Neutral Citation No: [2021] NIQB 101 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **COL11670** *ICOS No:* **2019/107778/01** *Delivered:* **16/11/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY THE MINISTRY OF DEFENCE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE VERDICT FINDINGS OF THE CORONER IN THE INQUEST TOUCHING ON THE DEATH OF SEAMUS BRADLEY

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Ms Fiona Doherty QC appeared on behalf of the Coroner
Dr Tony McGleenan QC and Mark Robinson QC appeared on behalf of Applicant

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RULING ON COSTS

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COLTON J

Background

[1] **Chronology**

15 August 2019	The respondent Coroner delivered his verdict and findings in the inquest touching on the death of James Oliver (Seamus) Bradley.
7 November 2019	The applicant issued a Pre-Action Protocol (PAP) letter to the respondent.
8 November 2019	The respondent sent a "holding response" to the PAP letter sent.
14 November 2019	Judicial review proceedings lodged by the applicant, the Ministry of Defence (MOD).
12 December 2019	Full PAP response issued by the respondent.
12 March 2020	Leave for hearing before Sir Ronnie Weatherup. He indicated that he was interested in only 4 of the 12 grounds. In the event

	he heard argument only on the "standard of proof" ground and adjourned the hearing as Mrs Justice Keegan would be dealing with the standard of proof issue in the Ballymurphy inquest.
13 November 2020	Supreme Court judgment in **Maughan** case (re standard of proof in inquest concerning suicide – civil standard applicable.)
17 December 2020	NICA judgment in **Stepaviciene** (following **Maughan**).
21 January 2021	Mrs Justice Keegan delivers findings on the inquest touching on the death of Patrick McElhone confirming standard of proof in inquests for all issues is the civil standard.
11 February 2021	The application was reviewed by this court. Applicant asked the court to stay the case until findings in the Ballymurphy Inquest were delivered. The court directed that the matter should proceed. The applicant sought time to amend the Order 53 Statement.
4 March 2021	Matter reviewed again by this court. Order 53 Statement not amended by applicant. Court asked for position papers on whether a "*rolled-up hearing*" should be held. Following further consideration respondent agrees that there would be no saving in time or cost by opposing the holding of a rolled-up hearing and agrees to same.
11 May 2021	Mrs Justice Keegan delivers findings on Ballymurphy Inquest. Confirms standard of proof in inquests is civil standard.
7 October 2021	Applicant asked the court to vacate the hearing dates – 2 days after skeleton argument due.
19 October 2021	The hearing was listed for 2 days commencing on this date. At the hearing subsequent to the indication on 7 October 2021 the applicant confirmed it was withdrawing the application. The court then dismissed the application. The court made no order in respect of the costs of the notice party – the next of kin of the deceased, who had been represented at the initial inquest and had been a notice party in relation to the judicial review application.

[2] The respondent sought the costs of defending the application. The parties agreed to make written submissions on the issue of costs.

[3] I am obliged to counsel Ms Fiona Doherty QC, on behalf of the Coroner and Dr Tony McGleenan QC and Mark Robinson QC, who appeared on behalf of the Ministry of Defence for their helpful written submissions on this issue.

The Relevant Legal Principles

[4] The court has a broad discretion in relation to the issue of costs.

[5] The powers of the High Court to deal with the costs of and incidental to proceedings are set out in the Rules of the Supreme Court and, primarily in Order 62. The general rule is the unsuccessful party should normally pay the costs of the successful party. Order 62 Rule 3(3) provides:

> "*If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*"

[6] There is no particular rule in relation to costs for proceedings in judicial review applications, although the matter has been considered in a number of decisions.

[7] The almost invariable practice of the court in this jurisdiction is not to grant costs if leave to apply for judicial review is refused. In paragraph 16.05 of *Scoffield and Larkin – Judicial Review in Northern Ireland* it says –

> "*The reason for this is that the leave application is technically an* ***ex parte*** *application, without there being any need for the proposed respondent to participate at the leave stage by lodging any form of acknowledgement of service, still less attending an oral hearing.*"

[8] When faced with determining the issue of costs where a judicial review is being discontinued the courts in this jurisdiction tend to adopt the principles set out by the court in **R(Boxall) v London Borough of Waltham Forest** [2000] All ER(D). In the **Boxall** case Scott-Baker J set out the relevant principles as follows:

> "*(i) The court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs.*
>
> *(ii) It will ordinarily be irrelevant that the application is legally aided.*
>
> *(iii) The overriding objective is to do justice between the parties without incurring unnecessary court time and consequently additional cost.*
>
> *(iv) At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been fought to a conclusion. In between, the position will, in differing degrees, be less clear.*

(v) *How far the court will be prepared to look into the previously unresolved substantive issues will depend on the circumstances of the particular case, not least the amount of costs at stake and the conduct of the parties.*

(vi) *In the absence of a good reason to make any other order the fall back is to make no order as to costs.*

(vii) *The court should take care to ensure that it does not discourage parties from settling judicial review proceedings for example by a local authority making a concession at an early stage."*

Application of the Principles to this Case

[9] The court did not find it easy to resolve the issue of costs. The matter is complicated by the fact that the application was to be dealt with by way of a "*rolled-up hearing.*" This has many advantages and the court felt it appropriate in a case such as this where in large measure the decision of the Coroner can be examined by reference to the findings in the verdict without recourse to affidavit evidence.

[10] The respondent has always argued that this was a case which was doomed to fail and in reality was simply a challenge to the merits of the Coroner's decision.

[11] In relation to the issue of the appropriate standard of proof to be applied in inquests, the EWCA judgment in *Maughan* had been delivered on 10 May 2019 some months before the inquest verdict. The decision of the Supreme Court in the same case on 13 November 2020, the NICA judgment in *Stepaviciene* (following *Maughan*) on 17 December 2020 and the findings in the inquest touching the death of Patrick McElhone on 21 January 2021 should have made it clear to the applicant that the appropriate standard of proof was indeed the civil one. Any remaining doubt on this issue should have been put to bed after the delivery of the verdicts in the Ballymurphy inquests on 11 May 2021.

[12] One of the orders sought by the applicant was –

> "*An Order of Certiorari quashing the decision of the Coroner to refer the findings to the Public Prosecution Service of Northern Ireland under Section 35(3) of the Justice (Northern Ireland) Order 2002.*"

[13] At the short hearing on 19 October 2021 and in the written submissions the applicant suggests that this was a key focus of the application. Ms Doherty points out that the actual grounds relied upon challenged only the inquest findings and how those findings had been reached. There is no ground criticising the referral to the PPS as a freestanding decision. That said, clearly a successful challenge to the

findings and the verdict would have had an inevitable consequence for any referral to the PPS. It does appear that there was significant confusion about the nature of any referral by the Coroner to the PPS and whether in fact such a referral had been made. In the applicant's written submission it is asserted that –

> *"The MOD learned, only recently that no referral has been made to the PPS. It is submitted on behalf of the applicant that the absence of a referral significantly alters the position and the approach of the applicant to these proceedings."*

[14] In written submissions the applicant focussed on the principle set out by Lord Carswell in *Re Darley's Application* which had been referred to in paragraph [5] of the Court of Appeal decision in *Jordan's (Hugh) Application* [2014] NICA 36. Whilst the court accepts this is by no means a straightforward argument it is not persuaded that had this matter been contested it would have been appropriate for the Coroner to simply adopt an "*amicus"* role and leave it to the applicant and the notice party to conduct the adversarial argument.

[15] The court is very conscious that it has not granted leave in this case and had not formed any view about the merits of the application. Such an exercise would involve consideration of extensive material which was before the Coroner and an analysis of the Coroner's findings and verdict. The court's preliminary view was and remains that the applicant would have faced an uphill task in persuading it to quash the inquest verdict, although the issue of referral to the PPS may have been more complicated. The court could not however say that the applicant's case was doomed to fail.

[16] Having regard to the broad discretion enjoyed by the court and looking at the case as a whole the court has decided not to make an inter partes order in relation to costs.

[17] The court is particularly influenced by the fact that the applicant's decision to withdraw the proceedings has saved the court and parties' significant time and resources. The court welcomes the decision of the applicant to withdraw the proceedings albeit an earlier decision to do so would have been better. The applicant's decision, which involved balancing a number of significant factors from its perspective has properly come to a view that there would be no utility in pursuing a contested hearing. That decision is to be welcomed. The court therefore has decided that the applicant ought not to be penalised on costs for withdrawing the application in the circumstances of this case.

[18] Accordingly, the court makes no order in relation to costs.