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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 12/10/ 2018*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY HUGH KENNY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY JOHN McEVOY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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McCloskey J

Framework

[1] This ruling, in the context of two judicial review challenges belonging to the stable of so-called "legacy" cases, determines the separate applications of the above named Applicants for permission to appeal to the Court of Appeal against interlocutory case management decisions/directions of this Court promulgated at the conclusion of hearings on 21 September 2018. I have deemed it appropriate to compile a joint ruling given the close association between the two cases and the common issues raised by the applications for permission. It is necessary for the Applicants to take this step by reason of section 35(2)(g) of the Judicature (Northern Ireland) 1978, which provides:

> "*No appeal to the Court of Appeal shall lie ….*
>
> *without the leave of the Judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a Judge of the High Court ….*"

[2] In the first case (Kenny) the Court directed, on 21 September, that the scheduled substantive hearing dates of 26 and 27 September 2018 be vacated. In the second case (McAvoy) the Court, again on 21 September, directed that the scheduled substantive hearing dates of 01 and 02 October 2018 be vacated. This represented the first of five provisions in each Order. The remaining four in each case were as follows:

- The Applicants were ordered to file their written proposals for the further timetabling of the cases within four weeks of the date of

promulgation of the awaited judgments of the Court of Appeal in certain related cases.

- The Respondents were directed to file their responses within a further period of two weeks.

- All parties were given liberty to apply.

- Costs were reserved.

Procedure

[3] The procedure which the court adopted in these two cases (and in certain others) was identical. By formal notice the Applicants' legal representatives were invited to provide written representations on the listing/timetabling issue. The Respondents replied in writing. The cases were then listed for consideration by the Court on 21 September 2018. On this date the Applicants' counsel had the facility of making further oral representations to the Court. The Respondents' counsel had the same facility. The Court then pronounced its decision orally. This procedure was adopted in all members of the group of five cases.

[4] The linkage between all members of this group and the still undecided appeals before the Court of Appeal in the cases of Barnard, McGuigan and McQuillan has been the subject of frequent and extensive written and oral argument in this court during the past twelve months and formed the centre piece of the most recent written and oral submissions generated underlying these permission applications. The topic of this linkage is so well known and so heavily documented that elaboration in this ruling would be wasteful.

The permission applications

[5] The two permission applications are couched in identical terms, with one qualification and signed by the same counsel. In the case of Kenny, the complaint is that the court's adjournment decision contributes to alleged breaches by sundry state authorities of the procedural requirements of Articles 2 and 3 ECHR (contrary to section 6 HRA 1998) in a context where the Applicant's claim relates to a currently live investigation ("Operation Everson") by the Police Service of Northern Ireland, being "*a body that the High Court has found in three other cases to lack the requisite independence to investigate …*". This latter ingredient does not feature in the permission application in the McAvoy case, which is otherwise in the same terms.

Decision

[6] It is unnecessary to dilate on the extensive written submissions and other written materials which underlie these applications and their determination by the court.

Directions were given for the preparation of a transcript of the hearings on 21 September 2018 and this is attached hereto. I consider its contents self-explanatory.

[7] In case management and time tabling decisions of this kind, the court exercises a discretion of long recognised breadth. At public hearings in this case and others, this court has had occasion to describe this discretion as one of the broadest judicial discretions in the legal landscape. Its breath is noted in both applications, each of which acknowledges that –

> "… *case management decisions, including adjournment orders, by the High Court exercising its case management powers rarely fall properly to be appealed.*"

Neither permission application instances a single case in which either (a) permission to appeal against a case management/timetabling order of this kind has been granted or (b) the Court of Appeal has interfered with the exercise of the trial judge's discretion.

[8] Second, neither application refers to the two main principles expressed in R (AM and OA) v Secretary of State for the Home Department [2017] UKUT 00262 (IAC) at [18]:

> "(1) I begin with two propositions which I consider uncontroversial. First, the decision whether to stay proceedings in any forum and, if so, on what terms involves the exercise of a relatively broad – though not of course unfettered – judicial discretion. Second, the most important factors influencing the exercise of this discretion will normally – though not invariably – be found in the multi-faceted overriding objective."

The judgment in that case continues at [20]:

> "(2) Section 49(3) of the Supreme Court Act 1981 is an express acknowledgement of the judge made nature of both the power to stay proceedings and the principles to be applied. It has been long recognised that the power of the High Court to stay proceedings is inherent in nature: Re Wickham [1887] 35 CH D 272 at 280, per Cotton LJ. In an earlier era, a stay had the Draconian effect of bringing proceedings to a conclusion, unless it was of the conditional variety. This has, however, been superseded by contemporary practice: Rofa Sport Management v DHL International UK [1989] 2 All ER 743. Accordingly, in modern litigation a stay does not have the drastic consequences of its 19th and early 20th century

> ancestors. The conditional stay sought in these proceedings is not to be confused with one of its ancestors namely the permanent stay."

[9] Furthermore, there is no engagement with the statement of the English Court of Appeal in AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921 at [25] that a decision to stay proceedings belongs to the realm of case management decisions in which –

> "In relation to stays of proceedings, as opposed to stays of enforcement, the judge is making a case management decision. Such decisions will rarely be challenged and even more rarely be reversed on appeal."

Finally, neither application engages with the Court of Appeal's approval of the formulation of the governing principles of the first instance Judge at [27]:

> "A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown."

[10] There is no suggestion that this court, in making the impugned decisions, adopted a procedure which was unfair or otherwise irregular. Nor is it suggested that

this Court has disregarded any material factor or permitted the intrusion of anything immaterial. Furthermore, there is no contention that this court has in any way misconstrued or acted incompatibly with the overriding objective. Finally, it is not suggested that the court has erred in principle or, indeed, that any significant issue of principle arises. This analysis flows inexorably from the terms of the permission to appeal applications in both cases.

[11] In both cases it is suggested that the impugned decisions of this court "… *constitute a breach of the Applicant's common law right to a fair hearing …*" This contention is formulated without the slightest particularity or even minimal elaboration. It is manifestly unsustainable in any event, not least because (a) the overall fairness of these proceedings will fall to be assessed upon their completion and not at some satellite, interlocutory stage and (b) in any event this court has demonstrably made strenuous efforts to complete the first instance stage of this case but has been unable to do so for reasons entirely outside its control.

[12] Finally, both applications embody the suggestion that the impugned decision of this court breach the Applicants:

> "*… legitimate expectation that his case would be fast tracked, it having been publicly undertaken in October 2017 that legacy judicial reviews would be dealt with swiftly and his case having been selected thereafter to be heard in Spring 2018.*"

As neither permission application condescends to the minimum of particularity in advancing this contention I shall treat it as a speculative and optimistic makeweight, an afterthought. This court assumes that if this contention were being advanced seriously, it would be accompanied by appropriate elaboration and particularisation.

Disposal

[13] As neither of these applications discloses any arguable judicial aberration of a material kind in the impugned decisions both are refused. Any consequential issue of costs will be addressed if required.

ICOS NOS 17/54285; 17/31932; 17/65900; 16/5507; 16/100974; 17/97529; 18/18762; 17/54802 & 02; 17/54285; 17/31932; 17/65900; 16/5507; 16/100974

THE NORTHERN IRELAND ROYAL COURTS OF JUSTICE

BELFAST

JUDICIAL REVIEW LIST

APPLICANTS: VERONICA RYAN & OTHERS

HEARD BEFORE

THE HONOURABLE MR JUSTICE McCLOSKEY

ON

21st SEPTEMBER 2018

APPLICANTS	REPRESENTATION
(1) VERONICA RYAN	MR DEVINE (C)
(2) FRIENDS OF THE EARTH	MR SAYERS & MR JONES
(3) COLM CAMERON	MR TOAL©
(4) HUGH KENNY	MS Ni Ghralaigh (C)**
(5) PATRICK LAVERY	MR SCOTT (C)
(6) JOHN McEVOY	MS **
(7) COLIN STUART	MS **
(8) JASON KIRKPATRICK	MR JUDE BUNTING (C)

RESPONDENTS	REPRESENTATION
(1) UNKNOWN	MR COLL QC
(2) UNKNOWN	MR McGLEENAN QC
(3) UNKNOWN	MR McGLEENAN QC
(4) UNKNOWN	MR McGLEENAN QC
(5) UNKNOWN	Mr Scott (C)
(6) UNKNOWN	MR McGLEENAN QC
(7) UNKNOWN	MR McGLEENAN QC
(8) HOME SECRETARY & NORTHERN IRELAND SECRETARY OF STATE	MR McGLEENAN QC

THE RYAN CASE

MR DEVINE: My Lord, I am very grateful, if it pleases the court and if it's convenient to the court, if the court would allow me to mention the case of Ryan at the outset, and I have a - a personal interest in a matter that's been heard in Laganside this morning. The - that's a case which I - I don't know the full details of the other cases that are in today's la - list, but it isn't the classic Article 2 case. It's a case I'm lead in by Mr Southey. He - he had sent the correspondence to the court asking whether or not it would be convenient for the court to - to review this matter next week.

By then, we would have the benefit of the respondent's position paper, which I'm told is being - has been drafted and it's just been finalised. I don't know if that course commends itself to the court.

Or is - there is a couple of issues just about the 53 which are still being resolved and the - there's an issue about whether or not the hearing date of the 26th of October is viable.

JUDGE: Yes, Mr Coll?

MR COLL: This morning, I appear for the respondent. Mr Southey informed me yesterday that he wouldn't be available today and asked if I would consent to the review or substantive (inaudible) being conducted next Friday, and that's fine me, my Lord, if it's suitable to the court.

There is, as my learned friend Mr Devine says, there, as he says, there is an issue between us, and your Lordship may have seen this in the position paper - the updated position paper from the applicant's side - about the order 53 statements, and it arises from the working side of the section 6 CNP application situation last May, so it may take a little bit of time if that can't be resolved between us before the court. I suspect ...

JUDGE: Well, there's nothing before me.

MR COLL: ... it will not be resolved.

JUDGE: Mr Coll, I'm told that there's an issue. That's it, full stop.

MR COLL: It's ...

JUDGE: And that there's no point in telling me now ...

MR COLL: No, indeed, my Lord.

JUDGE: ... to be perfectly honest. So ...

MR COLL: That's a fair comment, my Lord.

JUDGE: ... I don't know what the request means from Mr Southey (inaudible).

MR COLL: Well, I think that really what he anticipates is that, if there is to be a review of the - of the matter, that it - it might be to have greater utility if he were to be present, because this issue about the ...

JUDGE: Well, at the moment, in whose court does the ball lie, Mr Coll?

MR COLL: Our position paper is due today. I think in fact it's, strictly speaking, due tomorrow, the 22nd. And the pos - the real one of the matters before the court the court will merely need to consider previously the court had adjourned the hearing of the case to allow for the Supreme Court judgments in the cases of Nealon and the separate case of Stott to be promulgated.

Now, as it turns out, my Lord, neither of those were handed down by the court prior to the court going into summer recess and we don't know when those judgments are likely to come. It's possible perhaps they might come early next month, but we simply don't know. So that, I think, is the one of the - the issues that the parties will ask the court to consider as to what impact that has on the hearing date that's currently listed for 26th of October.

JUDGE: Well, I can say now that, for that reason predominantly, the case will not proceed on the 26th of October.

MR COLL: Yes, my Lord.

JUDGE: We'll have to just bite the bullet. Because the judgments, whenever they're given by the Supreme Court, will need some time to consider, the parties to be revising their position before this court ...

MR COLL: Yes.

JUDGE: ... and out of that won't happen overnight.

MR COLL: Well, if I may say, my Lord, I think that's a very realistic proposition, in truth, so I'm grateful to the court for that indication at this early stage.

With that in mind, my Lord, there's a question as to whether in fact the matter needs to be reviewed next Friday.

JUDGE: Well, Mr Southey's communication contains nothing of substance and there's nothing - no reason for listing the case again at this stage.

MR COLL: Well, perhaps my Lord, then if - if the parties were to revert to the court office in due course when the position papers are completed and perhaps also when the judgments in Nealon and Stott are available.

JUDGE: Very good. Thank you very much.

Well, I'm vacating the hearing date of 26th of October for the reason indicated and I will consider the respondent's position paper when received and ...

MR COLL: Yes, my Lord.

JUDGE: ... make such further directions at that stage (if any) as may be considered appropriate. I give no further directions regarding the listing for the moment.

One of the problems in these cases is the absence of a crystal ball. As other reviews this morning are going ...

MR COLL: Indicate.

JUDGE: ... to make clear, although I did my best to select what I thought were realistic hearing dates for all of these cases, I'm afraid issues completely outside the control of this court have resulted in those conservative predictions not materialising.

MR COLL: Yes, my Lord. My Lord, I wonder if I might ask for a short extension for ...

JUDGE: Yes.

MR COLL: ... our position paper to this day next week?

JUDGE: So I'll - we'll receive the respondent's position paper by the 28th ...

MR COLL: That's right, my Lord, yes.

JUDGE: ... of September.

MR COLL: Thank you, my Lord.

JUDGE: And I would encourage the parties to continue the dialogue which the - this email chain has brought to the attention of the court.

MR COLL: Yes, I will do.

JUDGE: Thank you very much.

MR DEVINE: Thank you.

…….. [UNRELATED CASE] ……

THE CAMERON CASE

JUDGE: We'll take the next case then.

THE COURT CLERK: Colm Cameron.

JUDGE: Yes, Mr Kelly, yes.

THE COURT CLERK: Cameron, my Lord.

JUDGE: Oh, sorry, you said "Cameron"?

THE COURT CLERK: Yes, Cameron.

UNKNOWN COUNSEL: My Lord, Mr Toal, led by Mr Southey QC, appears in the case now and I wish to apologise and say he's been...

JUDGE: Cameron.

UNKNOWN COUNSEL: ... required by the Court of Appeal.

THE COURT CLERK: Kenny then?

JUDGE: Sorry, which one is this?

THE COURT CLERK: Kenny.

MS GHAJRLIAGH: My Lord, I appear on behalf of the applicant in this matter.

JUDGE: In the case of Cameron?

MS GHAJRLIAGH: Kenny.

JUDGE: Right. I'm sorry.

THE COURT CLERK: Mr Toal is not here.

JUDGE: Oh, Mr Toal in Cameron, is he?

UNKNOWN COUNSEL: Yes.

JUDGE: He's not is here, no?

UNKNOWN COUNSEL: No.

JUDGE: Well, then we'll go on to Kenny. Sorry.

UNKNOWN COUNSEL: No, my Lord. And rather than putting Cameron off, Mr Toal says that he's heard the issues ventilated by the court this morning and he's in the court's hands as to which view you take.

MR McGLEENAN: I appear in Cameron, with my learned friend Mr (inaudible).

JUDGE: The - the real issue in Cameron is probably is this. It is still a distant listing date, of 26th of November, and I just wanted to ventilate with the parties whether we would provisionally maintain that date for a period. It's two months away.

MR McGLEENAN: My Lord, as Mr Toal says, he's entirely in your Lordship's hands.

JUDGE: Yes.

MR McGLEENAN: My Lord knows the impediment to progress is really the appellate consideration in the range of legacy cases, and possibly also the Supreme Court ruling, and possibly there is Strasbourg ruling in Keyu case - I think it's now got a different name, my Lord - but that's expected shortly.

It's conceivable that those would be, all of them, all available by November, so, my Lord, given that we have an end of November date for Cameron, it's possible that could be retained. But I think the cases that fall earlier than that in the schedule ...

JUDGE: They're quite different.

MR McGLEENAN: ... they're quite different.

JUDGE: Very different. And so we've got that dichotomy, there's no question about that.

MR McGLEENAN: Yes.

JUDGE: Yes. But then what about this summons to adduce further evidence? Have you received that?

MR McGLEENAN: No, my Lord.

JUDGE: No. Well, I'll deal with that by way of case management directions. I think we'll just maintain that listing date on a provisional basis.

MR McGLEENAN: Yes.

JUDGE: But that's the only direction I'm giving this morning.

Anything further will arrive in writing. Well, I - what I'll do is this - I'm sorry - I'll make a further direction now for the avoidance of any doubt and for convenience.

The respondent will signal to the court it's response to the application to adduce further evidence by - by the 1st of October, please. If there is any issue

relating to the interaction between, or the interplay between the application to adduce further evidence which is based on the affidavit of Mr Winters - Winters three and his second affidavit that I have turned up - which has a lot of exhibits - then the respondent could bring that to the attention of the court. I don't know whether there is. Thank you very much.

THE KENNY CASE

Now, the next case?

THE COURT CLERK: Kenny, my Lord.

JUDGE: Kenny. Yes?

MS GHAJRLIAGH: My Lord, I appear on behalf of the applicant in Kenny.

JUDGE: Thank you very much.

Well, in case of Kenny I invited the parties' written representations on the - essentially on the issue of listing. And I've considered the representations that have been made to the court regarding the listing on the 26th and 27th of September and I am coming to the reluctant conclusion that I must de-list the case. And, once again, I'm sorry for doing that, but this court has done all that it can to accelerate the hearing of these cases. Mr Ghajrliagh?

MS GHAJRLIAGH: My Lord, I have heard what your Lordship has said in relation to the case of Ryan and Cameron. My instructions are, nevertheless, to oppose any adjournment.

JUDGE: Of course. And that's exactly the position set out in your written submission and I've considered that .

On the broader front, my understanding is that the court's main case management directions have secured compliance, isn't that right, form LC1 and so forth?

MS GHAJRLIAGH: Indeed.

JUDGE: There's nothing outstanding. But further case management directions will be required.

Now, I'm open to suggestion on what we ought to do. If I vacate the hearing dates I don't see any virtue in continuing to list these cases and then discovering that proceedings in other courts are disrupting this court's programme. There is a lack of synthesis which this court is unable to control or remedy.

MS GHAJRLIAGH: My Lord, that goes to one of our reasons why you would - we would have objected, or why we do object to the adjournment is that we can see no basis why the cases cannot proceed whilst these cases are being heard. And I'm concerned by the suggestion today that there's now yet another case that's been added into the mix, the case of Kyu in the - in the European Court of Human Rights.

These matters, there are different matters that arise in the different cases. It was always envis - envisaged that a number of cases would proceed notwithstanding that - that McQuillan and McGuigan were being heard in Court of Appeal. That was always the plan of this court was that there would, nevertheless, be a select number of cases that would proceed, and the problem is, if we keep putting back behind other cases that are - raise some similar issues but are not on all fours with the cases before the court - for example in Kenny a number of different issues arise, including in relation to the applicability of the Article 2 investigative obligation to non-fatal killings, I mean, that's a, we would say, fundamental error of law being made by the police that needs to be resolved as soon as possible. But the problem is, if we keep putting these cases back behind an increasing number of cases in the Court of Appeal, in the House of Lords and now the - in the European Court of Human Rights, that causes real problems, particularly in Kenny, where there is an ongoing investigation that the Applicant maintains lacks independence and where the fundamental issue in all of these cases is already delay. And the the court has also has obligations in relation to cases where Article 2 is in play and where the submissions are relating to delay.

JUDGE: Well, I've taken all of this into account, Ms Ghajrliagh, and my hands are being tied, I'm afraid. There's no point in me giving half a judgment or hearing half a case - that would just lead to mayhem.

MS GHAJRLIAGH: Well, I hear that. But in - in circumstances where the court is unlikely to give an ex tempore judgment is that would there be any prohibition or problem in hearing legal argument on the issues at present?

JUDGE: And then I sit and wait for months and months and then I have to try and write a judgment - it's completely impractical, I'm afraid. Judgments in this court is

given within two weeks of hearings being completed - that's the strong general rule of practice in this forum.

MS GHAJRLIAGH: Well ...

JUDGE: Then I'll be appealed. The case will then go sitting (re -seated) on the shelf of another court. It's terribly unsatisfactory, I couldn't agree more.

MS GHAJRLIAGH: Well, my Lord, I am - I am in your hands, then, as to what - what happens next. But I do think that there has to be some marker down as to behind how many cases and what cases these cases are going to be delayed or ...

JUDGE: Well, everyone knows what this court has tried to do.

MS GHAJRLIAGH: Uh-huh.

JUDGE: We all thought we'd turned the corner 12 months ago …

MS GHAJRLIAGH: Uh-huh.

JUDGE: … and it's one obstruction after another.

MS GHAJRLIAGH: Well, is it now suggested, for example, that the court will wait for the determination of the European Court of Human Rights Keyu, for example?

JUDGE: All I'm doing today is de-listing the case.

MS GHAJRLIAGH: Right.

JUDGE: In due course, I will receive further representations from the parties.

MS GHAJRLIAGH: Uh-huh.

JUDGE: And that's brings me back to where I was a moment ago.

MS GHAJRLIAGH: Uh-huh.

JUDGE: I'm really in the parties' hands as to what the next step ought to be. Do I simply stay the case? Do nothing? Do I impose a time limited stay? Do I fix a review date? There's so little point in doing anything while we're waiting for other courts to give judgments.

MS GHAJRLIAGH: Well, that does, to some extent, go to my previous submission about what are we being stayed behind? If we're being stayed behind the judgments of the Court of Appeal, for example, then I would submit that it would be proper to list the case for review, for example, a week after the - the Court of Appeal has handed down its judgment in - in McGuigan and McQuillan.

JUDGE: That will represent just part of the time limit for appealing to the Supreme Court and we'll be going backwards, not forwards. I'll be told that advice is being given and received by the disgruntled litigants in those appeals on whether they wish to proceed to the Supreme Court. That's all I'll be told then. I won't need to be told that, because I will know it.

MS GHAJRLIAGH: Well, my Lord, de-listing without a date in circumstances where the fundamental issue in this case is Article 2 delay I would submit would not be a satisfactory position. It has to remain under, at the very least, under the supervision of this court in term it is of how it is progressing.

JUDGE: Yes. There's much force in that submission. Anything from the respondents?

MR McGLEENAN: My Lord, we would propose that the matter be reviewed once the time limit for appeal following Court of Appeal ...

JUDGE: It is four weeks?

MR McGLEENAN: It's 28 days my Lord, yes.

JUDGE: Yes.

MR McGLEENAN: Once that's expired ...

JUDGE: Thank you.

MR McGLEENAN: ... then we will know...

JUDGE: Well, this is precisely what I have in mind. I'm going to direct the case to be de-listed. And I will receive within four weeks of the date of the Court of Appeal judgments - and we know what those cases are - the Applicant's proposals for the further timetabling of this case. The court shall receive the Respondent's riposte within a further two weeks and further directions will follow. Anything further required?

MS GHAJRLIAGH: In relation to Kenny, no.

JUDGE: And I reserve costs and grant liberty to apply. Thank you very much.

MR McGLEENAN: Thank you very much.

THE LAVERY CASE

JUDGE: Now, what's next then, please?

THE COURT CLERK: Lavery, my Lord, Patrick Lavery.

MR SCOTT: My Lord, I appear on behalf of the applicant with Mr (inaudible).

JUDGE: Lovely.

UNKNOWN: I appear with Mr McAteer, my Lord, for the respondent.

JUDGE: All right, just give me a moment. Lavery is the case where the scheduled hearing date of the 23rd of November might possibly be viable.

MR SCOTT: Well, my Lord, given the indication that you gave recently, that an earlier date in late November was - was viable, at least for the present time, in our submission...

JUDGE: I am prepared to wait in Lavery.

MR SCOTT: … that would be...

JUDGE: I will provisionally affirm the hearing date. And I repeat the direction which I gave in the earlier case, which was that one, Cameron?

MR SCOTT: Yes, my Lord.

JUDGE: Cameron.

MR SCOTT: My Lord, the other issue based on the ...

JUDGE: (Inaudible). Yes, so the Cameron order will apply the term (inaudible) terms.

MR SCOTT: My Lord, that - there's no application for further evidence in Lavery.

JUDGE: No. So we won't have that provision in the order, you're quite right, yes.

MR SCOTT: My Lord, the only other issue in relation to the observation that the court was making in the review was the issue where the court has heard legal argument and then, many months later, is required to revisit that legal argument. That is precisely the position that we have in Lavery.

JUDGE: Well, I've seen the email traffic about that. We'll address that at the appropriate stage. We don't need to deal with that at this stage.

MR SCOTT: No, my Lord. I simply just wish to flag it up, given what was said earlier on.

JUDGE: Yes.

MR SCOTT: I'm grateful, my Lord.

JUDGE: Now what's next, please?

THE McEVOY CASE

THE COURT CLERK: McEvoy, your Honour.

JUDGE: McEvoy.

MS GHAJRLIAGH: My Lord, I appear on behalf of the applicant on behalf of McEvoy.

JUDGE: Yes.

MS GHAJRLIAGH: So, in light of what your Lordship has said, I just need to - I'm instructed to formally place on the record the objection to the adjournment, but...

JUDGE: Yes.

MS GHAJRLIAGH: ... I don't think there's much point making any further submissions.

JUDGE: Again with some reluctance I'm de-listing McEvoy. I'm vacating the hearing dates of 1st and 2nd of October and I make precisely the same order as I made in Kenny. That would seem to be appropriate, I think.

MS GHAJRLIAGH: I'm grateful.

JUDGE: Yes.

THE STUART CASE

THE COURT CLERK: Stuart now.

JUDGE: Stuart.

MS GHAJRLIAGH: In order, I also appear in Stuart on behalf of the applicant.

MR McGLEENAN: I appear for the respondent, my Lord, in that matter.

JUDGE: I'm not clear what the current state of play in Stuart is?

MS GHAJRLIAGH: So the current state of play in Stuart is that it's listed for the 15th and 16th October there is a discovery application listed between - before Keegan J next week, which we say should proceed, and we say should - that's on the 27th of September. And the applicant submits that that should proceed before Keegan J because it seems that a dispute has arisen between the parties as to what was determined at a pre - prior hearing before Keegan J, and so it would be appropriate for the matter to continue before her.

The argument was - which is effectively would be being continued next week - was begun by Mr Southey QC, who would like also the opportunity to himself continue that argument.

JUDGE: Well, was that in the context of a listing for a discovery order?

MS GHAJRLIAGH: Indeed. That ...

JUDGE: Is there a part-heard discovery application in that court?

MS GHAJRLIAGH: In effect, yes.

JUDGE: Now, what about the broader picture of maintaining the substantive listing, Ms Ghajrliagh?

MS GHAJRLIAGH: So, my Lord, in relation to Stuart, we would submit that it is on the borderline of the cases that could be maintained or if a judgment were to come out, were to be handed down next week or the week after, it would be possible to be trial-ready in Stuart by the 15th and 16th of October. So that is a listing which, in my

respectful submission, could be maintained, at least for another - at least kept under review for another week or two and before it is de-listed.

JUDGE: Yes. Give me one moment just ... What is the current scheduled date of the resumption of the discovery application?

MS GHAJRLIAGH: Next Thursday, which is the 27th of September.

JUDGE: 27th. Is any step in advance of that listing outstanding at the moment?

MS GHAJRLIAGH: Not as far as I'm aware, my Lord.

JUDGE: Thank you.

So, Mr McGleenan, the parties at the moment are bilaterally geared up to at least complete that phase of the litigation?

MR McGLEENAN: Yes, that should be dealt with next week.

JUDGE: Yes.

MR McGLEENAN: It's an issue of whether we should use a Flynn approach or whether we have used a Flynn approach.

JUDGE: Oh, yes, I've seen that. Actually, I just wondered was there any further written submission outstanding. I noticed that ...

MR McGLEENAN: I think we have put in a submission yesterday, which is, I would have thought, the last thing that needs to be said on that.

JUDGE: Yes. So you were, as of today, awaiting whose further submission?

MR McGLEENAN: I think ours was the submission that was to go in. I think at this time went in yesterday.

JUDGE: Well, yours has been received.

MR McGLEENAN: Yes.

JUDGE: I glanced at it very quickly earlier this morning.

MR McGLEENAN: Yes.

JUDGE: Yes.

MR McGLEENAN: That's it. Everything's complete, my Lord. The discovery point, I don't disagree it could be dealt with next Thursday.

JUDGE: Yes.

MR McGLEENAN: I'm sceptical about maintaining the hearing date in mid-October, my Lord.

JUDGE: Yes. Thank you.

MR McGLEENAN: We're in the court's hands.

JUDGE: I'm very grateful.

Now, I sympathise entirely with Ms Ghajrliagh's suggestion that we should hold on to the hearing dates. I'm afraid, in the real world, it's going to achieve nothing. With reluctance one again, I vacate the hearing dates of the 15th and 16th of October. I affirm the listing of the discovery application on the 27th of October and I give the same direction as I gave in Kenny regarding further timetabling. Today's costs are reserved and there will be liberty to apply. Thank you very much.

MS GHAJRLIAGH: I'm grateful.

MR McGLEENAN: My Lord, can I just correct the order; the date was the 27th of September for discovery?

JUDGE: September. You're absolutely right. It feels like October already, Mr McGleenan.

MR McGLEENAN: Yes.

JUDGE: Thank you. Now what's next, please?

THE KIRKPATRICK CASE

THE COURT CLERK: The last one is Kirkpatrick, my Lord.

JUDGE: Which one, sorry?

THE COURT CLERK: Kirkpatrick.

JUDGE: Jason Kirkpatrick, yes. Thank you.

MR BUNTING: May it please the court. May name is Jude Bunting. I appear on behalf of the applicant in this matter, along with Mr Emmerson QC.

JUDGE: You appear with whom?

MR BUNTING: Mr Ben Emmerson, who's been called to the Bar of Northern Ireland for this case.

JUDGE: He has been called to the Bar of Northern Ireland for ...

MR BUNTING: He's been given temporary...

JUDGE: ... the purpose of presenting this case.

MR BUNTING: This case, yes.

JUDGE: And who appears for the respondent?

MR McGLEENAN: I appear for both Home Secretary and Northern Ireland Secretary of State, my Lord, with Mr McLaughlin.

JUDGE: What is the applicant's state of readiness, Mr Bunting?

MR BUNTING: We're ready to go and we're very keen to proceed with the hearing which has been listed on the 3rd of October.

JUDGE: Listed on the 3rd, isn't it?

MR BUNTING: Yes.

JUDGE: And Mr McGleenan?

MR McGLEENAN: The court may have received a letter from the Crown Solicitor's Office yesterday.

JUDGE: I think I should just look at that now very quickly, so give me a moment. Yes, I've read that. You've considered that letter, have you, Mr Bunting?

MR BUNTING: I have indeed, my Lord, yes.

JUDGE: And what are your submissions on the letter?

MR BUNTING: The Applicant's submissions are that they read the letter … the applicant read the letter with some concern yesterday.

This is a case which has been hanging over in the court for two years now. It was first issued in October 2016. It came before this court on the last occasion on the 29th of June, when your Lordship expressed concern at the parties' lack of compliance with the court's management directions.

JUDGE: Well, in fact the court took the initial here, Mr Bunting. I conducted a review of all those cases that discovered that this one was lurking somewhere ...

MR BUNTING: Yes.

JUDGE: ... and you hadn't been prosecuting it with any degree of...

MR BUNTING: Yes.

JUDGE: ... expedition on your side.

MR BUNTING: Well, can I - can I clarify that, as we sought to do so in a note on June. As we explained, with had remained in close contact with the respondent's representatives, who had assured us that an upcoming review was likely on the part of the Secretaries of States and that was confirmed in a helpful email from Mr Mark Murray, of the Crown's Solicitor's Office, to this court on the 26th of June and said - it was said in that email: "I can confirm that we have indeed remained in close contact with the applicant's representatives in the intervening period. We have consulted at length with our clients in relation to the matters raised in this litigation.

"I can confirm that officials are in the process of writing to the Secretary of State for the Home Department and the Secretary of State for Northern Ireland to consider their approach as a result of new information coming to light."

That was as long ago as June of this year ...

JUDGE: Yes.

MR BUNTING: ... and the indication which - which we gave to the court on that occasion was, "Let's list this case - let's list this case promptly. Let's list in a realistic way so as to ensure that the Secretaries of State have an opportunity to carry out that review." And it is with some concern that appears that the application for review's only been made yesterday, rather than being made back in June.

There are three particular reasons, in my respectful submission, why a further delay in listing this case is of concern not just to the applicants but to the wider public purse and to public resources more generally.

The first is that this is an application which has been going on for some time and it raises the issues that my Lord has already touched upon in respect of the early - in some of the early leg - legacy cases about the needs of justice to be served quickly.

The second is that this is a case in which a degree of emotional and, indeed, health involvement is involved from the applicant and some of the witnesses in this case. Your Lordship may have seen that one of the witnesses who provided helpful affidavits in this case is a young woman called B, who travelled to Northern Ireland along with an undercover police officer, who says that she was in an intimate relationship with that undercover police officer, and if he was exploiting that intimate relationship for the purposes of - of his undercover police activity, someone like that needs to understand quickly whether or not her allegations are likely to be considered at either the public enquiry which is underway in England or at a subsequent public enquiry that may be called here in this jurisdiction.

And the third, and particular imperative for promptness in this case, comes from the fact that the first decision which is impugned in this litigation is a decision not to extend the terms of reference of the undercover police in the enquiry which is underway in England and Wales, and your Lordship may have seen in the press or, indeed, in the parties' pleadings - including in the skeleton argument which was lodged on Monday of this week - that there have been delays in the undercover policing enquiry. Those delays have been caused, in part, by the number of anonymity applications that have had to have been considered by Sir John Mitting, who is the new chair.

JUDGE: Well, are those delays not to your client's advantage?

MR BUNTING: They are to a certain extent. But my - the impression which I have from reading correspondence between my client and Mr Kirkpatrick and the other core participants in the Inquiry is that there is now a considerable concern that the delay that has been caused to the undercover policing enquiry. And if, for example,

this application were to succeed and this court were to quash the Secretary of State for the Home Department's current decision not to extend the terms of reference and, as a result, Sir John Mitting were to - have to consider issues relating to Northern Ireland in that enquiry - as well as issues relating to England and Wales - then that is an issue which ought to be factored into the timetable for the undercover policing enquiry.

So, what I'm saying is that leaving the case to continue percolating in the background means that there is con - ongoing uncertainty and the potential for further delay to a public enquiry which has been set up due to the extreme public importance which is involved in these issues, as recognised by the various statements of the then Home Secretary, Theresa May, in - in causing that enquiry to be put in place.

So to tie these three submissions together, there are very considerable imperatives in continuing with this case being decided promptly. And insofar as the delay has been caused by an institutional problem within the various Secretaries of State - be it the Secretary of State for the Home Department or for Northern Ireland - then a short order from this court requiring any further decision to be taken quickly is an order which I anticipate that those public authorities will consider with care. We are reluctant to lose that hearing date and we're keen to ensure that everything is done to maintain it.

Can I assist you any further on those points, my Lord?

JUDGE: Thank you, Mr Bunting. Mr McGleenan?

MR McGLEENAN: My Lord, there - there's a slight difference in respect of the two respondents. The Home Office has indicated in the letter ...

JUDGE: I see that.

MR McGLEENAN: ... there is not to be a further decision by the Home Secretary. The officials have examined the matter and they consider the position has not altered. The Home Secretary's been briefed on that.

Now, that...

JUDGE: Is this a case of joint decision-making by the two Ministers?

MR McGLEENAN: No, it's sequential decision-making.

JUDGE: Sequential.

MR McGLEENAN: So the - the Secretary for Northern Ireland was awaiting the Home Secretary's position before the submission has been prepared ...

JUDGE: Applying this to the framework of the Applicant's challenge, is it a challenge to separate decisions?

MR McGLEENAN: It is, yes.

JUDGE: It is.

MR McGLEENAN: Yes.

JUDGE: Very good. Yes.

MR McGLEENAN: So - and that would continue, my Lord. So what we would have now is, we have the further position of the Home Secretary, which would require to be evidenced in due course, and there will be contingent upon that decision of the Home Office a further decision by the Secretary of State (NI) based on the submission that's been prepared and put before her.

JUDGE: Yes.

MR McGLEENAN: So the - it is a case where there has been a reconsidering by the officials in the Home Office and there will now be a reconsideration by the Secretary of State for Northern Ireland. We've set out the time constraints for that in the letter.

JUDGE: Yes.

MR McGLEENAN: It will not be possible to have that submission cleared, decision made on it before the hearing date in this case. And we acknowledge the points made by my learned friend in respect of that delay, my Lord, but I'm afraid it's something we can't do - from our perspective do anything about.

So we've drawn the court's attention the factual picture will change in this case even if the decision remains the same by both Secretaries of State ...

JUDGE: I've seen that.

MR McGLEENAN: ... and the evidential basis for it will change, the nature of the rationality no doubt will be tailored to meet that and, my Lord, we say that the proper course is to allow the position to crystallise.

Given the pace of the Mitting enquiry, my Lord, it's still likely that we would be able to deal with this case in time, not to avoid or to avoid any collateral impact on - on the progress of that enquiry.

My Lord, so for the reason we've set out in the letter, it's our submission that the appropriate course is to facilitate the Secretary of State making the decision and to allow the matter to be adjourned until that's done, my Lord.

MR BUNTING: My Lord, can I just quickly clarify two factual points?

JUDGE: Yes, Mr Bunting.

MR BUNTING: The first is in respect of the undercover policing enquiry itself. As I understand it, Sir John Mitting is now moving to the end of his an anonymity applications. He's currently consulting in respect of the how any evidence is to be heard in that enquiry, and my understanding - I'll be corrected if I'm wrong - is that he's intending to move towards evidence being heard early in 2019.

JUDGE: Early 2019?

MR BUNTING: Yes. And so insofar as - as this case needs to be decided, it's my respectful submission that it needs to be decided quickly.

The second point relates to the applicant himself. As the court may have seen from the papers, the applicant doesn't reside in this jurisdiction. He lives in Germany and he's planning to travel to - to Belfast for the hearing on the 3rd of October. He's - he's booked other public appointments - including addressing Amnesty International and other NGOs - around the time of the court hearing for the specific reason ...

JUDGE: So he's coming here for a multi-faceted purpose?

MR BUNTING: He's coming here for the court hearing, but, for his convenience, he's booked his other personal speaking requirements around the court hearing.

JUDGE: Are these personal or professional commitments?

MR BUNTING: They are - well, I think he would consider...

JUDGE: Is it both?

MR BUNTING: ... he would consider them to be both. They are - they relate to his experience as an activist and he's - I think he's intending to address activists in Derry, along with Ian McCann, and I think he's also intending to ...

JUDGE: Is this anything to do with this case?

MR BUNTING: Yes, on the issues relating to this case, yes.

JUDGE: On what issue?

MR BUNTING: The issues relating to the use of undercover police officers from England and Wales in this jurisdiction.

JUDGE: Very good. Very good.

I rule that the balance in this case tips marginally in favour of vacating the hearing date, but on terms which will accommodate all that has been brought to the attention of the court on both sides.

While I vacate the hearing date with reluctance, I make the following observation. This court is already seized of another, different case {JR80} in which it has been presented with a similar representation made on behalf of the Secretary of State. In the other case the representation is made by the Secretary of State herself that certain decisions will be made and steps will be taken by a certain date.

The court accepted that representation in the earlier case and, in doing so, observed that it had no reason to doubt the bona fides of the Secretary of State. I accept the representation in this case and I have no reason, similarly, to doubt the bona fides of the Secretary of State. If, of course, the court's assessment of that should prove to be unfounded, well, then certain consequences will flow and the court will deal with those.

The course taken in the other case [JR80} will apply precisely to the present case. I vacate the hearing date on the basis of the parties will, by close of business on Monday, communicate to the court office an agreed re-listing date which will fall within the window of the 26th of November to 20th of December. Hearing dates are available during that window and the parties should act quickly and agree one and, simultaneously, convey to the court any proposed agreed associated case management directions.

The court, I think, will inevitably have to review this case at a hearing of this kind on a future date. I won't deal with that until we receive the parties' joint response on Monday.

I grant liberty to apply. I reserve the question of costs. The Applicant, in due course, and at the appropriate stage, if he considers that he has a sustainable application to recover any outlays already incurred in connection with the hearing date can make his bid. And if that matter cannot be agreed between the parties, the court will, if necessary, adjudicate.

Now, does that deal with everything?

MR BUNTING: My Lord, there was the matter, your Lordship may recall, that initially when this case was reviewed late last year your Lordship made a case management direction that the parties fill in and complete the LC1 form in respect of agreed and non-agreed facts. This was one of the matters which troubled your Lordship on the last occasion that that process hadn't been completed, notwithstanding the fact that this may not be a straightforward legacy case and in whereas some of the other cases that have come before the court this morning.

JUDGE: Well, what direction did I make about that?

MR BUNTING: Well, your Lordship made a direction on the last occasion that the claimant complete that by the 15th of July ...

JUDGE: Yes.

MR BUNTING: ... and the claimant, or - sorry - the Applicant did so on the 29th of June, on the date of the last hearing.

JUDGE: And you're awaiting the Respondent's ...

MR BUNTING: Yes.

JUDGE: ... response to that?

MR BUNTING: Yes.

JUDGE: I direct that the Respondent complete its Form LC1 response, and the date I will prescribe for that is the 26th of October. I'm doing that quite purposefully, because I read into this letter that the content of that response could foreseeably be influenced by the further decision to be made on behalf of the Secretary of State, which also foreseeably will materialise in advance of that date, and that will harmonise with the new programme, Mr Bunting, and will not impact on a new agreed hearing date during the window which I have directed.

MR BUNTING: I'm much obliged.

JUDGE: Thank you very much. That completes the list.

THE COURT CLERK: Yes, my Lord.

JUDGE: Very good.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.