Judicial Communications Office

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COURT ALLOWS APPEAL IN ARTICLE 2 ECHR INVESTIGATION CASE

Summary of Judgment

The Court of Appeal[1] today determined that the State's requirement to carry out an Article 2 compliant investigation into the deaths of three persons in Londonderry on 31 August 1988 has not been met and referred the matter back to the Attorney General to consider whether a fresh inquest should be held.

Factual Background

Sean Dalton, Sheila Lewis and Thomas Curran died as a result of an explosion in a flat at Kildrum Gardens, Londonderry on 31 August 1988. The flat belonged to a person referred to in the proceedings as "Person A". The three deceased went to the flat as they had not seen Person A for a period and were concerned about his welfare. Mr Dalton entered the flat via the kitchen window setting off an explosive device that had been planted in it. Mrs Lewis, who was on the walkway outside the flat, died at the scene. Mr Curran who was seriously injured died in March 1989.

The IRA issued a statement admitting to having planted the bomb. Their purpose had been to lure members of the security forces to the flat. The IRA claimed the bomb was planted on 26 August 1988. The police investigation did not result in anyone being charged or convicted of any offence connected to the murders.

An inquest into the deaths of Mr Dalton and Mrs Lewis was held on 7 December 1989. Person A gave evidence by means of a statement. He recounted how on 25 August 1988 masked men claiming to be from the IRA appeared and took him and his friend "Person B" to another location. He said they were held before being released on to a public road on 31 August 1998. At this point he said he contacted the police.

Police Ombudsman

In September 2005 a son of Mr Dalton ("the complainant") made a Statement of Complaint to the Police Ombudsman's ("PO") Office relating to the way in which the police had behaved in the events leading to his father's death. He referred to various incidents preceding the death including:

- An incident on 25 August 1988 which followed a rocket and shooting attack at Rosemount police barracks. He claimed a man was seen running from a car that had been used in the attack shouting that there was a bomb in it. The complainant said he phoned the police but got no response. A trail of blood from the car, which was later burnt out, ran towards Person A's flat and a rocket launcher was recovered from the car;
- Robbers leaving a hot food shop on 27 August 1988 dropped a card which had Person A's details on it. The police were given this card when they arrived and were alleged to have

[1] The panel was the Lord Chief Justice, Lord Justice Stephens and Mr Justice Maguire. Mr Justice Maguire delivered the judgment of the court.

said "we can hit this boy now, he'll be fresh from the robbery". The complainant noted, however, that the police did not attend Person A's flat;
- On 30 August 1998 a friend of Person A's was abducted by the IRA. There was a phone call to say he was being held in Kildrum Gardens but the complainant stated that the police did not attend Person A's flat;
- The complainant alleged that security force patrols in the area of Kildrum Gardens were scaled down leading to the family of the deceased forming the view that they were aware of the bomb in the flat but had decided not to do anything about it to protect an informer.

The complainant alleged that the police failed in their duties to properly investigate the deaths of his father and Mrs Lewis; knowingly allowed a bomb to remain in a location close to where the pubic had access in order to protect an informant; failed to advise the local community or its leaders of possible terrorist activities in the area; and failed to uphold his father's right to life.

The PO published his report on 10 July 2013. He thought it was likely that Kildrum Gardens was placed "out of bounds" as a result of consideration of police intelligence in the late afternoon of 26 August 1988 but rejected the suggestion that the police were trying to protect an informer as the person who was alleged to have been the informer had not featured in the investigation until long afterwards and had never been arrested. The PO referred to intelligence which stated that the police were warned after the attack on Rosemount Police Station on 25 August 1988 not to take follow up action and that on the following day intelligence was received indicating that the car used in the attack was abandoned "convenient to" a house in which a booby trap bomb was planted.

The PO concluded:

- There was sufficient intelligence available to the police to identify the location of the bomb and that steps could and should have been taken to locate the threat and warn the local community. He said this failure resulted in the police "not fulfilling their duty to protect the public";
- The police failed in their duty by knowingly allowing an explosive device to remain in a location close to where the public had access;
- The police failed in their responsibilities to uphold Mr Dalton's right to life and in their duty to properly investigate the deaths of Mr Dalton and Mrs Lewis.

The PO was critical of the way in which the original police investigation had been conducted. He also referred to investigative shortfalls relating to the "substantial number of retired police officers" who declined to assist the investigation and the loss of significant documentation concerning the management of the police investigation.

Attorney General

Mr Dalton's family wrote to the Attorney General ("AGNI") requesting him to exercise his discretion pursuant to section 14 of the Coroners Act (Northern Ireland) 1959 to have a fresh inquest into the killing in order to take into account the material which had been uncovered in the PO's report and which had not been available at the time of the original inquest. A principal concern was the possibility that the police did know or should have known of the existence of the bomb and did not take any or adequate steps to minimise the threat to the lives and safety of the residents in the area. It was claimed that the Article 2 obligations were reactivated. The AGNI replied on 26 May 2015 to say there had been no evidence in the PO's report which could go to the identification and/or

punishment of those responsible for the bomb so as to make the holding of a further inquest advisable. He commented that Article 2 did not require proceedings to be held for the purposes of establishing historical truth.

The Judicial Review

Dorothy Johnstone, Rosaleen Dalton's sister lodged a judicial review application on 26 June 2015 claiming the AGNI misdirected himself in concluding that the investigative obligation under Article 2 had been satisfied and that it could not be satisfied by a new inquest. The trial judge dismissed the application. In his view what a new inquest might achieve *vis a vis* the perpetrators was entirely speculative and was a very frail basis for saying that the AGNI was entitled, let along obliged, to order an inquest. In his view there was no evidence of anything amounting to more than a claim of negligence on the part of the police. The trial judge referred to the family's active civil proceedings against the police and said these would provide further opportunity to seek documents and call witnesses. Overall, the trial judge was of the opinion that the AGNI's decision was a lawful one.

Grounds for Appeal

On appeal, Rosaleen Dalton ("the appellant"), who had taken over from Dorothy Johnstone who had died shortly after the brining of the appeal, submitted that this was a case where significant new evidence had come to light as a result of the PO's investigation and that this raised important questions about how the police had behaved prior to the explosion occurring. It was contended that the PO's report demonstrated that the police had key intelligence in advance of the explosion of the trap that was set by the IRA into which the police would be lured but, despite this, the police failed to take action to safeguard the public. The appellant claimed that the situation uncovered by the PO should be further investigated which could only satisfactorily be done by establishing a fresh inquest as the legal means for ensuring that an effective official inquiry was provided. It was submitted that this was a case where an investigative obligation was revived[2] by virtue of the new information brought to light by the PO with the impact that ordering a new inquest was obligatory on the AGNI as he was required by law to act consistently with his obligations under ECHR.

Counsel for the AGNI submitted that this was not a case where he was required by Article 2 ECHR to order a fresh inquest and in any event there had been no refusal by the AGNI to order: "On the contrary no final decision had been made and any decision made to date should not be viewed as final". The AGNI submitted that a proper investigation had been carried out by the PO and that even if *Brecknell* applied in the sense that it was enough to revive the Article 2 obligation, it did not follow that he was under an obligation to order a fresh inquest. The AGNI submitted that the accusations levelled at the police amounted to no more than a claim for negligence and the existence of civil proceedings could be taken into account when considering what steps should be taken.

Recent Case Law

The central issue in this case was whether the AGNI was obliged on the facts of this case to order a fresh inquest into the death of the deceased by reason of the requirements of Article 2 ECHR. An anterior issue related to how Article 2's procedural obligation to carry out an effective official investigation operates in the context of historic cases where the death at issue precedes the

[2] In accordance with *Brecknell v UK* (2008) 46 EHRR 42 which set a threshold for the purpose of answering the question when an investigative obligation for the purpose of Article 2 ECHR arose again.

introduction of the HRA in October 2000. The Court referred to case law from the ECtHR and domestic courts which has provided increasing clarity as to how to approach this issue, some of which post-dated the judgment of the court below (see paragraphs [80] to [97] of the judgment[3]).

Consideration

The Court said the application of the principles described in the authorities to the present case raised the following issues:

- Does the doctrine of revival apply to a case of this type which does not involve the identification and punishment of those who were responsible for planting the device which killed the deceased?
- If revival is available on the facts of this case, is it correct to conclude that there has been a revival?
- In this case, in the light of the PO's report, have the requirements of Article 2 been satisfied?
- If they have not been satisfied does it follow that the court should order the AGNI to exercise his discretion to require the holding of a fresh inquest?

Does the doctrine of revival apply in this case?

It was argued that revival is inextricably linked to cases where the new information fed into the prospects of identifying and punishing those who were responsible for the deaths and, in this case, there was no realistic prospect that this would be the effect of any further information. The Court, however, said that care must be taken not to read too much into this:

- *Brecknell* was a case about bringing perpetrators to justice but it does not necessarily follow that "identification and/or punishment of perpetrators" is the only circumstances in which revival can occur. The Court said there is scope for a broader interpretation to be adopted:

> "[The ECtHR] spoke of the essential purpose which underlay the need for investigations into unlawful or suspicious deaths. That purpose was to "secure the effective implementation of the domestic laws which protect the right to life. Such laws will normally include laws which enjoin the State to refrain from the intentional and unlawful taking of life but it will normally also include laws which are designed to require the State to safeguard the lives of those within its jurisdiction. It is to this latter aspect that the materials uncovered in this case were relevant"."

- The Court said it was inclined to the view that there is value in looking at cases in which the "effective official investigation" requirement within Article 2 attaches to the State even though the object of such an investigation is not to identify and/or punish perpetrators but is to consider State responsibility more broadly.

The Court said that evolving human rights jurisprudence both from the ECtHR and the domestic courts has established that the procedural obligation to investigate deaths can extend beyond those

[3] *Brecknell v UK* (as above); *Finucane's Application* [2019] UKSC 7; and *McGuigan & Another's Application* [2019] NICA

deaths in which state authorities are alleged to be implicated. If a procedural obligation under Article 2 can apply in relation to the cases it cited it does not appear to be a substantial jump to be able to accept that where new evidence emerges at a later date after an initial investigation has been completed, it can follow that the Article 2 obligation can be revived in such cases:

> "The Court therefore is of the view that the doctrine of revival can apply in this case, notwithstanding that it is not the object of the investigation to identify and punish those who are the direct perpetrators."

Is it correct to conclude that there has been a revival?

The acid test for what triggers a revival is the existence of a "plausible or credible allegation, piece of evidence or item of information" which is relevant. The investigation carried out by police in 1988-89 and the inquest in December 1989 both focussed on the responsibility of those who planted the bomb. The Court said there was no investigation into the responsibility or accountability of the police for the protection of life. In this regard the allegations which raised new issues were those raised with the PO in 2005 and that gave rise to his investigation. The Court said it was the PO's report that had brought about a revival. In contrast, the AGNI's position was that the PO's report should not be viewed as reviving any Article 2 obligation as it was not the occasion for the discovery of something new.

Looking at the matter objectively, the Court drew the conclusion that the initiation of the complaint in 2005 and the disclosure of material in support of it by the complainant, met the *Brecknell* revival test: "In other words, what was asserted and was put forward at that time was sufficient to give rise to a requirement that the matters raised should be investigated." The Court said it would therefore, provisionally, conclude that Article 2 was revived in this case in 2005. Since then further investigative activity has been carried out and reflected in the publication of the PO's report in 2013 which is to be viewed as a response to the investigation obligation which had been revived:

> "In these circumstances the Court is of the view that the question is not whether the PO's report itself has revived the Article 2 obligation but rather the different question of whether, at this time, it can be said that the Article 2 obligations resting on the state as a result of the revival in 2005 have been satisfied … If the obligations have been met, no further steps will have to be taken to achieve compliance. However, if the state's Article 2 obligations have not been satisfied, in principle, more will need to be done, provided any further round of investigation realistically can result in compliance. … It seems to the Court that in 2005 a distinct trigger was pulled when the deceased's relative put forward his various complaints, which hitherto had not been the subject of any effective investigation."

The Court said that a countervailing factor, however, was that after a basic investigation at the time of the incident, the matter within a very short period became dormant but later revived in 2005. It noted that it has remained live since then so that it now can be said that a substantial proportion of the procedural steps taken in this case can be viewed as taken after the critical date:

> "In the light of these factors the court inclines to the view that the genuine connection test on the facts of the present case is on balance satisfied. While this leaves the question of whether in this case the Convention values test is also satisfied it is not necessary for this to be determined and the court will leave this open, whilst accepting

> that a strong case can be made for saying that establishing compliance with this test would probably be an uphill struggle."

Has the State's obligations pursuant to Article 2 been met at this time as a result of the PO's report?

The Court commented that while the PO at the end of his investigation was able to draw a series of conclusions in relation to the complainant's complaints and while the complaints, save for one significant exception (that relating to whether a police informer was being protected), were generally sustained, it did not follow from this that the objective of an Article 2 obligation has been met. It said the issue was not simply about whether the complainant and/or the families may feel some measure of vindication from the conclusions which have been reached by the PO but whether an effective investigation had been provided:

> "Bare conclusions alone will often not be enough to satisfy the Article 2 obligation, if the basis upon which they have been reached, and the reasoning leading to them, remain unexplained. In this case, the families have been told that the police ought to have known that a device was in the vicinity of 38 Kildrum Gardens in the period running up to the death of the deceased and they have been told that steps could and should have been taken to locate the threat and warn the local community. Additionally, they have been told that the failure to take protective measures had tragic consequences and that this may be viewed as the police not fulfilling their duty to protect the public. But, there appears, equally, to be much which remains shrouded in mystery. In particular it is unclear how key conclusions were arrived at. While there are references to police intelligence which the PO has seen and while there is reference to some police officers or retired police officers who assisted the PO's work, there is little which is which nailed down or specified in detail."

The Court said that an effective investigation will entail a picture of the investigative process which leads to particular conclusions so that the extent of the investigation can be seen together with the investigator's reasoning to his or her conclusions. This enables those affected to arrive at a balanced view of the quality of the process which has been undertaken. Such will expose or be likely to expose failings or omissions or shortcomings:

> "In a case such as this, where there has been a refusal to co-operate with the PO by senior and well placed retired police officers and where it is known that a range of documents are missing from the investigation these matters assume great importance. Where the investigator – here the PO – feels obliged to say, as he has done in relation to his report – that his work has been "significantly hampered" in relation to the investigation and examination of the case, this inevitably detracts from the level of public confidence a report of this type enjoys and points towards the need for still further probing of the facts."

The Court said that a good example of the deficiency of the PO's report from an Article 2 perspective related to the decision to take the area around Kildrum Gardens 'out of bounds'. The report said that this occurred as a result of a consideration by police of police intelligence, but there was no evidential material offered to show why, or by whom, this decision was arrived at or what alternatives to this step were considered. The Court said this was probably a key decision which would have needed to be carefully modulated so as to ensure that key Article 2 obligations in respect of the local population were not being overlooked: "An effective investigation would have focussed,

inter alia, on this decision, as it appears to have been crucial to later events." On the other hand, the Court said it was conscious that it had been suggested that the PO must have had confidence in the views he expressed in his report, especially as he eschewed the need to propose further investigation or referral of any particular matter to the public prosecution authorities. The Court, however, concluded that the argument that the PO's report has satisfied the Article 2 obligations which have been revived should be rejected.

Should the court order the AGNI to exercise his discretion to require the holding of a fresh inquest?

In view of its conclusion that the Article 2 obligations had not been met, the Court said it must consider whether it should order the AGNI to exercise his discretion to provide a fresh inquest. Section 14 of the Coroners (Northern Ireland) Act 1959 ("the 1959 Act") provides that the AGNI may direct any coroner to conduct an inquest into a death where he has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable. This provision makes the matter one involving the personal judgment and assessment of the AGNI. The AGNI, as a public authority for the purposes of the HRA, is obliged to act in conformity with the requirements of Article 2 where they are engaged, as they are in this case, albeit in the context of a revival of the procedural obligation after a period of relative inactivity. Ordinarily, the Court would expect the AGNI to broach this question on the basis that if an Article 2 compliant inquiry into a death had not yet been provided then steps should be taken to rectify the position. It noted, however, that this is not to say that necessarily and in every case the court will impose on the AGNI an obligation of the nature sought in this case by the grant of an order of *mandamus* directing him to provide a fresh inquest as it would be a mistake for the Court to see the matter as being so black and white as to fetter the discretion of the AGNI.

The Court said there will be a need for the AGNI to give further consideration the case in the light of this judgment and that he should have the opportunity to consider the available options. It noted, however, that the availability of witnesses and the state of the documentation will have an impact and "with the best will in the world, the ability now to conduct a meaningful inquiry may have been lost":

> "If the unmet obligations of Article 2 can be met the court would expect this to be the course which should be taken, but equally, if they can't be met, this may indicate a need to acknowledge this and to bring the process to an end."

The Court noted, however, that a coroner, if appointed to hear a fresh inquest, now possesses power (section 17A of the 1959 Act) to require the attendance of witnesses and to procure the production of documents. These powers were not available to the PO. The Court also commented that there are other ways of satisfying the requirements of Article 2 in a case of this kind where it is a paramilitary organisation which planted the bomb which killed the deceased. It said the applicant and the deceased's family have already issued civil proceedings, which are now well advanced, is a potential vehicle which could be deployed, if not to satisfy Article 2, to assist in the process of satisfying it and should not be dismissed out of hand:

> "The court should not be interpreted as saying that in this case the AGNI should not order a fresh inquest or should regard civil proceedings as the means of taking the matter forward. All the court is saying that the matter is not so open and shut in favour of the remedy which the applicant seeks as to cause the court to resort to an order of *mandamus.*"

Conclusion

The Court concluded that the trial judge erred in this case, in particular, by viewing the width of the *Brecknell* judgment too narrowly. In its opinion, the AGNI also committed the same error. As a consequence the issue of compliance of past investigations with the requirements of Article 2 was not satisfactory addressed. The key finding of the Court was that to date the Article 2 investigative obligation which was revived has not been satisfied. Again, this was not the view of the trial judge or the AGNI. In these circumstances, the court will allow the appeal.

The Court said it would make a declaration but the terms of this may need to be discussed with the parties. It declined to order *mandamus* against the AGNI.

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

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