Neutral Citation No: [2022] NIQB 19 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HUM11792** *ICOS No.* **21/074334** *Delivered:* **15/03/2022**

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 PAULA LAVERY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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Hugh Southey QC and Mark Bassett (instructed by KRW Law LLP) for the Applicant
Tony McGleenan QC and Michael Egan (instructed by Crown Solicitor's Office) for the proposed Respondent

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HUMPHREYS J

Introduction

[1] On 24 September 1992 Leonard Fox was shot dead whilst working at a property at the Ballybeen Estate in Dundonald. The killing was admitted by the UDA/UFF.

[2] These tragic events were the subject of a review by the Historical Enquiries Team ('HET'). The HET report reveals that the victim was warned a month earlier about the threat to his life if he continued to work in loyalist areas. One man was subsequently charged with the murder of Leonard Fox but later acquitted.

[3] The HET concluded that the original investigation was well managed and there were no new lines of enquiry which could bring about any prosecution of those responsible for the murder.

[4] This application for leave to apply for judicial review arises out of a refusal by the Police Service of Northern Ireland ('PSNI'), the proposed respondent, to confirm the existence of an 'Out of Bounds' ('OOB') Order.

The Impugned Decision

[5] On 3 February 2020 the solicitors for the applicant wrote to the PSNI making the following request:

> "We would be obliged to know if you are in a position to forward confirmation of the existence of an 'Out of Bounds' order/directive for any period prior to the said date and time."

[6] By a reply dated 13 November 2020 the confirmation being sought was denied and the proposed respondent stated:

> "material relating to the investigation cannot be disclosed to the public, except following the direction of a court, or production of a court order."

[7] On 24 March 2021 the applicant's solicitors renewed their request in relation to the existence or otherwise of an OOB Order. On 29 March 2021 this was again rejected.

[8] A solicitor acting for the applicant has deposed to a conversation which he had with DI Millar of the PSNI Legacy Investigation Branch on 22 April 2021 in respect of a different 'legacy' case. The note of this conversation recounts the following:

> "I do see that you have asked about Out of Bounds. Previously we did answer this question. But in good old KRW Law fashion after we answered on a couple of occasions we started to receive various template letters in relation to Out of Bounds matters. As it stands, we are not doing them. We simply do not have the resources."

[9] This was confirmed in further correspondence from the proposed respondent dated 14 May 2021.

[10] A pre-action protocol letter was sent by the applicant's solicitors on 15 June 2021 challenging the failure to confirm or refute the existence of an OOB Order and the apparent practice or policy underpinning this refusal. Inter alia, it was contended that this was in breach of the common law duty to provide reasons; the applicant's Convention rights; the common law principles of rationality and fettering of discretion.

[11] In its pre-action response dated 2 July 2021 the proposed respondent:

(i) Denied that article 2 could have any application in this case; and

(ii) Stated that it could not confirm the detail of any investigation to the public without a production order or order of the court.

[12] An application for leave to apply for judicial review was launched on 23 September 2021. This included an application for an extension of time in the event that the court considered the application to be out of time.

Delay

[13] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[14] In this case, the information being sought by the applicant's solicitors was unequivocally refused on 13 November 2020. This is when the grounds for the application first arose. Proceedings ought therefore to have been commenced by 13 February 2021. The delay in question is a period of over seven months.

[15] The leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated at para [21]:

> "The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantial hardship to, or substantial prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding."

[16] The Court of Appeal also made it clear in that case:

> "If there has been delay, the application for leave should include (a) an application to extend time stating the grounds relied on and (b) an affidavit explaining all aspects of the delay."

[17] The court does not have any affidavit explaining all aspects of the delay in the instant case, despite the relief by way of an extension of time being sought in the Order 53 statement.

[18] The affidavit from the applicant's solicitor states that at the time of commencement of the proceedings an application for legal aid remained undetermined.

[19] The date and progress of any legal aid application is not deposed to in evidence. In any event, this court has previously cautioned against the expectation of practitioners that applications for public funding alone would given rise to a 'good reason' under Order 53 rule 4 in *Re Watterson* [2021] NIQB 16.

[20] In *Re Fionda (A Minor)* [2018] NIQB 51, Sir Anthony Hart commented:

> "When a prospective applicant for judicial review is already well outside the three month period within which Order 53 proceedings are to be brought there is a heavy burden on the applicant's advisers to move as rapidly as possible to institute proceedings … If legal aid is being sought in my opinion an applicant should issue the Order 53 summons and then ask the court not to proceed until the legal aid position is resolved."

[21] There is no evidence in this case that the application for legal aid was made within the three month time period. There is no basis upon which the court could be satisfied that the 'heavy burden' alluded to by Sir Anthony Hart has been met. In the circumstances, no good reason has been shown to extend time.

[22] The court always retains a discretion to hear cases where there is some public interest in so doing. It is evident that in certain legacy killings, the issue of the existence or otherwise of an OOB Order has proved significant. For instance, the Police Ombudsman report into the killing of Seamus Fox in April 2010 recognised that the use of OOB Orders may be a necessary policing tactic but had the potential to diminish the ability of the police to respond to day to day requirements.

[23] However, this does not equate to a finding that there is a public interest in this matter proceeding to hearing despite the evident and unexplained delay. For reasons which I will expand upon below, I find that there is no such public interest.

[24] The application for leave to apply for judicial review is out of time and no good reason having been shown for an extension of time, it is hereby dismissed.

The Application for Leave

[25] Since I heard full argument on the issues, I propose in any event to address the question of the merits of the applicant's case. In doing so, I bear in mind the test for leave which obliges the applicant to demonstrate an arguable case with reasonable prospects of success.

The Grounds for Judicial Review

[26] The applicant emphasises that the proposed respondent was wrong to state, as it did in correspondence, that it could not disclose the information sought without a court order. In a very different context, the Court of Appeal in England & Wales held in *R v Chief Constable of North Wales ex p. Thorpe* [1999] QB 396:

> "Each case must be judged on its own facts. However, in doing this, it must be remembered that the decision to which the police have to come as to whether or not to disclose the identity of paedophiles to members of the public, is a highly sensitive one. Disclosure should only be made when there is a pressing need for that disclosure. Before reaching their decision as to whether to disclose the police require as much information as can reasonably practicably be obtained in the circumstances. In the majority of the situations which can be anticipated, it will be obvious that the subject of the possible disclosure will often be in the best position to provide information which will be valuable when assessing the risk." [at 428B]

[27] Thus the common law does permit disclosures by the police when there is sufficient public interest justification to do so.

[28] The applicant also relies on the statutory functions of the police enshrined in sections 31A and 32 of the Police (Northern Ireland) Act 2000, including the securing of community support and bringing offenders to justice. It is contended, in light of the existence of the discretion to disclose and the need to further those principles, that a policy of non-disclosure of OOB Orders is unlawful and/or represents an unlawful fetter on discretion.

[29] It is important to place the particular request at issue in these proceedings in context. There is no suggestion, let alone evidence, that there was an OOB Order in place at the time of the murder of Mr Fox. The possible existence of such an order does not feature anywhere in the HET Report nor is there any material in the correspondence from the applicant's solicitors which could be said to give rise to any suspicion of an OOB Order being in force.

[30] The issue was first raised in the correspondence of February 2020 and this would appear to be part of a series of requests made by the same solicitors in respect of legacy litigation. The reference to "various template letters" in the note of the phone conversation suggests that this was a request made across a series of cases. The applicant relies upon extracts from a variety of previous reports including that of the Smithwick Inquiry and the Rosemary Nelson Inquiry in order to contend that OOB Orders can be of significance in identifying circumstances which may give rise

to evidence of collusion. However, there is no evidence that anyone has suggested an OOB Order was in place at the time of the murder of Mr Fox.

[31] I accept the submission that insofar as the proposed respondent has stated material relevant to an investigation cannot be disclosed without a court order, this is wrong in law. However, the evidence before me does not substantiate the existence of a blanket policy in relation to OOB Orders. Rather it indicates that the police will not dedicate resources to answering generic or speculative requests. If there is material to justify a claim that an OOB Order was in place, and it was relevant to the circumstances of the death, this would trigger the exercise of the police's discretion in relation to disclosure.

[32] On this analysis, there is no unlawful policy nor has any fettering of discretion occurred. In an appropriate case where a proper basis for the request is established, the proposed respondent will have to consider whether disclosure should be made applying the correct legal test. In the absence of a proper basis, however, I am not satisfied that any duty arises and I therefore find that this ground of challenge is unarguable.

[33] The applicant also relies on article 10 of the ECHR to argue that a right of access to the information sought arises. Article 10 protects freedom of expression but it has been argued, in a series of cases, that this right itself gives rise to a duty to disclose information on the part of public authorities. In two cases, *Sugar v BBC* [2012] UKSC 4 and *Kennedy v Charity Commission* [2014] UKSC 20, the Supreme Court has rejected the argument that article 10 imports such a general duty of disclosure.

[34] The applicant asserts that the views of the majority in *Kennedy* were obiter, given that the appellant's case failed for other reasons. She also relies on a recent decision of the Grand Chamber, in *Magyar Helsinki v Hungary* [2020] 71 EHRR 2, where it was stated:

> "The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force … and secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular 'the freedom to receive and impart information' and where its denial constitutes an interference with that right." [para 156]

[35] The Grand Chamber went on to consider the factors which may be relevant to the determination, including:

(i) The purpose of the person requesting the information;

(ii) Whether the information sought is in the public interest;

(iii) Whether the person seeking the information is acting as a public watchdog; and

(iv) Whether the information is readily available.

[36] In *Moss v ICO* [2020] UKUT 242 (ACC) Upper Tribunal Judge Wright was asked to find that *Magyar* should be followed by the domestic courts but stated:

> "As demonstrated above, *Magyar* has expanded the understanding of Article 10(1) so that as a matter of ECtHR law it now covers, albeit in limited circumstances, a right of access to information. This was not disputed before me. However, the view of five members of the Supreme Court in *Kennedy*, as well as the Court of Appeal in *Kennedy* and two if not three members of the Supreme Court in *Sugar (No.2)*, in my judgment, is that domestic law does not consider Article 10(1) extends to include a right of access to information, and I consider myself bound by the rules of precedent to follow this view."

[37] I consider that the analysis of Judge Wright is correct. Although this aspect of the judgment in *Kennedy* was technically obiter, it was arrived at following full argument before the Supreme Court. In any event, the determination relating to the scope of article 10 was part of the ratio of the court in *Sugar*.

[38] Section 2 of the Human Rights Act 1998 requires a domestic court to "take into account" any decision of the European Court of Human Rights when determining a question which has arisen in connection with Convention rights. This, as the House of Lords held in *Kay v Lambeth LBC* [2006] 2 AC 465, preserves the principle of stare decisis, recognised by Lord Bingham as a "cornerstone of our legal system." When faced with an apparent conflict between a domestic judgment with precedent effect and a Strasbourg decision, he held:

> "As Lord Hailsham observed ([1972] AC 1027, 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention

> arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here."

[39] As Scoffield J commented in *Re ABO Wind Farm (NI) Limited's Application* [2022] NIQB 3:

> "Although an undoubtedly technical point, a decision of the Supreme Court on an appeal from a court in England and Wales (which does not involve a devolution matter) is not binding on the courts of Northern Ireland. Only a Supreme Court decision on appeal from the courts of this jurisdiction is so binding. That is the effect of section 41 of the Constitutional Reform Act 2005."

[40] On this analysis, it could be argued that neither *Kennedy* nor *Sugar* are binding on this court and I would be free to follow the Grand Chamber decision in *Magyar*. However, to do so would be to ignore the highly persuasive value of the decisions of the Supreme Court reached after full argument on the issues. I therefore propose to follow the approach set out in *Kennedy* and *Sugar* and to hold that the applicant's claim to a right to disclosure on the basis of article 10 is unarguable.

[41] If I had been persuaded that *Magyar* represented the law in this jurisdiction, I would have rejected the applicant's claim as being unarguable in any event. In the absence of any evidential basis in relation to the OOB Order information sought, it cannot be said that disclosure was in the public interest. The applicant is not herself equivalent to a public watchdog and the circumstances of her father's death have been reviewed by the HET who identified no need for any further disclosure. Both as a matter of law and fact, therefore, this ground of challenge is unarguable.

[42] The final ground of appeal relates to the alleged violation of article 2. Following the decision of the Supreme Court in *Re McQuillan* [2021] UKSC 55, it is clearly arguable that this death, occurring as it did in 1992, falls within the 'genuine connection' test articulated by the Supreme Court and therefore article 2 rights are engaged.

[43] The question to be considered therefore is whether the denial of access to the information sought is arguably a breach of article 2. The applicant says that this was a legitimate request based on the suspicion of collusion, which is itself a public interest issue, and the information ought to be readily available.

[44] However, the court returns to the fundamental point. There is no evidence of the use of an OOB Order in this case as part of some collusion between agents of the state and the killers of Mr Fox. There is only a speculative request for disclosure of information based on the findings and comments made during the course of investigations into wholly separate deaths. It cannot be said that in any killing which occurred in Northern Ireland between 1988 and 2000 that article 2 generates an automatic right to disclosure of information from the police. It is necessary that any such request for disclosure has a basis in fact as well as being in the public interest.

[45] The necessary substratum of evidence does not exist in this case and therefore it cannot be said to be arguable that the failure to make disclosure is a violation of article 2.

Conclusions

[46] For the reasons set out above, the application for judicial review is out of time and no good reason has been established for an extension of time. For that reason, the application must be dismissed.

[47] Had I been persuaded that there was a good reason, I would nonetheless have refused leave on the merits on the basis that each of the grounds for judicial review was unarguable.

[48] I propose to make no order as to costs inter partes.