Neutral Citation No: [2020] NIQB 12 **ICOS 19/3163** ***Judgment: approved by the Court for handing down*** ***(subject to editorial corrections)****	***Ref:*** **McC11195** ***Delivered:*** **12/02/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ROBERT LAVERY

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

PUBLIC RECORDS OFFICE NI

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McCloskey LJ

Introduction

[1] This ruling determines the question of whether these proceedings should be stayed and, if so, in what terms.

[2] By this application for judicial review Robert Lavery (the Applicant) seeks to secure –

> *"… the inquest papers regarding the death of his son Sean Lavery on 08 August 1993 from the Public Record Office of Northern Ireland by way of an application under the Freedom of Information Act 2000 ("FOIA")."*

The impugned decision is dated 21 November 2018. There are two proposed respondents, namely the Public Record Office of Northern Ireland ("PRO") and the Department for Communities ("DFC"). The case has not progressed beyond the leave stage.

History of these proceedings

[3] The litigation history is, in brief compass:

(a) Proceedings were initiated on 10 January 2019.

(b) The first CMD Order is dated 11 January 2019. There have been 9 further such orders.

(c) The court conducted an uncompleted *inter - partes* leave hearing on 20 May 2019. An adjournment materialised, given the Applicant's wish to make amendments and rely on further evidence. A CMD Order issued.

(d) On 20 June 2019 this court issued its "*General Ruling and Directions of the Senior Judicial Review Judge*" in relation to the entire legacy cohort of cases. This case does not appear in that Order, possibly on account of its youth. It does belong to the legacy cohort.

(e) By its further CMD Order dated 23 July 2019 the court made a series of directions arising out of the Applicant's proposal to amend the Order 53 Statement again.

(f) The case was reviewed *inter – partes* on 04 September 2019.

(g) On 21 November 2019 the COA gave leave to appeal to the UKSC in ***McQuillan*** [2019] NICA 13.

(h) Next, a substantive *inter – partes* leave listing was scheduled for 28 November 2019. All parties provided written submissions in advance, with the Applicant continuing to propose amendments.

(i) On 24 January 2020 another *inter-partes* listing ensued. The Applicant filed a summons seeking to make further amendments. A second General Legacy Cases CMD Order was evolving at this stage. This case [with Patrick Lavery] will be allocated to the 'Miscellaneous Cases' cohort. The link with ***McQuillan*** [Art 2 ECHR / HRA 1998] was recognised, again. The court issued sundry directions in an endeavour to promote progress.

The Order 53 Statement

[4] There have been multiple iterations of the Order 53 Statement. The latest version is apparently that dated 18 June 2019 (which appears to be the fifth). This contains a series of particulars directed by the court previously missing. Quashing and/or declaratory remedies are pursued. The alternative relief sought is a declaration under section 4(1) HRA 1998 that sections 15(5), 65(2) and 66(5) FOIA are "*….incompatible with Article 14 ECHR together with Article 10 ECHR as they are indirectly discriminatory to those of Northern Irish origin and/or directly discriminatory to*

those seeking records from [PRO]." This is followed by the court directed particulars of ambit, status and analogous situation.

The Here and Now

[5] Yet another version of the Order 53 Statement, again in draft, emerged some three weeks ago in the context of a summons seeking permission to effect still further amendments. The impetus for this development appears to be the resumption of business of the Northern Ireland Assembly ("NIA").

[6] The parties have exchanged updated written submissions. On behalf of the proposed Respondents it is stated that by virtue of the restoration of NIA the only impediment to the necessary decision making has been extinguished, continuing:

> "*The Respondents can now progress these applications for access to the relevant papers and neither intrusive relief nor judicial superintendence is necessary …*
>
> *The impediment to the operation of the consultation process required by sections 16 and 66 of FOIA has been removed. Moreover, the Minister can now make the necessary determinations pursuant to any applications made under the 2016 Rules.*"

At an *inter-partes* listing on 20 January 2020 the court was further informed that a submission had just been provided to the Minister and that the time limit for the response by the statutory consultees (DOJ and NIO), following referral when made, would be five days. It was submitted by the proposed Respondents that these developments render these proceedings academic.

[7] The Applicant's position is rehearsed in a combination of counsels' written submission of 20 January 2020 and a preceding solicitor's letter dated 14 January 2020. The essence of their case is encapsulated in the following sentence:

> "*The Applicants therefore maintain their challenges on the basis that there has been unlawful delay in the provision of those inquest papers. If the Applicants' legal arguments are correct there has never been any good reason for delay …*
>
> *Until the inquest papers have been released then we cannot agree that the issues are academic …*
>
> *The prompt release of the papers would inevitably require the Applicants to review the merits of this application.*"

The McQuillan Case Factor

[8] See above. By order dated 21 November 2019 the Court of Appeal granted leave to appeal to UKSC in the case of ***Margaret McQuillan*** in which the public authority respondents are PSNI, SOSNI and DOJ. The court's preceding substantive order had entailed two declarations whereby the Chief Constable of PSNI (a) is obliged to conduct further investigations into a 1972 death in a manner which satisfies the State's procedural obligation under Article 2 ECHR and (b) is required to take prompt steps to secure the practical independence of the investigators in a manner compliant with Article 2 ECHR. On the same date leave to appeal to UKSC in ***McGuigan and McKenna*** [2019] NICA 46 was refused. Petitions for leave to appeal have subsequently been submitted to UKSC. The grant of leave on the Article 2 ECHR ground in ***McQuillan*** is unconstrained.

[9] It was common case in ***McQuillan*** that there was fresh evidence (certain military communication logs) satisfying the *Brecknell* principles. The question was whether the "*genuine connection*" test, with its twin elements of "*temporal connection*" and "*procedural acts and omissions*" was satisfied. The COA determined this issue in the affirmative, differing from the trial judge. Its reasoning prayed in aid the UKSC decision in *Re Finucane* [2019] NI 292, the COA considering that the passage of time should attract very little weight only.

[10] In summary there are two central issues in ***McQuillan*** namely (a) the independence of PSNI and (b) the Article 2 ECHR investigative obligation in the context of a death preceding the effective date of HRA 1998 by some seven years.

[11] The link between the present case and ***McQuillan*** has been repeatedly acknowledged at earlier stages of these proceedings in the orders of the court: see the extensive litigation history rehearsed in [3] above.

[12] As in the case of ***Patrick Lavery***, at this juncture the court confines itself to urging the parties to explore a sensible, reasonable and practicable consensual mechanism for disposing of these proceedings. The court considers that this would best further the overriding objective and would simultaneously promote the public interest. The court will lend such assistance to this exercise as may be reasonably possible.

Order

[13] In all of the circumstances outlined above I consider that the course most apt to further the overriding objective is to direct that the proposed Respondent's solicitor provide a timetable for the outstanding decision making **by 21 February 2020**. No further direction is appropriate and, with the exception of this step, none of the parties should take any cost incurring steps, save in the promotion of consensual resolution, until further order. The stay likewise continues until further order.