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Ref: HUM11868

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

ICOS No. 16/005507

Delivered: 13/06/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY COLIN STUART
FOR JUDICIAL REVIEW

Hugh Southey QC and Blinne Ní Ghrálaigh (instructed by KRW Law) for the Applicant
Tony McGleenan QC and Michael Egan (instructed by the Crown Solicitor's Office) for
the Respondent

HUMPHREYS J

Introduction

[1] The applicant's brother, Telford Stuart, was shot dead on 2 October 1972 at Twinbrook outside Belfast. He was a serving soldier in the British Army, a Sapper in the Royal Engineers but also a member of a secret undercover unit, the Military Reaction Force ('MRF').

[2] The MRF used the cover of a laundry collection service, Four Square Laundry, to attempt to garner intelligence and information in relation to Republicans. Its modus operandi was to collect laundry from customers and then test them for any firearms or explosives residue before cleaning and returning them. It also afforded opportunities for surveillance work to be carried out in relation to properties and vehicles.

[3] It was whilst in such a laundry vehicle that Telford Stuart was shot by two gunmen, the murder later admitted by the Provisional IRA. One man, David Wilson, was prosecuted in relation to the incident and in June 1973 he pleaded guilty to offences including possession of firearms with intent and membership of the IRA. He was sentenced to 12 years' imprisonment. An inquest which was opened in April 1973 was adjourned and not subsequently resumed.

[4] The Historical Enquiries Team ('HET') published its Review Summary Report ('RSR') into the murder in April 2009. The HET findings included the following:

- (i) The IRA was responsible for the murder and it was carried out following the detection of the existence of the undercover unit;
- (ii) The claim that the operation was compromised by members of the IRA was described as 'plausible';
- (iii) Open source material referred to indicated that the IRA had identified two of its members, Seamus Wright and Kevin McKee, were working as double agents and it was they who revealed the existence and operation of the MRF to the IRA. Mr Wright and Mr McKee were both members of the 'disappeared', their bodies having been located many years later in 2015;
- (iv) There were no new lines of inquiry which could be pursued with a view to bringing about the identification of those responsible for the murder.

The Impugned Decision

[5] On 21 November 2013 the BBC broadcast a Panorama documentary into the activities of the MRF which included interviews with former members. This prompted the then Director of Public Prosecutions ('DPP'), Barra McGrory QC, to write to the Chief Constable of the PSNI the following day expressing his "great concern" about the programme. The letter states:

"I have viewed with great concern the Panorama broadcast last evening documenting the activities of the MRF, a unit of the British Army operating in Belfast in the early 1970's.

Former members of this unit appear to have claimed on camera that they considered themselves to have been authorised to operate outside the law of Northern Ireland. This raises the clear possibility, if not probability, that serious criminal offences were committed.

Accordingly, in accordance with section 35(5) of the Justice (NI) Act 2000 [sic], I am asking you to initiate an investigation into the activities of this unit, to include the authority upon which the unit and its commanders acted.

I look forward to receiving your report including any evidence or information arising out of your investigation and your recommendations as to prosecution."

[6] Following correspondence, solicitors acting for the PSNI confirmed on 10 November 2015 that it did not consider that the section 35(5) request included the actions of terrorists resulting in the death of members of the MRF. The PSNI had therefore determined that the scope of the investigation did not include the murder of Mr Stuart. It is this decision which is under challenge in these judicial review proceedings.

The Application for Judicial Review

[7] As originally constituted, the application for judicial review sought to rely, inter alia, on the state's procedural obligations arising under article 2 of the ECHR. Leave was granted by Maguire J on 12 September 2016 but the proceedings were subsequently stayed pending the outcome of the Supreme Court appeals in *Re McQuillan* [2021] UKSC 55.

[8] As a result of that decision, the applicant accepts that the article 2 obligations are not engaged on the facts of this case. The amended Order 53 statement seeks declaratory relief on the basis that the Chief Constable has misdirected himself in fact and law in refusing to include the circumstances of Mr Stuart's death in the police investigation into the activities of the MRF. The applicant says that this exclusion was irrational and contrary to section 35(5).

The Legal Framework

[9] Section 35(5) of the Justice (Northern Ireland) Act 2002 ('the 2002 Act') provides:

"The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director –

- (a) information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and
- (b) information appearing to the Director to be necessary for the exercise of his functions."

[10] This was the subject of judicial consideration by the Court of Appeal in *Re Beatty's Application* [2022] NICA 13, a case concerning the alleged failure by the DPP to instruct the PSNI to accelerate the investigation into a Troubles related murder. McCloskey LJ observed:

“... section 35(5)(a) must be construed in a manner which furthers the legislative intention already identified namely the public interest in the investigation, prosecution and identification of offenders. The Chief Constable/Police Service is of course an independent public authority: but its independence is not absolute.”
[para 32]

[11] The extent to which the DPP could seek to direct a particular police operation was held to be one of “demonstrably limited scope”, recognising the need for the Chief Constable to exercise autonomous control over budgets, allocation of resources, policies and the formulation of criteria.

The Grounds for Judicial Review

[12] The evidence of Detective Superintendent Jason Murphy, Deputy Head of the Legacy Investigations Branch (‘LIB’) is that, following the November 2013 referral from the DPP, steps were taken to ascertain which incidents would fall within its scope. It was established that the MRF operated between 1971 and 1973 and some 207 fatalities were identified during this period in the west Belfast and Tennent Street RUC station areas. Further assessment excluded cases where the deceased was a member of the security forces or where there had been a murder conviction. This caused the exclusion of the murder of Mr Stuart from the scope of the investigation.

[13] It was the view of the LIB that the investigation should focus on shootings by the Army rather than cases in which Army personnel had been killed. This view was raised by D/S Murphy in a meeting with the Assistant Director in the PPS in November 2016. On 8 December 2016 he received a communication from the PPS confirming that this was the intention of the section 35(5) referral. It was further stated that the investigation should consider whether there was any evidence that the murder investigation was compromised to protect the interests of the MRF.

[14] D/S Murphy raised this latter issue with Chief Inspector Neil McGuinness who advised that no evidence of any such compromise had been identified. In these circumstances the murder of Mr Stuart was not included in the investigation.

[15] A further review of this matter was carried out by both senior and junior counsel instructed on behalf of the respondent and the court was advised that there was no material to suggest the investigation was compromised.

[16] The LIB investigation concluded in February 2020 and a file submitted to the PPS. There is therefore no ongoing investigation.

[17] It is the applicant’s case that the scope of the section 35(5) direction is a matter for the court to determine. It is contended that the DPP cannot seek to narrow the

scope of the investigation since, as held in *Beatty*, the level of permissible intrusion is limited. Further, it cannot be the case that the Chief Constable can restrict the scope since that may undermine the purpose of the statute and the referral, namely to ensure proper investigation.

[18] At first blush, this submission is startling. It would mean that, in any case, the court would have to be asked what a section 35(5) referral actually means, even where there is no issue between the DPP and the Chief Constable. In support of his proposition, the applicant relies on the Supreme Court decision in *R (O) v Home Secretary* [2016] UKSC 19 where Lord Wilson said:

“... the court’s approach to the meaning of policy is to determine it for itself and not to ask whether the meaning which the Home Secretary has attributed to it is reasonable.” [para 28]

[19] Whilst this is not a matter of policy per se, the issuance of a communication pursuant to section 35(5) does trigger a legal duty on the part of the Chief Constable. If both the DPP and the Chief Constable placed an interpretation on such correspondence which was obviously wrong, then an aggrieved party would potentially have a right to seek to have the scope determined by a court exercising supervisory jurisdiction. I therefore approach this matter on the basis that there is one correct legal interpretation of the letter dated 22 November 2013.

[20] In order to understand the nature of the section 35(5) referral, it is necessary to consider the letter as a whole. The correspondence specifically references the Panorama broadcast and the claims made therein by members of the MRF. These were said to give rise to the possibility, or probability, of the commission of criminal offences. “Accordingly”, it is said, the section 35(5) referral was made.

[21] Applying well-established principles of interpretation, the role of the court is to seek to ascertain the objective meaning of the language used in a document by reference to what a reasonable person, possessed of all the relevant background knowledge, would have understood the words to have meant.

[22] The BBC documentary contained no reference whatsoever to the murder of Mr Stuart or the Four Square Laundry operation. It concerned the following alleged MRF activities:

- (i) The shooting of brothers John and Gerry Conway on 15 April 1972;
- (ii) The killing of Patrick McVeigh on 12 May 1972;
- (iii) The shooting of Joe Smith and Hugh Kenny on 22 June 1972;
- (iv) The murder of Daniel Rooney on 27 September 1972.

[23] Each of these incidents involved, it was claimed, the shooting of civilians by the undercover MRF unit. It was the claims made on camera by former members of the unit which prompted the letter from the DPP since they gave rise to the concern that criminal offences had been committed. The word 'activities' in the first and third paragraphs has a clear read across into the request which is being made of the Chief Constable.

[24] I have therefore concluded that the request made by the DPP was closely connected to the subject matter of the documentary. The language of the letter, including the use of the word 'accordingly', makes this clear. The Chief Constable was not being asked to conduct some all-encompassing investigation into all matters connected to the MRF but rather to investigate the activities as represented by the shootings carried out by undercover soldiers.

[25] As a result, I have concluded that the interpretation placed on the correspondence by the respondent is correct. The murder of Telford Stuart did not fall within the section 35(5) request.

[26] If, contrary to this approach, the correct standard of review is a rationality one then equally I find no basis to impeach the respondent's analysis. As was recognised by the Court of Appeal in *Re Frizzell's Application* [2022] NICA 14:

"The standard for judicial review in a case such as this is obviously a formidable one given that it concerns the decision making of a public body which is specialist and tasked with investigating crime." [para 24]

[27] It could not be said that the two primary criminal justice bodies in Northern Ireland, tasked with investigating and prosecuting crime, have both acted irrationally in their approach to the DPP's request under section 35(5).

[28] The applicant did not seek to go behind the assertion made by Chief Inspector McGuinness that there was no evidence that the police investigation into the murder of Telford Stuart had been compromised. Nothing therefore turns on this issue.

Conclusion

[29] For the reasons outlined, the application for judicial review is dismissed. I will hear the parties on the question of costs.