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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**22/11/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PETER JOHNSTON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Ronan Lavery KC and Mark Bassett (instructed by Owen Beattie & Co) for the Applicant
Laura Curran (instructed by the Crown Solicitor's Office) for the Respondent

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HUMPHREYS J

Introduction

[1] On 14 October 2000 the applicant was subjected to a paramilitary style punishment attack when he was beaten and shot in both legs at his home in Newtownards.

[2] The matter was reported to the police at the time. By July 2021 the applicant had heard nothing about the investigation and raised the matter with his solicitor. By this application for leave to apply for judicial review, the applicant seeks to challenge the alleged continuing failure of the PSNI to investigate the shooting, which is said to be in breach of the obligations owed under article 2 and/or 3 ECHR.

The Grounds for Judicial Review

[3] The applicant contends that there has never been an effective investigation into the attack which took place on him. It is his case that since this event post-dated the coming into force of the Human Rights Act 1998 on 2 October 2000, the positive duty to investigate the crime under either article 2 or 3 was engaged.

[4] The applicant also alleges that the original RUC investigation cannot be considered as compliant with the article 2 or 3 obligation since it lacked the necessary quality of independence.

The Test for Leave

[5] As recently confirmed by the Court of Appeal in *Re Ni Chuinneagain's Application* [2022] NICA 56 an applicant must satisfy the court at the leave stage that there is an arguable case with a realistic prospect of success and which is not subject to a discretionary bar such as delay.

The Evidence

[6] The affidavit from the applicant gives little detail in relation to the attack beyond saying he was beaten and shot in both legs. It does state:

> "I was unsure whether the attackers were members of loyalist paramilitary groups operating in Newtownards at the time. At the time of swearing this affidavit I now believe that it was the case"

[7] The applicant goes on to say:

> "I believe that the RUC (at the time) or the PSNI since may have identified the perpetrators through intelligence but have elected not to investigate further or prosecute so as to protect their sources within the loyalist paramilitaries in Newtownards."

[8] It will be apparent that neither of these averments satisfies the requirements of Order 41 rule 5 of the Rules of the Court of Judicature (NI) 1980 in that neither the sources nor the grounds of the applicant's beliefs are stated. In these circumstances, it is difficult to attach any weight to this evidence.

[9] The court also has the benefit of an affidavit from the applicant's solicitor, Mr Beattie, which exhibits the correspondence passing between him and the PSNI. A letter was first written to Bangor CID on 21 July 2021 seeking information in relation to the investigation. Local police were unable to provide any such information and inquiries were then made with PSNI legal services. On 21 October 2021 they stated:

> "… this investigation is no longer live. Attempts have been made to locate the paper file/investigative papers but have proven fruitless."

[10] Further correspondence was sent on 27 October 2021 and 1 February 2022 but no reply received. A pre-action protocol letter was then sent on 21 February 2022 alleging breach of the article 2 and 3 ECHR investigative obligation. The response from the Crown Solicitor's Office, dated 25 March 2022, makes a number of positive averments:

(i) The applicant did not suffer a life threatening injury so as to engage article 2 ECHR;

(ii) Forensic evidence was obtained from the applicant's address in the form of the spent bullet case, a live round and the bullet which lodged in his leg. The scene was analysed for fingerprints, house to house inquiries conducted and statements taken but no one was made amenable;

(iii) Operational policy at the time was to close the investigation on exhaustion of available lines of enquiry which would have been communicated to the applicant by telephone (a matter which the applicant disputes).

[11] The applicant also seeks to rely on evidence which he says demonstrates a 'history of collusion', including PONI reports into the Loughinisland killings and the attack at Sean Graham bookmakers. Reference is also made to the Walker Report from 1980 which endorsed and formalised an informer-led model of policing. The applicant's solicitor deposes:

> "It is a reasonable contention that the Walker report approach led to a distortion of the rule of law in Northern Ireland, whereby handlers of informers were instructed to ignore the most serious breaches of the criminal law in order to obtain intelligence."

[12] On the basis of these materials, the applicant invites the court to conclude that the attack against him was carried out by loyalist paramilitaries and that there would have been intelligence in relation to same in October 2000. Mr Beattie avers:

> "The Respondent may, or may not, have prioritised intelligence gathering at the expense of prosecution of violent crime."

Articles 2 and 3 ECHR

[13] In the course of argument, the applicant's counsel accepted, correctly, that this was properly analysed as an article 3 rather than an article 2 case. Whilst a 'near death' attack may suffice to trigger the article 2 obligation, this was not such a case albeit that the treatment meted out to the applicant could certainly be classified as inhumane.

[14] In any event, the procedural aspect of the obligation is the same whether one relies on article 2 or article 3. The elements of the obligation are set out in detail in *Re McQuillan* [2021] UKSC 55 at para [109]. The Supreme Court identified the following:

(i) Articles 2 and 3 are core provisions of the ECHR;

(ii) The state is required to carry out an investigation when an individual has been killed by force in order to secure the right to life and ensure accountability;

(iii) A similar duty of investigation arises under article 3 where there is reasonable suspicion that a person has been subjected to torture or inhuman or degrading treatment;

(iv) Investigations must be adequate and prompt;

(v) They must be subject to public scrutiny to ensure accountability;

(vi) The investigation must be effective, but this is an obligation of means rather than result;

(vii) The persons responsible for the investigation must be independent of those implicated in the events.

[15] Where an investigation has been carried out and closed, new evidence which comes to light may serve to revive the obligation under the principle set out in *Brecknell v UK* [2008] 46 EHRR 42:

> "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]

[16] The applicant candidly admits in his skeleton argument that he cannot point to any specific or new evidence which has emerged since the conclusion of the investigation. Instead, he relies upon claims of collusion with loyalist paramilitaries in order to ground his case.

[17] As will be apparent from the parts of the evidence extracted above, there is, in reality, no such evidence presented to the court. The claims about links between the RUC and loyalist paramilitaries are, of course, in the public domain and have been

the subject of judicial consideration in cases such as *Re McEvoy's Application* [2022] NIKB 10. However, it is simply not open to the court to draw a general inference, even for the purpose of meeting the leave threshold, that there must have been some collusion between the police and loyalists in the instant case. This is entirely insufficient to ground a claim of want of independence on the part of those who initially investigated the attack.

[18] The evidence which the court has is that the attack was investigated in a conventional manner but did not lead to anyone being charged or convicted. The investigative obligation is, of course, one of means rather than end. Once an investigation has been undertaken and is closed, the obligation can only be revived in line with *Brecknell*. No such trigger exists in this case and therefore the applicant cannot show an arguable case of breach of the article 3 obligation which has realistic prospects of success.

[19] That is sufficient to deal with the matter but since I heard full argument on the issue, and given its relevance to other legacy cases, I will consider the question of delay.

Delay

[20] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 requires that an application for judicial review be made within three months of the date when the grounds first arose unless the court considers there is good reason to extend the time.

[21] It is well established in administrative law that time runs from the date of the act complained of, not from the time the applicant is informed or becomes aware of it – cf. Treacy J in *Re Bryson Recycling* [2014] NIQB 9 at para [77]. The decision to close down the investigation in this case was taken in 2001. It is apparent therefore that the grounds for this application first arose over 20 years ago.

[22] The leading case on delay in this jurisdiction is *Re Laverty's Application* [2015] NICA 75 in which the Court of Appeal stated that an applicant seeking an extension of time must file evidence explaining all aspects of the delay.

[23] In this case, the court has the benefit of an affidavit from the applicant's solicitor addressing the events post-July 2021 but nothing dealing with the failure to take any steps to enquire about the investigation in the preceding 20 years. Even if the applicant was unaware of the precise date of the closure of such investigation, it must have been apparent to him that nothing had happened in terms of prosecuting those responsible. There are other periods of delay, including from October 2021 to February 2022, but the period prior to July 2021 remains wholly unexplained.

[24] There is simply no evidence before the court which would permit it to exercise its discretion in favour of an extension of time given the passage of time

since this investigation was closed. It is also apparent that there has been considerable prejudice to the proposed respondent in addressing this claim since the original investigative file cannot be located. The time limit for bringing an application for judicial review reflects a public policy that challenges to administrative acts and decisions should be made promptly.

[25] Good reason to extend time may encompass the public interest in the outcome of particular proceedings or an important point of law which requires to be determined. No such issue arises here. The contours of the article 2 and 3 investigative obligation have been the subject of much judicial consideration at the highest level and no novel point has been identified in this case. Moreover, I have found, in any event, that the applicant's case does not meet the threshold of arguability.

Conclusion

[26] For these reasons, the application for leave to apply for judicial review is dismissed. I will follow the court's usual practice in relation to costs unless the parties wish to advance alternative submissions.