Act 1998 on 4 October 2000. They rely on the rule established in Re McKerr [2004] UKHL 12 and say that no such obligation arises in domestic law for deaths which occurred prior to its commencement. In Re McCaughey [2011] UKSC 20, the Supreme Court, recognised an exception to this principle in cases where a decision had been taken, post 2000 to hold an inquest into the death. In the recent Supreme Court case of Keyu v SOSFCA [2015] UKSC 69, the court declined to determine whether McKerr was still good law in light of the more recent Strasbourg jurisprudence on the "detachability" of the procedural obligation. The proposed respondents argue that the present case does not fall within the exception in McCaughey and that therefore there is no Article 2 obligation in the case.

[29] On this point I agree with the applicant that there is least an arguable case for the purposes of a leave argument that Article 2 is engaged. In this case the relevant investigation was initiated after the Ballast Report in 2007. It seems to me it is arguable that the circumstances of this investigation are analogous to a situation where an inquest is ordered after the implementation of the Human Rights Act in respect of a death which occurred prior to it being in force.

[30] The real issue is whether or not there is a sufficient evidential basis to raise an arguable case that there has been an unlawful delay in the investigation into the murder of the applicant's brother. The basis for this suggestion was initially the decision not to re-engage four investigators. I do not think that it can be argued that this conceivably contributed to any delay. The applicant further refers to public comments by the former Ombudsman responding to the issue of the four researchers. The key passages of her comments are set out in the applicant's affidavit as follows:

> "Vincent Kearney: 'Some families believe that the long drawn out process is a tactic.'
>
> 'Yes, yes I know that and I find it difficult to explain some of the delays we have seen.'

> 'There is a process that has to be gone through and I understand that but there is a difference between a year, two years and five years. It's too long, it's too long for the families.'
>
> 'We know that the DPP was waiting for information from the police in regard to the offender and that information was not forthcoming for a very long time. Despite the fact that the senior investigating officer in the case had done what he should do … so delay was further up the chain.'
>
> 'Vincent Kearney: 'Current Deputy Drew Harris led this investigation for most of the past five years. In your view is that where the buck stops?'
>
> 'I can't comment on that because I do not know the interactions between Assistant Chief Constable, Deputy Chief Constable and Chief Constables.'
>
> 'On December 31 the PSNI stopped the contracts of a number of agency staff and among those agency staff were four people who were working on this case. It is my view that there is a potential to delay this further.'
>
> 'I am astonished given the nature and complexity of this case, given the history of it, without those four officers who were doing it, we are talking months and months of further unnecessary delay.'"

[31] Is this sufficient evidential basis for a judicial review challenge based on delay? It is not at all clear if Dame O'Loan was actually aware of the background to the staff in question which has now been clarified. I also note that according to another BBC news report Dame O'Loan and a barrister were appointed to a panel to oversee an investigation into murders and other serious crimes committed by the UVF in North Belfast, specifically in relation to Operation Stafford which is the subject matter of this challenge. The panel had been established by the PSNI "to address issues of confidence and to demonstrate in good faith the scale and extent of the investigative work which has been undertaken". According to the report the review panel will meet PSNI detectives every 8 weeks to review progress in the case and will brief the families of the dead with any relevant information.

[32] There is nothing in the application from the applicant to suggest that any such information was provided to the McTasney family which would impact on this application.

[33] In any event the facts of the matter are that the investigation has advanced to the point where the next step will be the consideration by the criminal courts of Haggarty's criminality, which is in itself an essential step in the assisting offenders process that may well lead to other alleged perpetrators of criminality being made amenable.

[34] In his affidavit the applicant refers to concerns about the independence of the PSNI and its willingness to properly investigate Mr Haggarty. However the facts of the matter are that Mr Haggarty is facing criminal charges including one in relation to the applicant's brother. Furthermore there is an ongoing investigation into potential criminal activity by those RUC officers who were responsible for "handling" Mr Haggarty. That investigation was in fact carried out by the PONI. The PONI are not a party to this application nor has there been any suggestion that the PSNI have obstructed or delayed this investigation in any way. Indeed if this were so one would expect the Ombudsman to say so.

[35] When I look at the material available to me in this matter it seems to me there is simply insufficient evidence to argue that there has been unreasonable delay in this matter.

[36] Even assuming there is an Article 2 argument in this case I am of the view that the court should be wary about intervening in the matter. As indicated it is clear that a prosecution is now underway and of course this is one of the primary means by which the State can discharge its obligations under Article 2. The State is therefore in the process of discharging its obligation. Mr Devine argues that the PSNI's role at this stage is complete in that it has submitted papers to the PPS but inevitably the entire investigation will be the subject of scrutiny in the course of the criminal proceedings. Furthermore as a result of the investigation a parallel investigation is continuing into further criminal prosecutions arising from the murder of the applicant's brother.

[37] I do not see how the court could realistically carry out the exercise requested by the applicant without a detailed and further investigation of the steps taken by the PSNI throughout the course of the investigation. To do so in my view would be disproportionate. It could well impact on the upcoming prosecution and ongoing investigation. It could well result in further delay for both. It may well be that at the end of the entire investigation including any potential criminal prosecution that issues might arise about the lawfulness or otherwise of the police investigation but for the court to conduct an investigation under the guise of judicial review proceedings at this stage would at best be premature.

[38] It is clear that the court is now presented with an application which has a purely historical focus. There is no intrusive role a court can play in ensuring that any public law rights of the applicant are protected. Mr Devine was clear that this application was not about compensation or damages, even though that relief is sought on the face of the Order 53 Application, which is normal. The question of

delay and damages was considered by our Court of Appeal in the case of **Jordan's Applications 13/002996/1; 13/002223/1; 13/037869/1**. Mr McLaughlin referred me to a passage in the judgment of Morgan LCJ at paragraph 26 as follows:

> "We consider therefore that in legacy cases the issue of damage as against any public authority for breach of the adjectival obligation in Article 2 ECHR ought to be dealt with once the inquest has finally been determined. Each public authority against whom an award is sought should be joined. In order to achieve this it may be necessary to rely upon Section 7(5)(b) of the 1998 Act. The principle that the court should be aware of all the circumstances and the prevention of even further litigation in legacy cases are compelling arguments in favour of it being equitable in the circumstances to extend time as required. Where the proceedings have been issued within 12 months of the conclusion of the inquest, time should be extended."

[39] It seems to me this principle is also applicable in the circumstances of this application. Indeed, I would question whether or not a judicial review is the appropriate way in which to seek any remedy for alleged delay in circumstances where criminal proceedings are underway as in this case. It seems to me that any enquiry related to this would be essentially based on evidential issues which a judicial review court is not necessarily best placed to assess. I do not believe therefore that any declaration leaving aside the issues of arguability is either necessary or appropriate at this stage of the investigation into the activities of Mr Haggarty and in particular the murder of Peter McTasney.

[40] I would like to conclude by indicating my hope that the outworking of the charges against Mr Haggarty and the PONI investigation will provide answers to the applicant and his family on the circumstances surrounding the horrific murder of his brother.

[41] However, I do not believe that it is appropriate to grant leave for judicial review of the recent investigation carried out by the PSNI into his murder and therefore leave is refused.