

**Neutral Citation: [2016] NIQB 59**

Ref: MAG9964

Judgment: approved by the Court for handing down  
(subject to editorial corrections)\*

Delivered: 17/6/2016

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**Mulhern's (Francis) Application [2016] NIQB 59**

**IN THE MATTER OF AN APPLICATION BY FRANCIS MULHERN  
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE ATTORNEY GENERAL  
FOR NORTHERN IRELAND**

**MAGUIRE J**

[1] The applicant in this case is Francis Mulhern. He is the father of Joseph Mulhern ("the deceased"). The deceased was murdered by PIRA on a date unknown between 21 June 1993 and 23 June 1993. The application for judicial review arises out of a request made by the applicant to the Attorney General for Northern Ireland ("the AGNI") on 27 April 2015 asking him to direct a new inquest into the death of the deceased. The AGNI has not refused to order a new inquest but nor has he ordered one. His position is that he has considered the application. On 1 July 2015 the AGNI wrote to the Director of Public Prosecutions ("the DPP") enclosing relevant documents. The AGNI provided a summary to the DPP of the applicant's application and suggested that the DPP may wish to consider exercising his power under section 35(5)(a) of the Justice Act (Northern Ireland) 2002 in relation to the decision of the Police Service of Northern Ireland not to charge Freddie Scappaticci or "person J" with any offence in connection with the murder of the deceased. In the AGNI's response to the applicant's pre-action protocol letter preceding this application for judicial review the AGNI, *inter alia*, stated that:

"It is the Attorney's view that, in the light of materials supplied by you, the criminal justice route is the most appropriate route and the Attorney is keen to see if this can be advanced. The material supplied tends to support the proposition that Freddie Scappaticci has been involved in the murder of Joseph Mulhern."

## **The judicial review application**

[2] The judicial review application was filed with the court on 7 December 2015. It seeks orders of mandamus from the court requiring the AGNI to exercise its power under section 14(1) of the Coroner's Act (Northern Ireland) 1959 to direct a fresh inquest in respect of the death of the deceased or, alternatively, requiring the AGNI lawfully to consider exercising his power under section 14 so as to decide whether to direct that a fresh inquest be held in relation to the murder of the deceased.

[3] The grounds on which the said relief is sought may be summarised as follows:

- (a) The AGNI unlawfully has failed to satisfy the State's investigative obligation under Article 2 of the ECHR, an obligation which should primarily be discharged by way of an inquest.
- (b) The AGNI has acted irrationally in referring the death to the DPP instead of directing a new inquest.
- (c) The AGNI has had regard to immaterial considerations.

## **Section 14 of the Coroners Act (Northern Ireland) 1959**

[4] The above is the statutory power under which the AGNI may direct a fresh inquest. In its material part for the purpose of these proceedings, it reads:

"Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner...to conduct an inquest into the death of that person..."

[5] It seems clear that the emphasis in this provision is on the matter being very much one involving the judgment and assessment of the AGNI personally. This is supported by the use of the expression "reason to believe", the use of the words "in his opinion" and the use of the word "advisable".

## **The death of the deceased**

[6] While the papers contain a fund of information about the death of the deceased, all of which the court has considered, it is unnecessary to set all of this information out in this leave judgment. The court will, however, provide a short summary of the most salient matters pertaining to the death as follows:

- (i) The deceased in 1993 was 23 years old and lived with his father (the applicant herein) and two brothers and a sister.
- (ii) It seems clear that the deceased had become involved in PIRA activities.
- (iii) About two weeks before his death, the deceased took an overdose of tablets and had to be taken to the Royal Victoria Hospital.
- (iv) After the deceased left the hospital there was an arrangement made between certain others and the deceased under which the deceased was to go off with some others on what the deceased considered to be a break. This was to have been for a week or two.
- (v) The deceased was picked up from the family home by a man who called at the house.
- (vi) This was the last time before his death that the applicant saw him.
- (vii) The deceased's body was found a few days later near to the border between Northern Ireland and the Republic of Ireland.
- (viii) The deceased had been shot to the back of the head and right side of his neck.
- (ix) There was a claim of responsibility for his shooting by PIRA. It was alleged by PIRA that the deceased was an informer who had been working for RUC Special Branch.
- (x) Following the death, a police investigation ensued. Three people were arrested and questioned by police but no-one was then or later charged with the deceased's murder. It is clear that the applicant did not tell the police about important evidence which he had in respect of the death in the course of the original investigation.
- (xi) An inquest into the deceased's death was held on 20 June 1995. The applicant did not tell the inquest all of what he knew of the deceased's death.
- (xii) In 2003 the applicant provided information to the Stevens Inquiry. While a statement was prepared by the Stevens team in respect of his potential evidence, the applicant declined to sign it.
- (xiii) In 2011 the applicant did sign a statement relating to what he knew and this was taken by the Stevens Inquiry.

- (xiv) The case became the subject of consideration by the Historical Enquiries Team and this resulted in the provision to the family of the deceased of a Review Summary Report (“RSR”). This was in or about 2013. The RSR reviewed the original police investigation and reached the conclusion that the deceased was killed by members of PIRA who shot him at close range. The report records that a suspect was arrested in 2012 but that nothing came of this, the suspect being released without charge. The report concluded that there was no intelligence that could have prevented the deceased’s murder. It also concluded that there were no evidential opportunities that would help progress the investigation into the deceased’s murder. There is a reference in the report to what was described as “post murder intelligence”. This referred to intelligence about two named PIRA activists. Apparently they had been watching the deceased when he had been in hospital. They were, it seems, there to check to see if the deceased was visited by Special Branch while he was being treated following his overdose. It is noted that this intelligence was not at the time passed on to the team investigating the murder.

#### **The applicant’s statement of 10 May 2011**

[7] At the time of the original police investigation into the deceased’s murder the applicant withheld from the police a substantial amount of information he had acquired about it. The reason for the non-disclosure of this information appears to have related to the applicant’s fear that disclosure might place him at risk from PIRA. Ultimately, as recorded above, the applicant did make a signed statement to the Stevens Inquiry team in 2011. The statement made is some 22 pages in length. It deals mainly with the events in the aftermath of the murder.

[8] In particular, the statement reveals that there were a number of conversations between the applicant and PIRA connected persons about his son’s death. A theme of these conversations was that the deceased had been working for Special Branch and that it was this, which allegedly the deceased had eventually under interrogation admitted to, which led to his death. After a few weeks a number of items of his son’s property were, the applicant said, returned to him by persons who arrived at the family home. A letter, allegedly written by his son to him, was also given to him together with a taped version of his confession.

[9] Some 6 or 8 weeks after the death the applicant recounts that he had a conversation with a person he identified as Freddie Scappaticci. The court will not set out the details of this in this judgment but it seems beyond question that what Scappaticci is alleged to have said, if true, would demonstrate that he and others had been directly involved in the deceased’s murder.

## **The issues in the application**

[10] At the leave hearing the issues before the court crystallised. In particular, it was not argued on behalf of the AGNI that on the facts there was no engagement of Article 2 of the Convention. It was assumed by Mr Scoffield QC on behalf of the AGNI that Article 2 was engaged. The central issue was whether it could be said that in any material way the AGNI had acted unlawfully in the way he dealt with the matter. For the applicant, Mr Underwood QC submitted that the Article 2 obligation which was live in this case had not been performed and needed to be performed. Counsel argued that the original inquest had not been Article 2 compliant and that the mechanism of an inquest was the obvious means by which the State could and should deliver performance of its Article 2 obligations. In these circumstances, Mr Underwood submitted that the AGNI was under a duty to make a decision on the applicant's request and to order a fresh inquest using his section 14 powers.

[11] Mr Scoffield, on the other hand, argued that the application for judicial review was premature as the AGNI had not yet reached a decision to refuse to direct an inquest. As already noted above, it was the view of the AGNI that it was the criminal justice route which was the appropriate way to advance matters at this time. For this reason, counsel submitted, the AGNI had contacted the DPP so that he could, in the light of the materials, consider exercising his powers to direct further investigation by the police. In the light of what the DPP decided to do and in the light of the result of any further criminal investigation the AGNI could, if necessary, review the matter. No door had been closed to the possibility of a fresh inquest.

[12] In his submissions, Mr Scoffield characterised any further criminal investigation as itself forming part of the State's response to the fulfilment of its obligations under Article 2.

## **Developments of relevance**

[13] The DPP has now considered the papers passed on to him by the AGNI together with other materials he had available to him. This has led to him making a direction for the police to carry out further investigation into a range of cases, including the present case, in which Freddie Scappaticci is believed to have been involved. There are apparently some 40 or so cases within this category. The further investigation needless to say is a criminal investigation which will have as its aim the bringing of the perpetrators of criminal acts to justice. As the court understands it, the further investigation by the police will be on significant scale for which substantial resources have been earmarked. It will take time to complete but it is evident that it is conceivable that the outcome may be the prosecution of those responsible for this sort of murder, including the murder in this case.

## **The court's assessment**

[14] There were a number of issues raised in the course of the leave hearing which the court can briefly deal with before making its overall assessment.

[15] The court considers that Mr Scoffield made three points which while of considerable weight and likely to be of importance at a full hearing do not have the status of "a knock-out blow" for present purposes.

[16] Firstly, the court, contrary to Mr Scoffield's submissions, is not persuaded that the AGNI when making a decision whether or not to order a fresh inquest under section 14 is immune from judicial review. The proposition that the AGNI at least arguably is subject to the supervision of this court was considered by the court in its leave judgment in the case of Dorothy Johnstone's Application. In that case the court had the benefit of considering a range of authorities. Having done so, the court concluded that the point was arguable. It has not heard anything in this case which causes it to alter the approach the court took in that case on this point.

[17] Secondly, the court is equally unpersuaded that the AGNI cannot be made subject to a rationality challenge in this context. In the court's view, the AGNI is exercising a statutory discretion which may rightly be viewed as wide but this, in itself, does not mean that it could never be the subject of a *Wednesbury* type challenge. The width of the discretion taken with the language in which the discretion is cast together with the constitutional role of the decision maker, causes the court to approach the issue of review with what might be viewed as a light touch. This was the approach which the court adopted in *Johnstone supra* and is the approach which the court will apply in this judgment. The effect will be that the court will be prepared to accept that the decision maker in this case should be afforded a substantial area of latitude.

[18] Thirdly, the court is satisfied that Mr Scoffield was correct to raise the issue of non-compliance by the applicant with the pre-action protocol. It seems clear that the applicant in its pre action protocol correspondence did not raise all of the grounds for judicial review now put forward. It is important that the court makes it clear that pre action letters should contain all of the grounds of judicial review relied on. This is necessary so that the proposed respondent has the opportunity to deal in its response with all the matters in dispute. On the facts of this case the court will, however, decline to dismiss any ground of judicial review for this reason alone.

[19] In the absence of argument on the point, the court will make the assumption that in this case Article 2 of the Convention is engaged and that the requirements of Article 2, as a matter of domestic law, have yet to be satisfied. This issue can, of course, be subject to full argument if leave is granted.

[20] The central issue in this application therefore is whether the AGNI arguably has acted unlawfully by not directing a fresh inquest. In this area, quite properly, Mr

Scofield accepts that the AGNI (like any public authority) is bound to observe the requirements of the Human Rights Act 1998.

[21] In the court's estimation it cannot be said that there is at this time an arguable duty on the AGNI to exercise his discretion under section 14 in favour of a fresh inquest. The court does accept that there is a case for directing a fresh inquest. But the court also accepts that there is a case for not doing so at this time. The AGNI's position is that he feels that there is scope for the case to be made subject to further investigation in the light of the information which, over time, has emerged. This is, in the court's view, a tenable view. The step taken by the AGNI to refer the issue to the DPP and to ask him to consider using his powers in respect of requiring further investigation by the police in the light of the information now available cannot, in the light of the width of the AGNI's discretion, even arguably, be viewed as unreasonable or irrational. Such a step, as the AGNI has put it, involves going down the "criminal justice route", but the court regards such a route as appropriate to the pursuit of the important goal of seeking to bring the perpetrators of this murder to justice. Moreover there is nothing in the recent developments in this case which cast significant doubt on the viability of dealing with the matter in this way.

[22] Nor does the court believe that the AGNI has acted contrary to section 6 of the Human Rights Act 1998 in taking the course which he has taken. It is well known that there is not just one way of satisfying the obligations imposed on the State by Article 2 of the Convention. Such obligations can be satisfied in a number of ways and through a variety of permutations. While the holding of an inquest is a regularly used method of satisfying the requirements of Article 2, there are other ways of doing so, including that of criminal investigation leading to prosecution of the perpetrators of the unlawful death. The court is able to accept that the course which is presently being charted, involving further investigation into the sort of murderous activity which lies at the centre of these proceedings, is part of a process by which the State's obligations under Article 2 can be discharged.

[23] For the AGNI to say that he wishes to monitor the situation and to consider how matters progress does not appear to the court to be contrary to the principles of public law and does not savour of any abuse of power on his part. The court also does not view this case as one in which the AGNI has declined to exercise discretion. On the contrary, the court is satisfied in the absence of evidence to the contrary that he has given his mind to the issue of the appropriate response to the request made to him and has, legitimately, decided to take the course he has adopted.

### **Alleged Misdirection**

[24] An issue which arises in this judicial review is what is suggested by the applicant to be misdirection of himself by the AGNI. This is said to have infected how the AGNI dealt with the applicant's case. It is argued (more in correspondence than orally) that there were errors in the AGNI's approach to the issue of the "critical date" and as to the what he is said to have understood to be the sole purpose of an

inquest *viz* the identification and punishment of perpetrators as opposed to issues in respect of State culpability in murders.

[25] The basis for this case is claimed to come from exhibited correspondence not in respect of this case but other cases where the AGNI was considering the potential exercise of his section 14 power.

[26] Mr Scoffield, for the AGNI, submitted that whatever had been the position in other cases the AGNI in this case had not in any way misdirected himself and indeed that he had not sought to raise issues of this type in this case. Moreover, counsel assured the court that the AGNI has no set policy or a closed mind in relation to these matters.

[27] The court accepts Mr Scoffield's arguments in respect of this issue and does not consider that it should grant leave in respect of alleged misdirection as there is no basis for believing that such points as might have been made in other cases have any purchase on the facts of this case.

### **Conclusion**

[28] In all the circumstances of this case the court declines to grant leave to apply for judicial review on any ground.