Judicial Communications Office

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COURT ORDERS SECRETARY OF STATE TO HOLD PUBLIC INQUIRY INTO THE DEATH OF SEAN BROWN

Summary of Judgment

Mr Justice Humphreys, sitting today in the High Court in Belfast, made an order of mandamus compelling the Secretary of State for Northern Ireland ("SOSNI") to cause a public inquiry to be held, under the Inquiries Act 2005 ("the 2005 Act"), into the death of Sean Brown who was murdered on 12 May 1997.

Investigations into the death of Sean Brown

There have been a number of investigations into the death of Sean Brown including the initial police investigation and a statutory review by the Police Ombudsman for Northern Ireland ("PONI") in 2004. The Brown family brought civil proceedings against the Chief Constable of the PSNI and the Ministry of Defence ("MOD") in 2015 and these settled in May 2022. In open court, a statement was made on behalf of the Chief Constable apologising for inadequacies in the RUC's original investigation and noting that the PSNI would continue to engage fully in the inquest proceedings.

An inquest was opened in 1997 but did not commence hearings until March 2023. In November 2023, the Crown Solicitor's Office wrote to the family's solicitors saying that during disclosure work, the PSNI had "encountered issues arising from what can broadly be described as intelligence coverage". As a result, the PSNI had formed the view that an inquest was not the appropriate vehicle for the continuation of the investigation into the death of Mr Brown. The letter further stated: "In the event that the family seek a public inquiry into Mr Brown's death, PSNI confirms that it does not dispute that a public inquiry, which would have the facility for a closed hearing to address such issues, would be an appropriate method to continue the investigation into the death of Mr Brown." Between September 2023 and February 2024, a number of public interest immunity ("PII") certificates were signed by UK government ministers.

On 27 February 2024, a gist of the redacted sensitive material was read by counsel to the coroner in an open hearing. It said that "the intelligence material indicates that at the time of the death of Sean Brown a number of individuals linked through intelligence to the murder were agents of the state. Intelligence is not evidence but issues relating to the agents of the state and their handling would inevitably fall to be investigated in the inquest if it were possible for the coroner to do so." This came as a shock to the family as what they had long suspected to be the case was now a matter of public record.

On 4 March 2024, the coroner handed down an open ruling of the PII claims describing the "lamentable" experience of the Brown family in waiting for an inquest. He also described the failings on the part of state agencies in relation to their statutory duties to disclose material to the coroner as "deplorable and frankly inexcusable." The coroner concluded that he could not satisfy his duty to carry out a full, fair and fearless investigation in to the death of Mr Brown in the absence of the material covered by the PII and said it was his intention to write to the SOSNI

requesting that a public inquiry be established into the death which would allow the sensitive material to be examined and tested in a closed hearing.

The response of the SOSNI

On 8 March 2024, the SOSNI instructed solicitors to write to the coroner to ask him to consider whether he would be minded to exercise his powers under section 9(6)(a) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act") to ask the Independent Commission for Reconciliation and Information Recovery ("ICRIR") to "review" the death. The coroner replied on 13 March 2024 stating that in his opinion the appropriate way to deal with the issues disclosed to the inquest in the materials would be through a public inquiry, noting that the Chief Constable of the PSNI had confirmed his support for this route despite the fact that it would inevitably involve the examination of the conduct of his organisation. In parallel, the Brown family's solicitors stated that the family were fundamentally opposed to the Legacy Act in general and to ICRIR in particular. No answer was forthcoming from the SOSNI and judicial review proceedings were commenced on 22 May 2024. The new SOSNI, appointed after the general election on 4 July 2024, met the Brown family in August but in a letter dated 13 September 2024, they were advised that a public inquiry would not be established. The letter concluded that the SOSNI considered "the ICRIR to be capable of discharging the Government's human rights obligations."

On 20 September 2024, the Court of Appeal handed down its decision in *Dillon*[1]. Officials provided further advice to the SOSNI in light of this judgment recommending that he affirm his previous decision and encourage the Brown family to meet with ICRIR. The advice stated that an inquiry under the 2005 Act would be able to deliver an article 2 ECHR compliant investigation but this could take two to three years to complete, and emphasis was placed on the resources which would be required. The advice said that on the law as it currently stands ICRIR does not offer an article 2 compliant process however this could change if either the United Kingdom Supreme Court ("UKSC") reverses the findings of the Court of Appeal, or the position is altered by legislation. The SOSNI was advised that an ICRIR investigation could start and finish sooner than a public inquiry with less costs. On 12 November 2024 the SOSNI indicated that he agreed with the recommendation on the basis that there was "a clear commitment to ensure the ICRIR is made ECHR compliant." On the evening before the hearing of this judicial review the SOSNI announced that a Remedial Order would be laid before Parliament to remedy the deficiencies in the Legacy Act in relation to immunity and civil actions. He also stated that primary legislation would be introduced "when parliamentary time allows" to restore inquests and reform ICRIR by addressing the disclosure and representation issues identified by the Court of Appeal. In parallel, the Government would seek leave to appeal to the UKSC in respect of these matters.

The judicial review

The applicant, Bridie Brown (the widow of Sean Brown) brought judicial review proceedings challenging the legality of the decision of the SOSNI not to establish a public inquiry. At the core of her case is the state's obligation to conduct an effective investigation into the death of her husband under article 2 ECHR. The applicant contends that in the context of an inadequate police investigation and discontinued inquest, the only means to provide an effective and compliant article 2 investigation is, as the law stands, by setting up a public inquiry under the 2005 Act. The applicant further contended that, in light of the finding in *Dillon,* the ICRIR is not capable of

[1] *In re Dillon's Application* [2024] NICA 59

delivering an article 2 compliant investigation, and a public inquiry is the only feasible option open to SOSNI.

The SOSNI in rebuttal said he has sought permission to appeal the decision in *Dillon* to the UKSC and a decision is awaited. Further, the UK Government is committed to ensuring that ICRIR is ECHR compliant and that there is no authority which supports the mandating of a public inquiry by the courts. The SOSNI also contended that there are a number of other cases in which inquests have been stopped, for reasons similar to those which pertain to this case, and others which have been halted by operation of the Legacy Act and therefore any determination in favour of the applicant could have precedent effect.

The court had no hesitation in finding that the UK Government remains in breach of its article 2 investigative obligation in relation to the death of Sean Brown: "Indeed, this is not seriously contested by anyone." In addition, it said there are a number of significant features of this case:

- This is not a case where there is a mere allegation of collusion by state agents in a Troubles-related death. A statement has been made in open court, following a careful analysis of sensitive documents to the effect that a number of individuals linked through intelligence to the murder were agents of the state;
- This requires a detailed and forensic examination of evidence by an impartial and independent tribunal as it gives rise to an allegation that the state colluded with terrorists in the murder of an entirely innocent man;
- This information came to light in 2024, some 26 years after the police investigation was closed. This information was withheld from PONI and from the second investigation which followed the PONI report;
- A High Court judge, sitting as a coroner, has requested that the SOSNI establish a public inquiry into the death pursuant to section 1 of the 2005 Act, which was accompanied by detailed reasons;
- Previous efforts to investigate this death have been wholly inadequate. The shortcomings in the police investigation were such that the Chief Constable apologised to the Brown family in the High Court;
- The inquest process was frustrated at every turn by the failure of the state to comply with statutory disclosure obligations. These failings were so egregious that it led the coroner to question whether the non-compliance was part of a deliberate effort to prevent the inquest from discovering the truth; and
- The Chief Constable of the PSNI is on record as supporting the establishment of a public inquiry, despite the fact that this would shine a light on the failings of his force.

The court commented:

> "Even if permission to appeal to the Supreme Court were to be granted in the case of Dillon, it will be many months before there is a judgment addressing the ICRIR issues. This will only serve to cause yet further delay whilst no article 2 compliant investigation is held. It is no defence to an action asserting breach of section 6 of the HRA to say that the public authority in question is waiting to see if the law is changed to enable a solution to be found. I am bound by the Court of Appeal decision in *Dillon* and I propose to determine this application on the basis that ICRIR is not fit for purpose insofar as article 2 investigations are concerned. A similar analysis applies to the mooted legislative changes. The Government has asserted that it intends to make

> the ICRIR ECHR compliant but to do so, in the absence of a successful appeal in *Dillon*, will require primary legislation. The only indication of a timetable for this course of action is a general assertion that it will occur when parliamentary time allows. This could, of course, be months or years of further delay whilst the Brown family's article 2 rights continue to be breached."

The court said that the claim on behalf of the SOSNI that no court has previously mandated a public inquiry only advances the respondent's position so far. It is recognised in the authorities that such an order can be made, albeit it may only be in exceptional circumstances. Whilst delay and expense are relevant factors for any decision maker to take into account, they cannot serve to trump the article 2 obligation. The court said it was not clear on the evidence before it that any investigation by ICRIR would be quicker than a public inquiry given the need for a UKSC decision or legislative change before it could even begin such work. It said much of the preliminary work of a public inquiry has already been undertaken by the inquest process with witnesses having been identified and statements taken and disclosure from state bodies having taken place: "These are very considerable foundations upon which the work of a public inquiry could build. Indeed … any chair of a public inquiry is duty bound to act with regard to the need to avoid unnecessary cost."

The court also commented that floodgates arguments are rarely successful:

> "It could scarcely be a defence for a state to resist a case of manifest breach of article 2 on the basis that others may successfully assert article 2 rights. The courts have already placed limits on the article 2 investigative obligation through the genuine connection test. If the complaint relates simply to remedy, the position is that each case must be examined on its own merits. It must be recalled that responsibility for the breach rests exclusively with the state. In this particular case, there are a number of seriously aggravating factors. Some of these may be present in other situations. It will be a matter for the courts to determine whether, and to what extent, this decision represents a precedent for others."

The court recognised that the establishment of a public inquiry would lead to expenditure, probably of significant sums. However, courts have previously stated that where ECHR rights are in play the court may be required to consider the allocation of resources and the effectiveness of administration. However, courts have also stated that it is a matter for the state to organise itself so as to be able to comply with Convention requirements. Moreover, such considerations could not trump the need to promptly investigate, in particular, allegations of collusion in murder."

The court further noted that the SOSNI has decided to 'wait and see' if ICRIR can be rendered article 2 compliant either by a successful appeal to the UKSC or primary legislation amending the Legacy Act. It said that neither of these has any particular timescale and, in the meantime, as a result, the state will remain in continuing breach of its article 2 obligation. This proposed course of action flies in the face of the promptness and expedition requirement of article 2, a matter of some significance when the state has already been responsible for egregious delay. Case law acknowledges that ministers enjoy a broad discretion under section 1 of the 2005 Act, however, discretion in public law must always be exercised lawfully and rationally:

> "The breadth of a discretion narrows significantly when the lawful options open to the decision maker reduce. When one is left with only a binary choice between a lawful and an unlawful course of action, then the discretion reaches vanishing point. Where there is only one lawful decision to take, there is no discretion to exercise. After 27

> years, the United Kingdom has manifestly failed to investigate the murder of Sean Brown in which state agents were allegedly involved. An 87-year-old widow does not know how, why or by whom her husband was killed. Previous investigations have been fundamentally flawed. Information has been deliberately withheld. The inquest process has been repeatedly frustrated by the failures of state agencies to comply with their statutory obligations. It simply cannot be the case that the state can cite resources and ignore the duty it owes to the Brown family."

Remedy

Public law remedies are discretionary so the court can weigh up the rights of the individual, the public body and the public interest more generally in determining what relief, if any, to grant. The UKSC has stated[2] that a mandatory order takes a matter out of the hands of the authority and makes the court the primary actor. Accordingly, when deciding to grant a mandatory order to require the authority to do a particular thing, the court has to have regard to the way in which such an order might undermine to an unjustified degree the ability of the authority to fulfil functions conferred on it by Parliament and act in the public interest. If the court makes a quashing order or issues a declaration, but declines to grant a mandatory order, the matter remains in the hands of the public authority which may be best placed to take account of all interests with full relevant information about them. However, the nature of a breach of a legal duty on the authority may be such as to call for the grant of mandatory relief in order to compel the authority to do what it has a clear legal duty to do.

The court in this application said this is not a case where there is any plea of impossibility:

> "I have concluded that there is a clear and unambiguous obligation on the state to carry out an article 2 compliant investigation. No viable alternative to a public inquiry has been advanced. In these circumstances, there can be only one lawful answer, a public inquiry must be convened to satisfy the state's article 2 obligation. The breach of duty in the circumstances of this case is such as to call for the grant of mandatory relief to compel the state to fulfil its clear legal duty. I accept that this is an unusual and exceptional course to take. However, it is fully justified on the facts of this case and on a proper application of legal principle. The features I have set out … above clearly bring this case into the realm of the exceptional. I therefore make an order of mandamus compelling the Secretary of State for Northern Ireland to cause a public inquiry to be held, under the Inquiries Act 2005, into the death of Sean Brown on 12 May 1997."

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://www.judiciaryni.uk/).

ENDS

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

[2] *R (Iman) v London Borough of Croydon* [2023] UKSC 45

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