Neutral Citation: [2016] NIQB 56 | *Ref:* **MAG9965**

Judgment: approved by the Court for handing down | *Delivered:* **17/6/2016**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Johnstone's (Dorothy) Application [2016] NIQB 56

IN THE MATTER OF AN APPLICATION BY DOROTHY JOHNSTONE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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AND IN A MATTER OF A DECISION OF THE ATTORNEY GENERAL FOR NORTHERN IRELAND

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MAGUIRE J

Introduction

[1] The court has before it an application for judicial review. The applicant is Dorothy Johnstone. The proceedings were initiated on 26 June 2015. The intended respondent is the Attorney General for Northern Ireland ("AGNI").

[2] The proceedings arise out of the death of Sean Eugene Dalton ("the deceased") who died on 31 August 1988 as a result of a bomb, believed to be planted by PIRA, at a flat at Kildrum Gardens, Londonderry.

[3] The court records that there is no evidence to suggest that the deceased was other than an entirely innocent person. Indeed at the relevant time the deceased was acting as a "Good Samaritan" seeking to ensure the welfare of a friend.

[4] In the aftermath of the deceased's death a police investigation was carried out.

[5] This led to an inquest into the deceased's death. This occurred on 7 December 1989.

[6] The inquest revealed that the deceased had died around 11.50 am on 31 August 1988. His body was found inside an upper storey flat at 38 Kildrum

Gardens. The body of a woman was also found lying beside a coal bunker in the rear garden of the flat below. It is clear that the death of both resulted from an explosion which took place in the hallway of No. 38. A third person was also injured in the explosion, a Mr Curran. He later, at the end of March 1989, died from his injuries. It appears likely that an explosive device had been secreted in a wellington boot just inside the flat. The deceased had entered the flat, when there had been no reply to knocking the door, by climbing through a window. He walked through the kitchen and into a hallway adjacent to where the device had been placed so setting the explosion off.

[7] The immediate background to this incident was that Person A was the occupant of the flat at No. 38. It appears that Person A and Person B were abducted on or about 25 August 1988 and were taken to a location where they were kept until 31 August when they were released onto a public road. On that day a neighbour of Person A's, Mr Curran, who gave evidence at the inquest, described how the deceased (Mr Dalton) had called round and was concerned as he had not seen Person A for some time. Mr Dalton lived in the flat below Person A. Person A's next door neighbour, a Mrs Lewis, also became involved. Mr Curran and Mrs Lewis went to Person A's flat. They were joined outside the flat by the deceased. There was no answer to the door. Being concerned about Person A's welfare, the deceased climbed through the window into what appeared to be a deserted flat. However shortly after getting inside the flat Sean was killed when the bomb went off. Mrs Lewis, who had not gone inside the flat but was standing on the balcony outside, appears as a result of the explosion to have been blown off the balcony hence explaining her body being found beside the bin in the garden below. Mr Curran also was on the balcony and sustained serious injuries in the explosion.

[8] At the inquest evidence was given by a police officer that PIRA had admitted responsibility for the placing of the device in the flat. It appears that the intended victim or victims had been police officers and that the plan had been to lure officers to the flat. The abduction of the occupant and his friend was part of this plan, the expectation or hope being that the police would go to the flat to inquire about them.

[9] On 27 September 2005 a relative of the deceased Martin Dalton made a complaint about the police investigation into the deceased's death to the Police Ombudsman for Northern Ireland ("PONI").

[10] Thereafter PONI carried out an investigation into this complaint and ultimately published a report concerning the deceased's death. The report was published on 10 July 2013.

[11] In November 2012 correspondence began between the deceased's family and the AGNI in respect of the issue of whether a fresh inquest should be directed by the Attorney General under the power contained in section 14 of the Coroners Act (Northern Ireland) 1959. Ultimately the AGNI refused this request on 2 October 2014. It is this refusal which is the impugned decision in this case.

[12] In the aftermath of the AGNI's refusal a pre-action protocol letter was sent by the applicant's solicitors to AGNI on 24 November 2014. The AGNI responded to this on 10 December 2014. There then occurred further correspondence between the parties. Throughout this correspondence the AGNI maintained his position while indicating that he was always willing to consider any new information or material.

The Police Ombudsman's Report

[13] The above report is a substantial document. As indicated above, it resulted from a complaint about the police investigation into the deceased's death. The gravamen of this complaint related to an alleged failure on the part of the police to allow the device planted in the flat to remain in its location without any warning to the public. It was suggested that the absence of any warning was a consequence of the police protecting an informer. The police thus, it was alleged, had failed to protect the public and had failed, *inter alia*, to protect the deceased's life. The investigation of PONI was therefore directed at determining whether there was evidence of police misconduct or criminality.

[14] In the course of his investigation PONI did not receive full assistance from all relevant retired police officers, including former officers in Special Branch, but was able to gather together and consider a range of information, including intelligence information, relating to the incident. From this PONI was able to conclude that there had been prior intelligence that paramilitaries intended to plant a bomb in a house and stage an incident in the hope that the police would carry out follow up enquiries during which they would trigger an explosion. PONI also uncovered a number of incidents which seem to have been staged with a view to drawing police attention to the location. The report concluded that while PONI could not be certain that the police knew there was a bomb specifically at the flat at 38 Kildrum Gardens, there was strong evidence that the police had sufficient information and intelligence to identify the location of the bomb. Thus the police ought to have known that a device was in the vicinity of the flat and they should have taken steps to mitigate the threat and to warn the local community. Such steps were, however, not taken. The theory that the police had at the time been acting to protect an informer was not supported in PONI's report.

[15] Overall the PONI report reached the view that after an initial flurry of activity work on the murder inquiry into the deceased's death was scaled down and lost focus and that by the standards of the day the investigation was inadequate. The bomb in the flat represented a real and immediate threat to the local community.

AGNI's response

[16] The AGNI's view, having considered an extensive range of information in relation to the case, as of 2 October 2014, was that a new inquest was not, at that time, "advisable". This conclusion was arrived at for a variety of reasons: there had

by the date of decision already been a detailed examination by PONI (which had attracted a response from the Retired Police Officers Association); there was an absence of material to establish what utility a new inquest would have; Article 2 did not require proceedings to be held which had as their purpose the establishment of historical truth; and what Article 2 did however require was an investigation leading to the identification and punishment of perpetrators, particularly in the case of deliberate killing, a matter about which there was an absence of evidence in this case. The Article 2 objectives were not therefore likely to be achieved by a fresh inquest in this case. The AGNI also referred to the fact that PONI had not referred any matter to the Public Prosecution Service, notwithstanding his criticism of police actions and to the fact that the deceased's family had begun civil proceedings against the police.

[17] While there then ensued extensive correspondence between the family's solicitor and the office of the AGNI, it is unnecessary for present purposes to set out the details in this leave judgment.

The grounds of judicial review for which leave is sought

[18] Four grounds of judicial review have been advanced in this case. However these, without significant loss, can be distilled to two grounds as follows:

(a) The AGNI's conclusion that an inquest was not advisable was unreasonable and irrational.

(b) A fresh inquest was necessary for the purpose of discharging the investigative obligation under Article 2 of the ECHR and the AGNI misdirected himself on this issue and, if he had properly directed himself, he would have directed a fresh inquest.

The leave hearing

[19] The leave hearing was protracted in this case. This was largely because the court was anxious to have submissions from the parties in respect of the Supreme Court's recent decision in Keyu.

[20] The court is grateful to the parties for the very extensive submissions it has received from Ms Doherty QC, who appears with Mr McGowan BL, for the applicant and Mr Scoffield QC for the intended respondent. As this is a judgment on leave only, the court apologies in advance to counsel for any failure to set out fully the arguments it has received. Where this has occurred it has been to order to ensure that this judgment achieves its purpose as succinctly as possible.

Preliminary point

[21] Mr Scoffield raised an interesting preliminary point which the court will deal with first. He submitted that the AGNI as a law officer could not be made subject to the court's judicial review jurisdiction, save in the area of the case dealing with misdirection or breach of Convention rights. In support of this argument Mr Scoffield relied on the case of R v Attorney General ex parte Ferrante [1995] COD 18 and on a statement from Leckey and Greer's, Coroner's Law and Practice in Northern Ireland (1998) SLS at paragraph 15.13. The court accepts that on the face of it Ferrante does support counsel's submission and it plainly is the source of Leckey and Greer's comment.

[22] In response Ms Doherty argued that the law has moved on since Ferrante and that the trend today is very much in favour of judicial review being available in principle to the widest degree possible. As the AGNI was exercising a statutory function, it was her submission that there ought to be no significant difficulty in ensuring by judicial review that he has acted consonantly with the limits of his authority. As examples in this jurisdiction of situations in which the AG had been made subject to judicial review, at least in principle, counsel referred to In Re Shuker's Application [2004] NIQB 20 (on which Mr Scoffield also relied) and on In Re Forde's Application [2009] NICA 66. Ms Doherty also relied on *obiter dicta* comments of Nicol J in R v Attorney General [2011] EWHC 3759 (Admin) at [22] and drew attention to the Privy Council case of Mohit v DPP Mauritius [2006] 1 WLR 3343 at paragraph [14] which to a degree is open to the interpretation that it undermines the authority of Gouriet v Attorney General [1977] 3 WLR 300, which is the foundation on which Ferrante was based. In Ms Doherty's submission as the point was arguable the court should not reject the applicant's application on this basis.

[23] The court has little hesitation in accepting Ms Doherty's argument on this point. Whatever the merits of the Ferrante case, it seems clear to the court that this is an area where the law is not static. In this jurisdiction in Shuker the court did not hold that the AG could not ever be judicially reviewed and leave had been granted in that case. Likewise in Forde neither at first instance nor on appeal was any point taken by counsel or the court that the latter lacked jurisdiction. In these circumstances, the court considers the point arguable which is sufficient for the purpose of this leave judgment.

Ground (a) Irrationality

[24] In the applicant's Order 53 Statement it is suggested that the AGNI's decision was irrational *inter alia* because:

(a) He failed to take into account that PONI had no power to compel witnesses who were not serving members of the Police Service.

(b) He had failed to take into account that the PONI investigation did not have the full co-operation of retired police officers.

(c) He had failed to take into account the fact that the PSNI did not accept the PONI report.

(d) He had failed to take into account the fresh evidence contained in the PONI report.

(e) He had failed to take into account that a fresh inquest would have the power to compel witnesses.

(f) He had failed to take into account that a fresh inquest would provide an opportunity to clarify disputes.

(g) Moreover, he took into account the fact that the matter had been considered by the Northern Ireland Retired Police Officers Association.

[25] These failures, the Order 53 suggests, fed into irrational conclusions that the matter had been the subject of sufficiently detailed consideration and analysis already and that there would be no utility in the holding of a fresh inquest.

[26] The court does not find this ground of judicial review at all convincing. The court has no reason to believe that it has been established that the AGNI in fact failed to take into account the various matters referred to above at (a) to (f). The suggestion that he had not had regard to the various matters listed appears to the court to involve more than a little speculation. Moreover speculation alone is not a sound basis on which to grant leave to apply for judicial review: see SOS (NI) Ltd's Application for Judicial Review [2003] NIJB 252 at paragraph [19]. As regards (g) in the list above, the court does not consider that this betokens any arguable form of illegality on the AGNI's part.

[27] It is in this context important to recall the nature of the judgment being made by the AGNI. The terms in which section 14 (1) is cast are:

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner…to conduct an inquest into the death of that person…".

[28] It is the court's view that this provision lays not inconsiderable emphasis on the matter being one very much involving the judgment and assessment of the AGNI personally. This is supported by the use of the expression "reason to believe", the use of the words "in his opinion" and the use of the word "advisable".

[29] The impugned decision in this case was made pursuant to this provision and the court considers that a light touch form of review is appropriate in these circumstances.

[30] Applying a light touch, the court is not persuaded that there is an arguable case that the AGNI has acted irrationally in the assessment he has made. His decision is within the latitude he has had conferred on him by the statute.

Ground (b) Article 2 of the Convention

[31] It is not in dispute that in this case there was a police investigation at the time of the deceased's death and that this was followed up by an inquest on 7 December 1989. At this time the Human Rights Act 1998 had not been brought into effect in the United Kingdom. This did not occur until 2 October 2000. However, as a matter of international law, the United Kingdom, as a state party to the Convention would have been subject to it.

[32] The applicant's analysis is that the PONI report revived the need for an Article 2 investigation because that report contained fresh evidence as it disclosed intelligence information available to the police which had hitherto not be known about. There was therefore a need for a compliant Article 2 investigation both for the reason above and for the reason that the original police investigation and the earlier inquest had not been up to standard, in the former case, as PONI held in their report.

[33] The analysis of the intended respondent was quite different. On behalf of AGNI it was argued that there had been no revival of the Article 2 investigative obligation as this was directed to the issue of the identification and eventual prosecution or punishment of the perpetrator of an unlawful death. Those who fell into this category were those who had planted the device which killed the deceased. The PONI report had not provided new evidence about who the perpetrator or perpetrators were but was directed at a different issue *viz* the failures of the police to protect those who might be endangered by the placing of the device. There was no suggestion, it was submitted, that the holding of an inquest would be likely to advance the goal of bringing those responsible for the death to justice as opposed to the goal of establishing whether the police had discharged any protective duty owed by them – a matter about which PONI had expressed his opinion.

[34] In the alternative, it was suggested on behalf of AGNI that even if there had been a revival of the Article 2 investigative obligation this had been fulfilled by the PONI investigation and did not require a further inquest which served only the function of establishing historical truth and could not result in prosecution of the perpetrators. The reality was, in accordance with this submission, that what the applicant wanted a fresh inquest for was to pursue an issue of police negligence, notwithstanding that the family have already civil proceedings dealing with this issue in train.

[35] The court has not found this issue to be an easy one which points in the direction of the court granting leave in respect of this aspect of the matter. The court takes this view for the following principal reasons:

(a) The court is unconvinced that there cannot be a revival in relation to the Article 2 obligation in a case where this is said to occur as a result of new information about aspects of the matter which are significant but which in themselves may not advance the goal of successful prosecution of the immediate perpetrators of the unlawful death.

(b) If the Article 2 obligation has been revived the court accepts that it may not have been met by an investigation by PONI which itself suffered from imperfections caused in part by the non-cooperation of potential witnesses and issues like the loss of documents.

(c) The court is slow to take the view that the existence of civil proceedings taken by the family will necessarily cure the issue of compliance with Article 2 in these circumstances. It potentially could do so but the court is unwilling at this stage to go beyond that.

(d) The law in this area, it seems to the court, is in something of a transitional state in which there are a significant range of issues which may arise which have not been the subject of a definitive rule. While the court had hoped that the decision of the Supreme Court in Keyu might have provided specific guidance this has not materialised. The court inclines to the view that in this case a full hearing is the better forum in which to seek to resolve the issues which have been left open or not resolved as well as new issues which have emerged.

[36] The court will grant leave on ground (b) which is encapsulated at paragraph 3 (c) (i) and (ii) of the Order 53 statement.

Conclusion

[37] Leave is granted in accordance with paragraph [36] and is refused on all other grounds.