

Neutral Citation No: [2023] NIKB 63

Ref: HUM12160

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

Delivered: 17/05/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY COLM CAMERON
FOR JUDICIAL REVIEW (No. 1)

Hugh Southey KC and Stephen Toal (instructed by KRW Law) for the Applicant
Tony McGleenan KC and Ben Thompson (instructed by the Crown Solicitor's Office) for
the Respondent

HUMPHREYS J

Introduction

[1] On 26 October 1993 the applicant's father, James Cameron, was brutally murdered by members of the Ulster Freedom Fighters ('UFF') at the Belfast City Council Cleansing depot on Kennedy Way.

[2] In these judicial review proceedings, the applicant seeks to challenge two decisions of the respondent, the Police Service for Northern Ireland ('PSNI'):

- (i) The alleged failure by the Historical Enquiries Team ('HET') to release its findings into the investigation of the murder; and
- (ii) The failure to conduct an investigation into the murder in compliance with article 2 of the European Convention on Human Rights ('ECHR').

[3] Leave was granted in respect of this application on 26 October 2017, but the case was stayed pending the decision of the Supreme Court in *Re McQuillan's Application* [2021] UKSC 55. Following that judgment the applicant has refined and amended his grounds of challenge. A key issue for the court to determine will be whether the article 2 investigative obligation applies in the circumstances of this case.

The Applicant's Evidence

[4] In his affidavit, the applicant has stressed that his father's murder occurred at a time of particular tension in Northern Ireland. Just a few days earlier, the IRA had exploded a bomb at Frizzell's fish shop on the Shankill Road in Belfast, killing nine people in an ostensible effort to target the leadership of loyalist paramilitary organisations.

[5] On 25 October 1993 a telephone warning issued to Belfast City Council. The applicant reports, from his conversations with other council employees, that the usual police and military presence in the area of Kennedy Way was absent the following morning. Two masked gunmen arrived at around 7:30am and shot dead both the applicant's father and another staff member, Mark Rodgers.

[6] The applicant states that during the course of the police investigation an RUC detective, now deceased, Kevin Sheehy told his family that the police knew who was responsible for the killings, but they would not be charged as they were under investigation in a 'bigger case'.

[7] It later transpired that one of the weapons used in the murders was a Czech VZ58 assault rifle, one of a batch imported into Northern Ireland in late 1987 or early 1988 from Lebanon. The applicant alleges, without adducing any evidence in support, that Brian Nelson, a convicted loyalist paramilitary who was also an agent for the British Army, was responsible for the importation.

[8] The applicant also makes the more general point that the vast majority of loyalist terrorists arrested in the course of the Stephens Inquiries into collusion between loyalist paramilitaries and the state security forces were themselves agents of the state.

[9] The applicant concludes that:

"The original investigation into the murder of my father and his colleague did not take into consideration the probability that members of the RUC and/or British military had acted in connivance with the loyalist paramilitaries responsible by way of direct or incidental assistance in the planning and execution of their murders."

[10] The HET began its review of the murders in or around 2011 or 2012. The applicant's family were told that the case had been taken out of turn due to the failing health of the applicant's aunt.

[11] The family were told on 23 July 2013 that a draft report had been completed and would be forwarded once checking and editing had been carried out. In the

event, the HET was disbanded in September 2014 and no report was ever furnished to the applicant or his family.

[12] A Review Summary Report ('RSR') was prepared by the HET in relation to the murder of Mark Rodgers and provided to members of that deceased's family. In pre action correspondence the PSNI stated:

"PSNI have previously stated that no draft Review Summary Report (RSR) has been prepared in respect of the death of Mr James Cameron. While it was previously intended by HET that the RSR prepared in respect of Mark Rodgers would, at some stage in the future, be used as the basis for an RSR into James Cameron's death, this intention was never fulfilled."

[13] The applicant avers that a piece of evidence garnered from the scene of the crime, a balaclava, has since disappeared.

[14] The applicant's solicitor, Kevin Winters, has sworn several affidavits relating to his personal knowledge and also that derived from other sources. He has exhibited books and newspaper articles written about the activities around the relevant time of the UFF 'C' Company and its leader Johnny Adair. Mr Winters asserts that he has seen no evidence of any surveillance operation carried out into the individuals who were likely to engage in retaliation for the Shankill bomb.

[15] In the Police Ombudsman's report into loyalist paramilitary murders in South Belfast 1990-1998, it is recorded that surveillance into this unit was suspended on 22 March 1993 and resumed on 30 March 1993 during which period its members were responsible for two murders and two attempted murders.

[16] Mr Winters also notes that the threat message recorded on 25 October 1993 was against "Catholic Depots" and asserts that Kennedy Way was the only such depot in Belfast employing only Catholic employees.

[17] Reliance is placed on the Police Ombudsman's Report into the 1994 murders at Loughinisland and the Da Silva report into the murder of Patrick Finucane insofar as these reports address the history of the importation of the VZ58 weapons.

[18] Furthermore, Mr Winters deposes to evidence which has emerged in the course of a civil action brought by the applicant. The discovery in those proceedings includes a redacted document produced by an RUC collator which contains intelligence information as to the perpetrators of the killings at Kennedy Way. This document was marked "No Downward Dissemination" ('NDD'). Criticism has been levelled in other reviews at the failure by RUC Special Branch officers to disseminate relevant intelligence to CID detectives.

[19] In general terms, therefore, reliance is placed upon allegations of collusion between loyalist paramilitaries and security forces which are said not to have been the subject of adequate or proper investigation by the police.

The Respondent's Evidence

[20] Temporary Detective Superintendent Harrison has sworn an affidavit in relation to the complaints set out by the applicant and based on his perusal of the case papers, including the documents generated by the HET.

[21] In relation to the initial investigation, DS Harrison deposes to the fact that two people were charged, convicted, and imprisoned in relation to the attack. On 30 November 1994 Thomas Edward Beggs pleaded guilty to the murders of James Cameron and Mark Rodgers, to the attempted murder of other members of Council staff and to membership of the UFF, a proscribed organisation. On the same date Wendy Ann Davies pleaded guilty to charges of assisting offenders. On 5 December 1994 Beggs was sentenced to life imprisonment and Davies to a four year term by Kelly LJ.

[22] DS Harrison identifies the following investigative steps which were taken by police:

- (i) Three crime scenes were identified and examined, namely Kennedy Way itself, Southport Court where the gunmen's vehicle was hijacked and Donegall Parade where the vehicle was abandoned;
- (ii) Senior police officers and SOCOs attended Kennedy Way and evidence in the form of ammunition, bullet fragments, debris, tape lifts and fingerprints was removed from the scene;
- (iii) The vehicle was the subject of specialist examination;
- (iv) All scenes were photographed and mapped;
- (v) A series of case conferences was held between 26 October and 4 November to co-ordinate the team of detectives assigned to the investigation;
- (vi) House to house visits were carried out at the three scenes and a number of witnesses identified;
- (vii) A total of 104 statements were taken from non-police witnesses;
- (viii) 63 police officers provided statements;

- (ix) 27 houses in various parts of Belfast were searched and various items seized including clothing, shoes, books and a car. All items of evidence were submitted to the Forensic Science Laboratory for analysis;
- (x) Fingerprints obtained were checked against a list of 78 persons believed to be associated with the UFF;
- (xi) Security cameras along the route taken by the gunmen were checked;
- (xii) More than 60 suspects were interviewed, 16 of which were arrested and questioned about their suspected involvement in the murders, two of these were the suspected gunmen, ciphered as AB and CD. AB was questioned 39 times and CD 50 times. Neither made any admissions nor was there any forensic evidence to link them to the crimes.

[23] Having regard to the steps taken, and the successful prosecution of two individuals for crimes arising out of the murder, DS Harrison states that, in his opinion, the investigation was comprehensive, thorough and intense and that all reasonable lines of inquiry were pursued.

[24] In relation to the intelligence, he confirms that there was a warning the preceding day referring to "Catholic depots." After the murders, intelligence was received which named members of the UFF as having been involved. This resulted in the arrest and interview of several individuals.

[25] As far as the alleged comments from DS Sheehy, DS Harrison could find no corroboration of this within the case papers. He confirms that DS Sheehy died in October 2016.

[26] The allegation that the gunmen's vehicle was allowed to pass through a vehicle check point is also not supported by any documentation within the records. No such allegation was made during the course of the original investigation, and it was confirmed that security cameras were checked for the vehicle's movements.

[27] The evidence reveals that two draft RSRs were prepared in respect of Mr Rodgers, the second of which was released to his family in March 2016. It is also confirmed that no such draft exists in relation to the applicant's father. The HET policy log contains details of the communication between it and the applicant's family on 23 July 2013 when it was confirmed that a draft report had been completed and was awaiting checking. It was stated that the report is based on questions raised by the Rodgers family and would be tailored to the Cameron family questions when it was approved.

[28] The logs also show that the draft RSR only related to the Rodgers killing and further adaptation would be required in order to produce an RSR in respect of James

Cameron. This never occurred due to the closure of the HET and therefore no such document is in existence.

[29] In the draft Rodgers RSR, there is reference to a document dated 26 October 1993, headed "Woodbourne Sub-Division Neighbourhood Patrol Programme." This indicates that a vehicle check point and patrol was scheduled to be in the vicinity of Black's Road to pay attention to building sites, main routes, and private estates between 5:45am and 6:30am. This was one of a number of VCPs scheduled across Belfast that day. The gunmen entered the depot at Kennedy Way about an hour after the Black's Road VCP was due to cease.

[30] The HET inquiries revealed that the balaclava from the scene was returned by the forensic science laboratory to Woodbourne RUC station on 6 September 1994 but could not now be located.

[31] The draft RSR concluded:

- (i) The original RUC investigation was thorough, well managed and resourced with all appropriate lines of enquiry being pursued;
- (ii) There was an absence of identification or forensic evidence which could have lead to the convictions of others;
- (iii) There were no new lines of inquiry or investigative opportunities identified.

[32] Insofar as the allegation of collusion is concerned, DS Harrison concludes:

"I have not identified any evidence to support the contention that RUC officers provided assistance or otherwise colluded in the murder of these innocent civilians."

[33] The issue concerning the 'NDD' document disclosed in the course of civil proceedings is addressed in evidence by DS Stephen Wright. He states that the three individuals whose names have been redacted from the intelligence information were treated as suspects at the relevant time by the investigation team and that the information was shared with them prior to the end of October 1993.

[34] A further affidavit in relation to this issue has been sworn by DS Nicola Marshall. She states that RUC collators were individuals tasked to collect and disseminate information and intelligence on behalf of the CID. The relevant RUC Code confirmed that the collators reported to senior CID officers and all information recorded by them was available and accessible to CID. The fact that the document bore the 'NDD' label did not mean that the information contained therein was not passed to detectives.

[35] DS Marshall exhibits handwritten notes of a conference which took place on 27 October 1993 in which the names of the three redacted suspects were recorded. There is an instruction that these names be put on the HOLMES system, the investigation database. The CID investigation team had access to the information retained on HOLMES.

The Grounds for Judicial Review

[36] The amended Order 53 statement pleads:

- (i) There has been a failure by the respondent to comply with the article 2 obligation to conduct an independent, prompt and adequate investigation into the murder of James Cameron;
- (ii) The withholding of the findings of the HET is itself in violation of the applicant's article 2 rights;
- (iii) By withholding these findings, the respondent has breached the applicant's legitimate expectation;
- (iv) The failure also represents a breach of section 7 of the Data Protection Act 1998 ('DPA').

The Engagement of Article 2

[37] When it is engaged, the content of the article 2 investigatory obligation is well recognised. The state must ensure that an effective investigation is carried out in cases where individuals have been killed by the use of unlawful force. Such investigations must be prompt and proceed with reasonable expedition. When the infliction of lethal force allegedly involved state agents, the investigation must have the necessary quality of independence. The investigation must be subject to public scrutiny and involve the next of kin. In order to be effective, the investigation must be capable of identifying those responsible and bringing them to justice. Notably this is an obligation of means, not result.

[38] Central to this challenge is the issue of the application of article 2 ECHR to the investigation undertaken in respect of the murders. In *McQuillan* the Supreme Court confirmed that the critical date for the application of article 2 is 2 October 2000, the date of the coming into force of the Human Rights Act 1998.

[39] Prior to that date, article 2 formed no part of the domestic law of the United Kingdom and, prima facie therefore, imposed no obligations on those tasked with the investigation of these murders which occurred in October 1993.

[40] However, in *Brecknell v UK* [2008] 46 EHRR 42, the European Court of Human Rights explained that, in certain circumstances, the article 2 obligation may revive:

“The court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation.” [para 71]

[41] The first question for the court to determine therefore is whether, properly analysed, there is fresh plausible or credible material which meets the *Brecknell* test.

[42] If so, the court must then consider whether the ‘genuine connection’ or ‘Convention values’ test is met on the facts of the case. This approach is confirmed by the Supreme Court in *McQuillan*, following the ECtHR decision in *Janowiec v Russia* [2014] 58 EHRR 30:

“The Strasbourg court’s temporal jurisdiction in relation to such a claim requires either (1) a genuine connection with the death which constitutes the triggering event for the obligation consisting of (a) a reasonably short period of time between the death and the entry into force of the Convention for the state in question, not in excess of ten years, and (b) a requirement that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that state, or (2) in extraordinary situations which do not meet the ‘genuine connection’ test, where there is a need to ensure that the guarantees and the underlying values of the Convention are protected (the ‘Convention values’ test).” [para 135]

“It is clear that the Grand Chamber had the investigative obligation revival principle in *Brecknell* directly in mind when writing this passage and that in the last sentence of para 144 it specifically intended to limit the operation of that principle in relation to deaths occurring before the critical date by reference to the ‘genuine connection’ test and the ‘Convention values’ test.” [para 137]

Has the Article 2 Obligation Revived?

[43] The applicant submits that the following factors ought to lead to a conclusion that the *Brecknell* test has been met:

- (i) There is now much greater awareness of the existence of collusion or collusive behaviours between loyalist terrorists and security forces;
- (ii) In the case of the murder of Damien Walsh in March 1993, there is evidence from the PONI report that adequate preventative measures were not taken to prevent an attack and, it is claimed, there was a lack of such measures in this case;
- (iii) There is generally evidence of a failure to alert victims of loyalist violence to potential attacks;
- (iv) One intelligence document was marked 'NDD' and this is a pointer towards the involvement of informers;
- (v) There was no contemporaneous investigation into the question of collusion;
- (vi) These matters suggest that there are real doubts as to the ability of previous investigations to bring those responsible to justice.

[44] The *Brecknell* test is only met when there is new material which is plausible or credible and which is relevant to the identification and eventual prosecution of a perpetrator. In *McGuigan & McKenna's Applications*, the Hooded Men cases heard at the same time as *McQuillan*, the Supreme Court considered a volume of material which had come into existence post-October 2000, and which provided detail in relation to the interrogation techniques used and the identification of those responsible. Lord Hodge stated:

“What is critical here is not the inconclusive nature of earlier investigations but whether there exists such weighty and compelling new evidence as to require a fresh investigation. In our view, the new material does not add significantly to the state of knowledge in relation to this matter as it stood in 1978 nor does it alter its substance.” [para 128]

[45] The Supreme Court's language is indicative of the fact that the *Brecknell* test will not be lightly satisfied. In *Re McEvoy's Application* [2022] NIKB 10, I held that the test was met in circumstances where the new material identified emerged from a PONI report which directly related to the subject death and from a documentary film which identified evidence relating to those responsible for the unlawful death. On the basis of the evidence adduced, I concluded that there were “real concerns about the collusive behaviour of those investigating the attack” [para 30(v)] and that

it “casts real doubt on the ability of the original RUC investigation to bring those responsible to justice.”

[46] There is a significant distinction between the new material relied upon in *McEvoy* and the points advanced in the instant case. The *McEvoy* evidence related directly to the murder which occurred in that case in November 1992 and the identity of those responsible. The material relied upon by the applicant, by contrast, is either of a general nature or relates to other paramilitary attacks. Taking each of the factors identified in turn:

- (i) The state of knowledge of potential collusion could not be a *Brecknell* trigger – it alone does not constitute a plausible or credible piece of evidence relevant to the identification or prosecution of perpetrators. If it were, it would potentially mean that article 2 is revived in every case of killing by loyalist paramilitaries from 1990 to 2000;
- (ii) The fact that preventative measures (in the form of surveillance on C company) may have been removed in March 1993 cannot be said to have any evidential impact on the investigation into these killings. It does not have any relevance to the identification or prosecution of the perpetrators. Significantly, the respondent’s evidence is that there was no intelligence received prior to these shootings nor is there any evidence that a VCP was moved from this vicinity prior to the attack;
- (iii) The general claim of a failure to alert the victims of loyalist violence falls into the same category;
- (iv) A full account has been provided by the respondent in relation to the one intelligence document marked ‘NDD.’ The uncontroverted evidence is that the information contained therein was disseminated to detectives and the individuals were treated as suspects. There is no evidence in this case at all that informers were involved;
- (v) The fact that there was no contemporaneous investigation into allegations of collusion is explained by the lack of any such complaint at the relevant time. A generalised claim that collusion did occur, read across from other investigations, cannot satisfy the requirements of *Brecknell*;
- (vi) The claim that there is therefore real doubt around the ability of the original investigation to bring the perpetrators to justice faces the formidable obstacle that two individuals were convicted, one of whom pleaded guilty to the two murders. The investigation was therefore manifestly capable of bringing offenders to justice, even if evidence could not be obtained to bring some of the perpetrators before the courts.

[47] There is an admitted failing in the proper securing of evidence in the form of the balaclava at some stage post 1994. There is no suggestion however that this piece of real evidence would generate some basis to sustain a claim of collusion and cannot therefore assist the applicant's case.

[48] Equally, it was known at the time of the murders that a VZ58 was used and that these weapons were imported into Northern Ireland by loyalist paramilitaries. The alleged involvement of Brian Nelson is without any evidential support. This is not 'new' material which came into being after the critical date.

[49] There is no weighty or compelling new evidence in this case which would satisfy the *Brecknell* test and cause the article 2 investigative obligation to be revived.

The Genuine Connection Test

[50] This conclusion is sufficient to dispose of the article 2 issue, but I propose to address the second question, that of the genuine connection test, in any event.

[51] Given that these murders occurred in 1993, they fall within the "reasonably short period of time" alluded to in *Janowiec* and *McQuillan*. However, the genuine connection test has a second requirement, namely that a major part of the investigation must have been carried out, or ought to have been carried out, after the critical date.

[52] The evidence in this case reveals that the original investigation was carried out in 1993 and 1994, with the guilty pleas being entered in November 1994. No part of the investigation took place after the coming into force of the HRA, albeit that a review was conducted by the HET which commenced in 2006 and lasted until 2014.

[53] The applicant's case is that there has been no investigation into the allegations of collusion, and that this would be a "major part of the investigation" which ought to take place now, well after the critical date. Reliance is placed on the facts of *McQuillan* itself. Jean Smyth was killed in June 1972 and in 2014 military logs were discovered which supported the view that there was army involvement in her death. It was accepted that this information met the *Brecknell* threshold but there was a dispute as to whether there was a genuine connection between her death and the coming into force of the HRA. Given the lapse of 28 years, the temporal test was not satisfied. In relation to the second requirement, the court stated:

"The investigation of military involvement in the death of Jean Smyth is a major aspect of the case which is potentially decisive for the course of the investigation, and which will only be carried out after the relevant critical date."

[54] Thus, it was accepted, if Ms Smyth had been killed in 1992 rather than 1972, the genuine connection test would have been met.

[55] There is a qualitative difference between specific evidence which forms the basis for a new aspect of an investigation and general unsubstantiated allegations which derive principally from other cases. It cannot be said that the latter would or could amount to a “major part of the investigation.” This point is reinforced by the draft RSR in the related Rodgers case which indicates that there are no other lines of inquiry or investigative opportunities identified.

[56] In these circumstances, therefore, the genuine connection test is not satisfied.

[57] The applicant did not contend that the Convention values test applied to the facts of this case.

Legitimate Expectation and the HET Report

[58] The applicant also asserts that the withholding of the HET findings constitutes a breach of a legitimate expectation which has arisen.

[59] It is well established that a legitimate expectation only arises when a public authority gives an undertaking or promise in clear, unambiguous terms which is devoid of relevant qualification – see *Re Finucane’s Application* [2019] NI 292 and *Re Barnard’s Application* [2019] NICA 38.

[60] On the evidence in this case, no such undertaking was given to the applicant or his family. They were advised that a report relating to Mr Rodgers had been produced in draft form, but this would still need to be tailored in due course to address the questions of the Cameron family. There were therefore relevant qualifications attaching to the comments made by members of the HET.

[61] Whilst a unit with the respondent PSNI, the HET had its own teams of officers and enjoyed investigative independence. It must therefore have been the case that any undertaking which was given by it could only be fulfilled if the HET remained in existence. When it was wound up in September 2014, any of its obligations arising thereby could not be complied with. This court could not order a different unit within the PSNI, or the PSNI itself, to comply with any obligation which had arisen on the part of the HET to deliver a draft RSR.

[62] This ground of challenge also therefore fails.

[63] There is also pleaded a breach of section 7 of the Data Protection Act 1998 in and about the failure to disclose the HET findings. This is a statutory provision which is no longer in force and there was no argument advanced by the applicant either in his skeleton argument or orally on this ground. I therefore reject this ground of challenge also.

Conclusion

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