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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**29/06/2022**

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 BRIDGET IRVINE FOR JUDICIAL REVIEW

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Frank O'Donoghue QC and David Heraghty (instructed by KRW Law) for the Applicant
Peter Coll QC and Philip McAteer (instructed by the Crown Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] On 4 December 1971 loyalist paramilitaries planted a bomb at McGurk's Bar in North Queen Street, Belfast which detonated and killed 15 people and injured many more. It was one of the bloodiest attacks in the history of the conflict in Northern Ireland. The target was selected simply because it was a public house frequented by Catholics.

[2] The applicant's mother, Kathleen Irvine, was one of the victims of this massacre. The circumstances of the bombing have been the subject of several investigations over the last 50 years.

[3] The initial investigation by the RUC did lead to one man, Robert Campbell, being convicted of the murders and attempted murders in September 1978. However, a number of agencies have criticised the police investigation as being unduly and wrongly influenced by the theory that the attack was the work of republican paramilitaries. It is said that this misconception infected the investigative process until Mr Campbell was interviewed in July 1977.

[4] This judicial review relates to the report of the Historical Enquiries Team ('HET') into the McGurk's Bar bombing which was published on 20 May 2014. The applicant seeks to quash that report on the basis that its finding that there was no

"investigative bias" on the part of the RUC was irrational and contrary to the weight of the evidence. In the alternative, an order is sought quashing the specific findings in the report that there was no evidence of investigative bias.

[5] In a skeleton argument dated 16 May 2022, the respondent effectively conceded that the finding of no investigative bias could not be stood over, was irrational and contrary to the weight of the evidence. This belated admission meant that the focus for the court was on the most effective and appropriate remedy.

[6] In order to place this question in context, however, it is necessary to rehearse some of the history of these proceedings and related events.

The Ombudsman's Report

[7] In February 2011 the Office of the Police Ombudsman ('PONI') published its report entitled "The Bombing of McGurk's Bar, Belfast on 4 December 1971." The purpose was to determine whether there was evidence of any criminality or misconduct by any member of the RUC arising out of the attack or the investigation. Its findings included the following:

(i) In the immediate aftermath of the bombing, police interpreted the available intelligence and evidence as indicating that the IRA had been responsible for the bombing. Police failed to give adequate consideration to involvement by loyalist paramilitaries (para 8.25);

(ii) In the weeks following the atrocity the focus of the RUC investigation became unduly influenced by information, which suggested that the bombing was the responsibility of republican paramilitaries. This had the effect of undermining the police investigation (para 8.30);

(iii) Modern investigative practice recognises the dangers of personal and investigative bias affecting decision-making and the direction of enquiries;

(iv) An investigative bias leading to the failure to examine properly evidence and intelligence attributing the bombing to loyalist paramilitaries undermined both the investigation and any confidence the bereaved families had in obtaining justice (para 9.3).

[8] The finding of investigative bias was rejected by the Chief Constable of the PSNI.

The HET Report

[9] The HET Report of May 2014 describes the objectives of the team as including:

> "To re-examine all deaths attributable to 'The Troubles' and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the PSNI's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI."

[10] In relation to the specific review, it states:

> "The main objective of this HET review summary report is to provide the families with a final and comprehensive report on the review of the McGurk's Bar bombing … It endeavours to achieve this by bringing together and updating material from previous HET reports, reporting on the outcome of the HET review in response to the Police Ombudsman's report and finally providing a response to additional family questions and concerns that have continued to be raised throughout this period."

[11] The section of the HET report relating to the question of investigative bias makes it clear that this was an issue which the team was asked to address by the families of the victims. The analysis of the question stretches over some 10 pages and arrives at the following conclusion:

> "When the HET commented on the decision-making of DCI Abbott in the original review summary report, it was concluded that the investigation considered all relevant lines of enquiry, but may have attributed more significance to the potential involvement of republican terrorists than the balance of evidence supported. Having closely examined the quality of the evidence underpinning the PONI findings, the HET believes this early assessment remains valid. The HET has found no evidence that DCI Abbott acted as a result of investigative bias."

[12] In the report's conclusions, the finding in relation to DCI Abbott is extended to encompass all within the RUC.

The Response to the Report

[13] In 2016, Detective Superintendent Murphy swore an affidavit in which it was averred that the then Chief Constable had decided "not to contest the issue of investigative bias", although he was not conceding any of the grounds of the judicial review challenge. The motivation behind this concession was said to be a desire to avoid any further distress to the families.

[14] As a result, the respondent entered into discussions with the applicant's representatives with a view to agreeing necessary and appropriate excisions from the HET report. The applicant rejected this approach, stating instead that the entire report should be quashed.

[15] D/S Murphy stresses that the report itself is some 160 pages long, and contains many findings which would not be objectionable to the applicant and the other families of the victims. In addition, the point is made that the HET ceased to exist in 2014 and responsibility for the investigation of legacy related incidents has passed to the Legacy Investigation Branch ('LIB'). It has adopted a Case Sequencing Model in order to prioritise the outstanding investigations. It has a workload of well over 1,000 cases.

[16] On 1 December 2016 ACC Hamilton issued a statement as follows:

> "During judicial review proceedings in September 2015, we stated that the Chief Constable fully accepts the findings of the Police Ombudsman regarding the original investigation into the McGurk's bar atrocity, including the finding of investigative bias. We have redrafted the original HET report to unequivocally reflect this position."

[17] As a result, the competing positions of the parties can be analysed as follows:

(i) The applicant says the entire HET report should be quashed;

(ii) The respondent contends that the relevant material and findings concerning investigative bias can be excised from the report.

Remedy

[18] Section 18 of the Judicature (NI) Act 1978 makes it clear that remedies in judicial review proceedings, including orders of certiorari, are discretionary. They are designed to give practical effect to the order of the court and the courts have an ability to tailor the making of such an order to the circumstances of any given case.

[19] I respectfully agree with the finding by Girvan LJ in *Re Downes* [2007] NIQB 1 that the normal and proper remedy in order to deprive an unlawfully reached decision of legal effect is for an order of certiorari to be made quashing that decision.

[19] In *R (Demetrio) v Independent Police Complaints Commission* [2015] EWHC 593 (Admin), Burnett LJ considered the question of relief in circumstances where an IPCC Commissioner agreed that part of a report into police misconduct was

irrational. Having found that the report could indeed be impugned on irrationality grounds, the learned lord justice concluded:

> "That alone is sufficient to justify quashing those parts of the IPCC final report relating to the allegation that Mr Demetrio was strangled."

[20] In *Re Hawthorne & White* [2020] NICA 33 the Court of Appeal considered an application to quash a public statement made by PONI in relation to the attack at Loughinisland in 1994. A previous public statement had been quashed by consent in 2012 whilst this application related to the vires of PONI in arriving at conclusions that police officers had been guilty of collusion or criminal behaviour. The court allowed the appeal from Keegan J, holding that PONI had exceeded its statutory powers. However, it agreed with her that the statement should not be quashed. Instead, the parties were invited to consider the question of remedy in relation to the "offending paragraphs", recognising that the express findings of the court may constitute sufficient remedy.

[21] It is clear therefore that the court may, in its discretion, either quash the report in toto or seek to quash offending paragraphs and excise certain findings.

[22] There is now no doubt, as a result of the concession made by the respondent, that the findings of the HET report in relation to investigative bias were wholly ill-founded, unsustainable and illogical. It is rare for a public authority to admit that it has behaved irrationally. The concession made in this case, albeit some eight years after these proceedings were instigated, is a welcome acknowledgement of wrongdoing by the HET.

[23] There are a number of features of the HET report which are of significance on the question of the appropriate relief this court should grant:

(i) It purports to be a final and comprehensive report in line with the HET objectives;

(ii) It is specifically stated to be, at least in part, a response to the PONI report;

(iii) The families had specifically asked the HET to address the question of investigative bias;

(iv) The report purports to arrive at definitive conclusions on this issue.

[24] If the court were to take the course of action proposed by the respondent, namely to excise all the relevant portions of the report touching on the issue of investigative bias, a number of consequences would flow. Firstly, it would no longer represent a final and comprehensive report since there would be no specific findings on the evidential material relevant to the question of bias. Secondly, there would be

no conclusions on the issue at all, despite the fact the families asked for it to be addressed and the HET agreed to carry out this task. Thirdly, it would not comply with its stated objective to respond to the findings of PONI.

[25] On 14 June 2022, in order to seek to overcome these shortcomings, the respondent proposed, in addition to the excisions, that a prologue be added to the HET report in the following terms:

> "In September 2015, in the course of judicial review proceedings in respect of the HET conclusions on the issue of investigative bias, and in a public statement of 1 December 2016 the PSNI confirmed that it fully accepts the Police Ombudsman's report into the RUC investigation into the bombing, including the finding relating to investigative bias."

[26] This proposed form of words represents an addition to the HET report, albeit by way of prologue. It also does not cure the problems alluded to above. It does not purport to analyse the evidence relating to investigative bias, or to reach specific findings. It does not fulfil the obligation assumed by the HET to address the question of bias as part of its report. It therefore, by definition, cannot comply with the stated objective of being a final and comprehensive report.

[27] Equally, the proposed prologue must be read in conjunction with the statement referred to of 1 December 2016. In this statement, ACC Hamilton expressly refers to 'redrafting' of the report to "unequivocally reflect the position." No such redrafting has been undertaken. Instead, a set of proposed excisions was produced to remove all references to the issue of investigative bias. This represented convenient airbrushing rather than unequivocal reflection. I accept that the fact the HET did not exist at the time of this statement and therefore alteration to the substance of the report may have been problematic but, nonetheless, the assertion made was inaccurate.

[28] Having carefully considered the competing positions, and recognising that there is much in the HET report which is uncontroversial, I have nonetheless concluded that the proportionate and efficacious remedy is for the court to quash the HET report in its entirety. The findings in relation to investigative bias are infected by irrationality and it is not possible to remedy this legal wrong by mere excision. To do so would cause the HET report to fail to meet its stated objectives and, in particular, render it incapable of addressing a key issue as far as the applicant and the families of the victims are concerned.

Conclusion

[29] The applicant's claim therefore succeeds and I make an order of certiorari in relation to the HET report dated 20 May 2014.

[30] I am minded to order that the respondent pay the applicant's costs of these proceedings but will consider any submissions to the contrary.