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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY NICOLE McGRILLEN FOR JUDICIAL REVIEW

v

ONE OF THE CORONERS FOR NORTHERN IRELAND

McCLOSKEY J

[1] The applicant in this case is Nicole McGrillen. She is the daughter of Finbarr McGrillen ("the deceased"). The Coroner has ruled that there will be no inquest into the death of the deceased. The applicant challenges this invoking the procedural obligation of Article 2 ECHR via Section 6 of the Human Rights Act 1998.

[2] I elaborate briefly on the death as follows. Two persons have been convicted of the murder of the deceased. This occurred in a context where there had been separate investigations in the wake of the fatality. The Police Service conducted a conventional investigation into the conduct of the suspected murderers. By statute the Police Service was obliged to make a reference to the Office of the Police Ombudsman of Northern Ireland and did so. That stimulated a separate Ombudsman's investigation which self-evidently focussed on the acts and omissions of serving police officers. In the Ombudsman's ensuing report there are unambiguous criticisms of the conduct of certain officers who are identified by cyphers and certain officers who are not identified directly or indirectly.

[3] In the Coroner's ruling, there is reference to the report of the Police Ombudsman, the Coroner noting that the Ombudsman's focus was on the acts of the PSNI. The Ombudsman's report identified a series of failures and concerns culminating in the release of SH, that is one of the murderers, on bail. The Ombudsman found, in brief, that the police had failed to adequately protect the

deceased and had not adequately managed the wider risk SH posed to the public. These failures contributed to the circumstances that allowed the murder to occur. The Ombudsman's report made various recommendations for disciplinary action. The report was highly critical of the Police Service's actions.

[4] In the impugned decision the Coroner, in substance, noted all of the foregoing. No criticism can be made of the Coroner's summary. This court has examined in appropriate detail the conclusions and recommendations of the Ombudsman and, further, what the ensuing outcome was. In passing, and perhaps a little unusually, the Ombudsman's report deals with the latter issue as well as the former issue of conclusions and recommendations.

[5] The Applicant's Article 2 case focuses very much on the Ombudsman's investigation. This is reflected in the initial Order 53 pleading and its amended successor. First of all, it points out what the limitations of the Police Service investigation are. It is said that this investigation did not consider any systemic or procedural or structural shortcomings in relation to the events, acts and omissions alike, culminating in the deaths in question. That assertion is correct.

[6] Next there is an assertion that there was no public scrutiny of the Police Service investigation. That was but one element of the State response and I consider that the absence of any "public scrutiny", howsoever described, of an orthodox police investigation could not *per se* give rise to a breach of the Article 2 procedural obligation. *Ditto*, as has been said in many cases, the fact the Applicant and her family did not have sight of the materials gathered during such investigation or their lack of input into lines of enquiry or decisions about who should be prosecuted. These matters are not the stuff of what the Article 2 procedural obligation is designed to protect. Furthermore, there were two independent State agencies involved in this dimension of the State response, namely the Police Service and the Public Prosecution Service.

[7] In the amended Order 53 pleading the investigation of the Police Service is further criticised on the basis that it did not consider whether the acts or omissions of agents and agencies within the PPANI (i.e. civilian support staff) structure made any contribution to the deaths in question. That assertion is correct.

[8] I turn then to the Applicant's critique of the Ombudsman's investigation. In many ways the question which arises is whether the intrinsic limitations of the Police Service investigation were balanced out, or rectified, by the Ombudsman's investigation. As I have pointed out this was by statute confined to police officers suspected of criminality or disciplinary offences. First it is said that this investigation was not able to secure all of the relevant evidence necessary to consider how and in what circumstances the individuals concerned came by their deaths. That, *per se*, cannot be a legitimate Article 2 complaint because it must be considered in tandem with what the police investigation was considering in the sense in which I have earlier explained. It is the next sentence that is rather more important. The

Ombudsman does not have the power to compel police officers on sick leave and/or retired police officers or civilian support staff and/or dismissed police officers to co-operate with or give evidence to those conducting the investigation. As a statement of the law that is correct and as a statement of what occurred factually it is also correct.

[9] Within the Order 53 pleading one then has the omnibus complaint (my summary) that the Ombudsman was unable to ensure accountability of all the State agents potentially involved in the factual matrix bearing on the murder. I shall revisit this *infra.* There is a further discrete complaint that the Ombudsman did not consider whether there was a culture of treating alleged domestic violence offenders more leniently. This seems to me to belong very much to the periphery of what this challenge is all about. There is also a complaint of insufficient public scrutiny. Again, one has to bear in mind the totality of the State response and the publication of the Ombudsman's report and I would not be disposed to hold that a breach of the Article 2 requirement of public scrutiny can be levelled any more at the Ombudsman's investigation than at the Police Service investigation.

[10] There is a further suggestion that the Ombudsman's process did not allow sufficient participation by the Applicant and her family. One has to remember context at all times and when one juxtaposes that discrete complaint with the detailed evidence which has been put before the court about the interaction between first of all the Police Service and the family and secondly the Police Ombudsman and the family the conclusion that this discrete complaint has no merit is readily made.

[11] This brings me to what is very much the heart of the Applicant's challenge. That may be summarised in a nutshell as the limitations of the Ombudsman's investigation in particular. If I return briefly at this point to what the Coroner said in response to the application that was made to convene an inquest. In paragraph (e), Page 3, this is stated:

> "Those persons identified as causing the death have been prosecuted and convicted. There is no suggestion that other persons were involved in the murder but had not been identified and prosecuted."

The next paragraph refers to the criminal investigation. The preceding paragraphs all relate to the police investigation, the outcome thereof, the prosecution, the conviction and the punishment imposed in the sentencing process. The focus is very heavily on police investigation, the PPS prosecution, conviction and punishment.

[12] In a later passage the Coroner turns to consider the Police Ombudsman's report. It notes first of all that this was specifically focussed on the activity of the Police Service in relation to the deaths. It continues:

> "Following a detailed appraisal of process PONI identified errors by PSNI. It also evaluated the potential impact of these failures on the death. The report is highly critical of the PSNI in several important respects."

Next it says:

> "There have been consequences to the PONI investigations, recommendations were made and accepted that several officers faced disciplinary proceedings."

[13] Pausing at this point, I consider that those statements do not withstand scrutiny. As exchanges during today's listing has made clear it is essential to examine the Ombudsman's report in some detail. I have conducted that exercise exhaustively with counsel for the Applicant and counsel for the Coroner. That was not an easy exercise, given the structure and language of the report and I readily sympathise with the Coroner. It is clear that the Coroner addressed the application to convene an inquest in an assiduous and conscientious way but what is also clear is that this is a very difficult report to interpret and absorb. The forensic exercise which the court has carried out exposes the unsatisfactory way in which the report was compiled. In particular and inexhaustively, in the references *ex post facto* to (presumably) disciplinary action that was – and was not - taken the Ombudsman has by the use of shorthand failed to make clear the precise terms and course of the process which it seems as a matter of statute law must have been pursued vis a vis certain police officers. What does emerge, via a somewhat painstaking exercise, is the following: certain police officers were not compellable witnesses in the Ombudsman's investigation, nor were certain civilian employees. It follows that the Ombudsman's investigation was incapable of identifying those persons as potentially involved in a criminal or disciplinary way in the deaths in question and therefore liable to appropriate sanctions. In short the Ombudsman's investigation could not have had that outcome.

[14] As regards "Police Officer 8" (evidently the Custody Sergeant) the Ombudsman's investigation similarly could not have had that outcome because the officer concerned was, by virtue of being no longer a member of the Police Service, having retired, beyond the purview of disciplinary action. I quite deliberately do not add to that "punishment", since the adjectival dimension of Article 2 imposes an obligation of means and not of outcome.

[15] Furthermore, looking backwards at the complete factual framework as one must do - and indeed as the Ombudsman in the final version of this report was doing - the Ombudsman's investigation in respect of "Police Officer 9" was similarly incapable of leading to a process with the possibility of a disciplinary sanction vis a vis this person, given that the disciplinary proceedings against this officer were stayed. On this discrete issue, I make clear that in this case the court approaches this

specific facet of the Article 2 procedural challenge on the basis of the complete factual framework as it has developed and not on the basis of some forecast of what the final factual framework might eventually be at a particular stage in the investigative activities of the State agencies concerned.

[16] Pausing, the contrast between the activities of the State investigating agencies that is the Police Service and the Police Ombudsman, the latter in particular, on the one hand and, on the other, the further investigation which the Coroner is capable as a matter of law of carrying out becomes quite stark. The Coroner will be able to exercise two important statutory powers. First, steps can be taken to compel the attendance of an unspecified but clearly significant number of police officers and civilian members of staff who are in some way implicated in the events in question and who on the current evidence could conceivably bear some legal responsibility for what occurred. As matters stand it rather appears that their evidence would be more likely to belong to the outer limits of the wider circumstances than the narrower limits of the immediate circumstances. But that is simply a reflection of what actually happened in this case: on the one hand there were the immediate perpetrators and, on the other, there were the State agents whose acts or omissions may have been in some way legally responsible for the ability of the immediate perpetrators to carry out the murders in question.

[17] The second, and important, statutory power at the disposal of the coroner is contained in Section 17 of the Coroners Act 1959 as amended, that is Section 17A. This power can be exercised so to require all of these people to provide witness statements.

[18] I would add: the jurisprudence is clear - the Article 2 obligation is not confined to the immediate perpetrators of the death but can extend to others, that is, other State agents less directly involved. It has been accepted from the outset that Article 2 is engaged in the present case. There was no misdirection of any kind in the Coroner's approach in that particular respect, stating unerringly:

> "The coroner is of the view that there is information in existence to show an arguable breach by the Police Service of Northern Ireland of the Article 2 rights of the deceased. The findings of the Ombudsman's report as summarised above are support for that view."

This can only be construed, in my view, as a reference to the positive duty on the police officers concerned to protect the lives of the deceased persons in question. The role of the court is quite clear in an Article 2 challenge of this kind. One does not apply public law standards of challenge. Thus the court is not concerned with whether the Coroner has acted irrationally or in any disproportionate way, nor is the appropriate enquiry whether the Coroner took something immaterial into account or left something material out of account. Rather, in this species of human rights challenge based on the procedural obligation of Article 2 of the Convention which is

embedded in domestic law by Section 6 of the Human Rights Act 1998 the court conducts a full audit of legality and asks itself does the impugned decision give rise to a breach of the procedural obligation of Article 2 of the Convention contrary to Section 6 of the Human Rights Act. See the authorities and principles digested in R(SA) v SSHD [2015] (IJR) UKUT 536 (IAC), at [17] – [20] especially.

[19] When one considers the full scope of what has been uncovered by the Police Ombudsman's investigation and the nature and extent of the further investigation which the Coroner will be capable, as a matter of law, of carrying out I answer that question in the affirmative. I do so, I should make clear, first of all adopting the approach which has been spelt out fully in the leading authorities namely *Amin* and *Edwards v The UK* and, secondly, giving effect to the doctrinal approach outlined in *SA (supra)*. In short, in a case of this kind this is not a court of supervisory superintendence. It is rather a court which conducts a full audit of the legality of the impugned decision which in this case means the compatibility of the impugned decision with the procedural obligation of Article 2 of the Human Rights Convention.

[20] Accordingly, differing with respect from the Coroner, I conclude that the Applicant's case has been established on the basis which I have explained. The appropriate remedy in these circumstances will be an order of Certiorari quashing the impugned decision of the Coroner.