Judicial Communications Office

8 October 2021

COURT DELIVERS OMAGH BOMBING JUDGMENT

On 23 July 2021, Mr Justice Horner said **he was satisfied that there were certain grounds which give rise to plausible arguments that there was a real prospect of preventing the Omagh bombing that deserve to be fully investigated through an Article 2 ECHR compliant investigation**. **While not within his power to order an investigation in the Republic of Ireland, the judge said there would be real advantage if one were to take place simultaneously with one in Northern Ireland**. The court received OPEN and CLOSED material during the hearing. The judge, today, delivered his reasons for reaching this conclusion in an OPEN judgment. **He did not reach a conclusion on the evidence that there was a real prospect of preventing the bomb and said this was a matter for any inquiry.**

Background

The events leading up to the Omagh bombing on 15 August 1998 and the investigation and inquiries that took place afterwards are set out in paragraphs [2] to [143] of the judgment. Michael Gallagher ("the applicant"), whose son was killed in the bomb, was granted leave to judicially review the decision of the Secretary of State for Northern Ireland, Theresa Villiers MP, dated 12 September 2013 refusing to hold a public inquiry (or any inquiry that complied with Article 2 of the ECHR) into whether there had been a failure to investigate whether the Omagh bomb could have been prevented. The applicant is seeking a public inquiry that straddles both jurisdictions of Northern Ireland and the Republic of Ireland. The court received and analysed a significant amount of evidence including CLOSED material.

Legal Principles

The focus in this case was whether a plausible argument had been made out that there had been a breach of the obligation on the State to take reasonable steps to prevent the Omagh bombing and to conduct an Article 2 compliant investigation into that failure. The allegations relating to the issue of the preventability of the explosion are set out in paragraph [144]. The judgment also deals with the relevant legal principles of Article 2 ECHR and the Human Rights Act 1998 and the obligations on the State in paragraphs [146] – [189]. The UK Supreme Court[1] ("UKSC") has recently determined the characteristics that an Article 2 compliant investigation is required to have (see paragraph [194]). The court considered the issues of causation, rationality and proportionality, and limitation in paragraphs [195] – [214].

GROUNDS OF PREVENTABILITY

The applicant put forward 10 grounds relating to the issue of the preventability of the Omagh bomb.

Ground 1: Anonymous phone call of 4 August 1998 in which it was indicated that an attack would be made on police on 15 August 1998, and the disappearance of the "threat book" at Omagh police stations which should have recorded all such threats (paragraphs [215] – [236])

[1] *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7

On 4 August 1998, an anonymous call was received by a CID detective constable at Omagh RUC station, warning that two individuals ("C") and "(D") were arranging for four AK47 rifles and two rocket launchers to be moved from the Republic of Ireland into Northern Ireland on behalf of the Continuity IRA. It was claimed that the weapons would be brought in by "E" between 8 and 9 August to a specified address which was the family home of "F". They would then be moved to an unknown address two or three miles from Omagh on 15 August 1998 where they would be used in an attack on the police.

The detective constable briefed the Detective Chief Inspector and Special Branch officers who were on duty in Enniskillen but the Senior Divisional Commander was not informed until 15 August 1998 and the CID were not informed. When the Police Ombudsman ("PONI") tried to locate the "threat book" in which the warning should have been recorded during her investigation in 2001 it could not be found. The court said that to date no satisfactory explanation had been given for the book's loss. The Chief Constable at the time claimed that a number of contacts and actions were initiated immediately but these did not include surveillance or arresting C and D for questioning. Special Branch took the view, on the material available to it, that the phone call was made for an ulterior motive of creating circumstances where surveillance would be redirected to the border in order to detect certain smugglers bringing laundered fuel over the border. The court commented:

> "A fair view of all the evidence as it was available in early August 1998 leads inexorably to the conclusion that the phone call of 4 August 1998 giving the 15 August as the date of a proposed attack on the police had nothing whatsoever to do with the bombing which took place in Omagh. It was a tragic coincidence. Whatever provoked that phone call on 4 August 1998 it was most certainly not to warn of any imminent bomb attack on Omagh which would place all of its inhabitants and visitors at risk."

The court said it was worth noting that the operational policing response to the threat would have been to increase security around police stations and limit the number of officers on the ground to deny the terrorists easy targets. Vehicle control points would not have been set up. The court was satisfied that the threat was fairly and objectively assessed by the authorities at the time and dismissed as an attempt to goad them into action to apprehend smugglers laundering illegal fuel. It said that the PONI's criticism of the police and its failure to draw the phone call of 4 August to her attention appeared to be justified but that when the nature of the phone call was analysed it was not possible to conclude that it raised a plausible argument that it required preventative action or that if the authorities had responded to the threat there would have been a real prospect that the Omagh bombing could have been prevented.

The court said the authorities could not reasonably have expected on the information they had that dissident republicans ("DRs") were going to explode a bomb in Omagh on 15 August and that such an attack was not objectively verifiable. It considered that the telephone call did not constitute a "real or immediate threat" to the applicant or to any identifiable group to which he belonged but was a threat specific to the police. The operational measures which the authorities had to take in the context of that risk had to be "judged reasonably" and be such that they "might have been expected to avoid that risk". The court said the phone call of 4 August gave rise to no specific or general risk to Omagh and in the circumstances the response of the police was both reasonable and proportionate.

The court was not satisfied that ground 1 raised a plausible argument that if acted upon on its own, or if taken in conjunction with any of the other grounds, there was a real prospect that the Omagh bomb could have been prevented.

Ground 2: Information passed to police between June and August 1998 by the former British security agent known by the name of Kevin Fulton relating to DR activity

On 28 July 2001, the Sunday People published a story which identified Kevin Fulton as an RUC agent and claimed he had tipped off his handler about the Omagh bomb three days before it exploded. The explanation given in the article for the RUC's failure to act was that the bomb-maker ("AB") was also an RUC agent. The PONI in her 2001 Report reached a number of conclusions in respect of the information provided by Kevin Fulton, including that he passed information relating to alleged DR activities to a CID handler on five occasions between June and August 1998, but had never claimed that the bomb was destined for Omagh or had taken the RUC to the location where the bomb mix was being made as had been claimed in the newspaper. The PONI concluded that "even if reasonable action had been taken in respect of that intelligence alone it is unlikely that the Omagh bomb could have been prevented".

Details of the information that Kevin Fulton provided to the authorities were set out in the Bridger Report[2]. This included that on 11 August 1998 Kevin Fulton was told that the Real IRA was about to "move something North over the next few days". The court said the intelligence provided by Kevin Fulton cannot be dismissed summarily. It noted that the respondent has tried to portray his evidence as being "irredeemably unreliable" but that favourable assessments had been made by others of his reliability and trustworthiness in the past and reliance had been placed on his intelligence. The court added, however, that there could be no doubt that some of the claims attributed to Kevin Fulton by the Sunday People were incorrect.

The court said it was arguable that the intelligence supplied by Kevin Fulton either on its own, or more importantly in conjunction with other intelligence about the activities of those who planned and planted the Omagh bomb (and other bombs) had a real prospect of preventing this tragedy. It said there was a strong prima facie case for proactive steps being taken against those involved in acts of violence on both sides of the border but there may have been good reasons why the authorities adopted a cautious approach. These included that the risk of a covert human intelligence source in the Real IRA would be uncovered and the risk that action against those involved would result in the widening and deepening of the conflict resulting in bomb attacks in mainland Britain and ultimately the end of the peace process:

> "Such decisions had to be made in real time and have to be judged in real time and must not be judged with the hindsight of the Omagh bomb and its tragic consequences. However, ground 2 does have a part to play in determining whether or not the Omagh bombing could have been prevented. It is also important to emphasise that I am not reaching any conclusion on the facts, just assessing whether those facts give rise to an arguable breach of Article 2. It is also important that this ground is considered together with grounds 6, 7 and 9."

Ground 3: Information provided by David Rupert

[2] This report was prepared by Martin Bridger who was a former PONI investigator and who had assisted with the 2001 investigation. His report was commissioned by the Omagh Support Self Help Group chaired by the applicant, Michael Gallagher.

The applicant claimed that David Rupert, an agent being jointly operated and managed by the FBI and MI5 at the time of the Omagh bomb, had supplied the authorities with the names of people linked to the Banbridge bomb which exploded on 1 August 1998. It was suggested that this information, if provided to those investigating the Banbridge bomb, may have permitted identification of those who were involved in the Omagh bomb before it took place. It was also submitted that David Rupert identified Omagh as a possible target for a bomb in an email he sent on 11 April 1998 advising that DRs from Donegal had possession of a bomb for use in NI with two viable targets being Derry and Omagh.

The respondent contended there was no information provided by David Rupert which could arguably give rise to a real and immediate risk to the people of Omagh in August 1998. The court considered there was nothing in the email of 11 April 1998 to suggest that Omagh and Derry were anything other than guesses. Also, the information was acted upon by An Garda Siochána ("AGS") at the time who carried out a successful disruption operation on those involved. On 6 March 2006, the role of David Rupert was explained to the Omagh families and copies of his email distributed. It was made clear to all concerned that the intelligence was not related to the Real IRA unit which carried out the Omagh bombing.

The court was not satisfied that the email of 11 April 1998, or any other information provided by David Rupert, reached the necessary threshold on its own:

> "The email was speculation on the part of Rupert about the possible actions of a dissident group far removed from those who carried out the attack four months later. I do not see how this email, either on its own or considered with other evidence gives rise to the right to have an Article 2 investigation. Looking at the totality of David Rupert's evidence, whether viewed separately or along with other intelligence, I am not satisfied that it gives rise to a plausible argument that if acted upon it would have had a real prospect of preventing the Omagh bombing."

Ground 4: Information sent to the RUC by AGS on 13 August 1998 relating to the particulars of the red Vauxhall Cavalier that was used in the Omagh bomb

The applicant contended that the RUC were given information by AGS on 13 August 1998 relating to the red Vauxhall Cavalier that was used in the Omagh bombing. It was claimed there were two sources for this: evidence from a Detective Sergeant in AGS (DS John White) and "a very reliable individual" whose identity the journalist John Ware did not feel able to disclose. Sworn evidence of an Assistant Chief Constable, however, said the only information passed by AGS on 13 August 1998 was that a red Vauxhall car had been stolen. This was normal information sharing in accordance with agreed protocols and the car was one of 125 vehicles reported as stolen and passing between AGS and the RUC from 21:00 on 12 August to 15 August 1998. The court noted that it was highly relevant that there was no suggestion that this car was to be used for any terrorist purpose never mind a terrorist attack.

The evidence from AGS was given to the Nally Investigation which had been established by the Irish Minister for Justice following the 2001 PONI Report. This confirmed that no intelligence relating to the car being destined for use by DRs was ever received by AGS prior to the bombing. The Nally Report recorded that DS White never made the case that AGS had provided to the RUC in advance of the Omagh bombing particulars of the car used by terrorists. The court said:

> "On the applicant's case as presented in the OPEN hearings there are no grounds for concluding that the information provided by AGS to the RUC related to any car which was to be used in a bombing, never mind one which was to take place in Omagh. The AGS did provide details of a stolen car, but this was one of many that had been stolen and certainly was not earmarked as a car which was to carry a bomb. The evidence is weak and does not support a plausible argument either on its own, or with other information, that it would have had a reasonable prospect of preventing the Omagh bombing."

Ground 5: A briefing to the Senior Operational Commander South Region on 14 August 1998 indicating that information had been received from AGS in connection with a potential borne improvised explosive device on 15 August, resulting in a military operation being deployed in the South Armagh/South Down area on the morning of 15 August 1998

It was alleged that information had been received from AGS in connection with a potential car bomb on 15 August 1998 resulting in a military operation being deployed on the south Armagh/south Down area that morning. The claim appeared to be based on evidence from DCS Norman Baxter to the Northern Ireland Affairs Committee ("NIAC") and on allegations made in the BBC Panorama programme. The court noted that the claim was investigated in some detail by Sir Peter Gibson who reached the conclusion that there was no evidence whatever to make good these assertions. The court was satisfied that there was no substance to this allegation and furthermore that no arguable case had been made out that this information gave rise to a breach of Article 2. It said "the allegation has been fully investigated and has been found to be baseless".

Ground 6: Surveillance operations relating to events surrounding the Omagh bomb that were reported on in a BBC Panorama programme; in particular, telephone and vehicle monitoring carried out by GCHQ
Ground 7: The tracking and pattern of telephone usage by DRs and the connections arising between different bomb attacks, including the same mobile telephone being used in the Omagh bomb and the bomb in Banbridge on 1 August 1998

The court considered these grounds together along with ground 9. It referred to the report produced after the Omagh bomb dealing with cell-site analysis of the various activities of the DRs which was relied upon in the successful civil claim. The report analysed mobile phone activity to and from a series of mobile numbers around the time of several bomb attacks between 1 April and 15 August 1998 and on the day the red Vauxhall Cavalier was stolen. This information was not available to the RUC prior to the Omagh bomb. No cell site analysis had been carried out in relation to the earlier bomb attacks which it was claimed could have alerted the authorities to a real and immediate risk of the bomb attack in Omagh and which could have enabled the bomb to be prevented.

The court remarked that no satisfactory explanation had been offered by the respondent as to why such an analysis could not have been carried out at an earlier stage and why it related only to some, but not all, of the pre-Omagh bombing incidents. The court also noted that there was no information as to whether such an exercise was carried out in the Republic of Ireland after the recovery of explosives and two explosions between January and March 1998. Further, there was no evidence in the OPEN materials as to whether any request had been made to the authorities in the Republic of Ireland to find out whether they had attempted to carry out this analysis or whether a request had been refused or granted:

> "What the court does know is that after the Omagh bombing cell-site analysis was carried out and the evidence used to obtain a judgment in the civil courts against some of those involved in the Omagh bombing. This cell-site analysis provides clear prima facie evidence to the authorities as to whom was involved in some of the terrorist attacks in the six months leading up to Omagh. The authorities were entitled, given the evidence, which should have been available, to use it to disrupt those DRs who had been involved in the previous incidents."

The court noted that the authorities had powers of arrest, powers to enter and search premises, and powers to stop and detain:

> "There is no doubt that the authorities in Northern Ireland could have made life very uncomfortable for those DRs who could have been identified on the OPEN evidence which was potentially available as being involved in terrorist activities in the six months leading up to Omagh. Of course such activities might have had repercussions and it is entirely proper that those in authority considered what those repercussions were likely to be. But the court at present is looking only at what is arguable. … It is arguable that such a pro-active policy would have had a real prospect of preventing the Omagh bomb because it would have made life so much more difficult for the DRs living in Northern Ireland who were intent on carrying out a terrorist campaign."

The court said it did not know if any steps had been taken to share intelligence with AGS which would have enabled them to target those DRs involved in the earlier incidents. It commented that DCS Baxter's evidence to the NIAC made sense in that he found it difficult to understand why active steps were not taken to hunt down and bring the perpetrators of the earlier terrorist attacks in 1998 to justice and why that key intelligence was apparently not shared with CID, thus making investigation of their activities more difficult. The court, however, also noted that no loss of life had been caused by any of the explosions prior to 15 August 1998 and the exercise of powers against the DRs could have provoked a reaction that would have risked the peace process and the possibility of a return to open hostilities with the Provisional IRA being unable to avoid being dragged back into the armed struggle:

> "Fortunately these are not matters for this court on the hearing of this application but it is important that I highlight them. They are not easy decisions for the authorities and the government make. There was much to lose by escalating security prior to Omagh, although it may not appear that way by looking back on what happened in the shadow of the Omagh bomb. The evidence is that those who played leading roles in terrorist incidents which preceded Omagh could easily have been identified and targeted. … However, I am satisfied that arguable grounds are disclosed in respect of grounds 6 and 7 and 9 and it is important that an Article 2 compliant investigation be held to look into them. Furthermore, if possible, it makes sense that a similar inquiry is held in the Republic of Ireland looking at the self-same issues and, in particular, what intelligence was shared between both states. If the full panoply of legal powers available to the authorities had been used to disrupt these terrorists' activities, especially if co-ordinated on both sides of the border, then arguably there must have been a real prospect of preventing the Omagh bombing."

Ground 8: Information shared by AGS with the RUC relating to intelligence obtained by Detective Sergeant John White from the agent known by the name of "Paddy Dixon", relation to DR activity

DS John White claimed that prior to the Omagh bombing, he was a handler for an informant, Paddy Dixon, who was involved in stealing cars for known criminals including DRs. The contents of a report submitted by DS White were summarised by the Nally report which concluded that the allegations made by him were inconsistent and without foundation.

The court said that taking the applicant's evidence at the highest, no information was made available to the RUC by the AGS about the activities of DS White's informant and his activities prior to the bombing which could arguably have constituted a real and immediate risk to the life of the people of Omagh.

Ground 9: Detective Chief Superintendent Norman Baxter's evidence to the NIAC to the effect that investigators into previous attacks in 1998 did not have access to intelligence which may have enabled them to disrupt the DR gang by way of arrest or house searches prior to the Omagh bomb

The court considered this ground in conjunction with grounds 6 and 7 (see above). On 11 September 2009, DCS Baxter, the former Senior Investigating Officer into the Omagh bomb, gave evidence to the NIAC. He said that if telephone numbers of suspected terrorists had been available they should have been shared with investigators at an early stage as that could have helped the Omagh inquiry team. DCS Baxter refused to speculate on what might have happened if some of those had been arrested but accepted that the disruption may have prevented the Omagh bombing. The court said that DCS Baxter's opinion was "deserving of respect and he has no obvious axe to grind". The then ACC Harris, when giving evidence to the NIAC, hinted at two reasons why Special branch may have acted cautiously in the handling of intelligence: "One was the sensitivity of the relationship with GCHQ and then the sensitivity of the particular phone number".

As a consequence of NIAC's conclusion, the issue of intelligence sharing practices resulted in the Chief Constable referring to PONI a number of issues including both the RUC's relationship with GCHQ and the way in which intelligence was handled in relation to the Omagh bomb. PONI issued a report in 2014 after it had reviewed materials held in relation to previous inquiries and had seen the CLOSED Gibson report. PONI reached three separate conclusions:

- The actions of the officers were reasonable given what they thought the restrictions on disclosure placed on police were at that time;
- No evidence had been identified that intelligence was available to the police which, if acted upon, could have prevented the Omagh bombing;
- Special Branch acted in accordance with a reasonable understanding of the agreement and legislation in place in 1998 and any breach of the Interception of Communications Act 1985 could have rendered evidence obtained inadmissible in any subsequent criminal proceedings resulting in the proceedings being stayed and risk jeopardising the credibility of the Omagh investigation.

The court said it was clear that Special Branch officers acted cautiously and reasonably on the basis of what they considered to be their legal obligations. The court was, however, satisfied from the evidence of DCS Baxter that there was an arguable case of breach of Article 2 either taken on its own or in conjunction with grounds 6 and 7:

> "There was arguably a failure of policy. Instead of encouraging the authorities to use all the legal powers given to them to deal with terrorism there was a de-escalation of security "which was impaired by political thinking". On the basis of the OPEN evidence there is a plausible argument whether taken on its own, or preferably with grounds 6 and 7, that there was a failure to access all the intelligence potentially available in respect of earlier dissident attacks and that this would have enabled the authorities to so disrupt those at the heart of dissident terrorism and that, consequently, there was a real prospect of avoiding the Omagh bombing."

Ground 10: Information relating to the possibility that there was a surveillance operation taking place on 15 August 1998 which may have involved methods of surveillance employed by the FBI

The applicant claimed that there was an operation taking place on 15 August 1998 which may have involved methods of surveillance employed by FBI. This suggestion appeared in the Bridger report and was premised on the basis that the AGS had placed a tracking device in the vehicle and had used satellites to monitor its progress. The court said there was not a "shred of plausible evidence" to support these claims and concluded there was no substance to ground 10.

Rationality Challenge

The applicant also relied upon the respondent's arguable breach of common law reasonableness ("rationality") in making her decision to refuse to grant a public inquiry. This was a fall-back position to be pursued by the applicant if the HRA did not apply to the proceedings. The court, however, considered that the HRA does apply to the application and therefore the claim advanced under the rationality banner was somewhat redundant. It dealt with it in a summary fashion in paragraphs [296] – [310] and refused leave to the applicant to challenge the respondent's decision not to hold a public inquiry on the basis that it offends common law reasonableness.

Conclusion

Mr Justice Horner concluded:

> "I am satisfied that grounds 2, 6, 7 and 9 when considered separately or together give rise to plausible arguments that there was a real prospect of preventing the Omagh bombing. These grounds involve, inter alia, the consideration of terrorist activity on both sides of the border by prominent dissident terrorist republicans leading up to the Omagh bomb. It will necessarily involve the scrutiny of both OPEN and CLOSED material obtained on both sides of the border. It is not within my power to order any type of investigation to take place in the Republic of Ireland but there is a real advantage in an Article 2 compliant investigation proceeding in the Republic of Ireland simultaneously with one in Northern Ireland. Any investigation will have to look specifically at the issue of whether a more proactive campaign of disruption, especially if co-ordinated, north and south of the border, had a real prospect of preventing the Omagh bombing and whether, without the benefit of hindsight, the potential advantages of taking a much more aggressive approach to policing the suspected terrorists outweighed the potential disadvantages inherent in such an approach.
>
> I am not going to order a public inquiry to look at the arguable grounds of preventability. I do not intend to be prescriptive. However, it is for the government(s)

to hold an investigation that is Article 2 compliant and which can receive both OPEN and CLOSED materials on grounds 2, 6, 7 and 9."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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