Neutral Citation no. [2008] NIQB 44 | *Ref:* **GIL7142**

Judgment: approved by the Court for handing down | *Delivered:* **11/04/08**
*(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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RE JESSICA HAMILL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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GILLEN J

The Application

[1] This is an application by Jessica Hamill (the applicant), the mother of Robert Hamill deceased, for leave to judicially review a decision of the Secretary of State for Northern Ireland (SOS) not to extend the terms of reference of the Robert Hamill Inquiry to include the decisions made by the Director of the Public Prosecution Service(PPS), his servants or agents and those advising him. In addition she seeks an order of mandamus compelling the Secretary of State to extend the terms of reference of the Robert Hamill Inquiry.

Background

[2] On 16 November 2004, the SOS established an Inquiry under Section 44(1) of the Police (Northern Ireland) Act 1998(the 1998 Act). The terms of reference were as follows:

> "… To inquire into the death of Robert Hamill with a view to determine whether any wrongful act or omission by or within the Royal Ulster Constabulary facilitated his death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act was intentional or negligent; whether investigation of his death was carried out with due diligence and to make recommendation."

[3] The Inquiry is chaired by Sir Edwin Jowitt, a retired judge of the High Court of England and Wales. It was set up following the investigation by Judge Cory, a retired Justice of the Supreme Court of Canada, into "allegations of collusion by the security forces" in Northern Ireland.

[4] Subsequently, in the wake of representations made to the SOS, the Inquiry under the 1998 Act was converted into an Inquiry under the Inquiries Act 2005.

[5] Mr Hamill's death occurred on 27 April 1997 in the course of a violent incident in Portadown, County Armagh. One person has been prosecuted arising out of Mr Hamill's death resulting in a conviction on a count of affray and an acquittal on a count of murder. Five other individuals were charged with the offence of murder. Proceedings against them were discontinued in October and November 1997. It is clear that the roles of certain RUC officers in the events have become the subject of speculation in light of the fact that it is alleged that a police patrol vehicle, containing four officers, was parked about 20 yards from the place at which Mr Hamill suffered his fatal injuries.

[6] The current application arises out of the request by the Hamill family to extend the Inquiry's terms of reference so as to enable the Inquiry to consider and investigate the prosecutorial decision-making in this case. The Inquiry has supported the application for the extension of the terms of reference in separate reasons and representations submitted to the SOS.

[7] At this hearing Mr Underwood QC appeared on behalf of the Inquiry. In a helpful skeleton argument which was before the court, he indicated that the stance of the Inquiry arose "from the chairman's belief that the Inquiry must address, and be seen to address, failures to secure convictions in connection with Mr Hamill's death."

[8] By letter dated 20 March 2008 addressed to the solicitor acting on behalf of the applicant, a representative on behalf of the SOS indicated that he had concluded that the public interest did not require an extension to the terms of reference to the Inquiry and set out in detail the reasons for so refusing.

The applicant's case

[9] Mr Montague QC, who appeared on behalf of the applicant with Ms Doherty furnished the court with a comprehensive skeleton argument prior to the hearing in which the thrust of the case made was as follows:

(a) The SOS, in requiring that exceptional circumstances needed to be shown before the terms of reference would be amended, has misdirected himself as to the test applicable under Section 5(3) of the 2005 Inquiries Act. He ought to have confined himself to the simple test as to whether or not he considered that the public interest required it.

(b) The SOS had erred in concluding that the extension would cause disruption and damage to the PPS and a loss of confidence in the criminal justice system.

(c) That in deferring to the Attorney General on whether the extension sought would be "deeply disruptive" and damaging to the PPS, the SOS had erred in law.

(d) That there was an onus on the SOS to make all efforts to take all relevant matters into account and that by deferring to the Attorney General he had failed to carry out sufficient inquiry into whether or not these concerns would materialise upon extension of the terms of reference.

(e) That the SOS had erred in conducting an inquiry into the issues by employing the services of Mr Perry QC to advise him as to whether there was a sufficient level of public concern about the actions of the PPS to justify the inquiry.

(f) By relying so heavily on Mr Perry's advice, the SOS had effectively wrongfully delegated his decision-making powers.

(g) Alternatively the SOS had relied on Mr Perry's advice to such an extent that he failed to give adequate weight to the views of the family and the Inquiry.

(h) The SOS had erred in concluding that any extension would add significantly to the costs or duration of the Inquiry.

(i) That the SOS had been guilty of procedural unfairness in that Mr Perry was instructed by the Attorney General. Thus the advice relied upon by the SOS was obtained by one of the parties with an interest in the decision.

(j) The applicant finally relied on a series of factual errors which he had used to inform his decision.

The Inquiry

[10] Although not a party to the proceedings at this stage, Mr Underwood QC on behalf of the Inquiry appeared before me. I gave leave for him to participate having read his skeleton submission. In that skeleton he economically summarised the Inquiry's attitude and drew the attention of the court to three aspects of the decision under challenge as follows:

(a) The representations that the Inquiry had made to the SOS had not been considered.

(b) The decision contained or was informed by a number of significant factual errors.

(c) The role of the Attorney General in the decision-making process gave rise to concern.

The granting of leave

[11] In order for a court to be satisfied that there is a proper basis for granting leave for judicial review, conventionally the applicant needs to satisfy the judge that there are arguable grounds including whether there are some properly arguable vitiating flaws such as unlawfulness, unfairness or unreasonableness. It is wrong to grant permission without identifying an appropriate issue on which the case can properly proceed. It is not enough that a case is potentially arguable or that the papers disclose what might on further consideration turn out to be an arguable case. What is meant is an arguable ground for judicial review having a realistic prospect of success. There must be a real, or a sensible prospect of success.

[12] I am satisfied however that in addition to this conventional basis for granting leave, a court should consider granting leave in light of the importance of the issue and where public concern has been aroused even if the case is not considered to have a real prospect of success. In R (Gentle and Ors) v The Prime Minister and Another (2006) EWCA Civ. 1078 the Court of Appeal considered whether an independent inquiry should be held into the circumstances that led to the invasion of Iraq. The claimants, relatives of members of the British Armed Forces killed during the war, sought to bring a challenge by way of judicial review to the Government's refusal to hold such an inquiry. With some evident reluctance, the Court of Appeal granted permission holding that the case raised questions of general importance that should be finally decided after a full argument. At paragraphs 4 and 5 Sir Anthony Clarke MR said:

> "4. We say at once that we were reluctant to grant permission to appeal against the decision of the judge. On the face of them, the applications for judicial review are unpromising. Matters of this kind are essentially matters for the executive and Parliament. Our initial reaction was that the issues which the applicants seek to raise at an inquiry are not justiciable. They are matters to be resolved by political debate and, as it might be put, at the bar of public opinion.
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> 5. However, having heard oral argument we have reached the conclusion that we should grant

> permission to appeal, or more accurately permission to apply for judicial review, so that the matters can be fully debated. We are conscious, as the judge expressed himself to be, of the importance of the issue and the great public concern that it has aroused."

[13] I respectfully recognise that an approach thus formulated has great merit, accommodating as it does a strong impulse for practical justice. Its wisdom is well illustrated in this case. I am satisfied that the current Inquiry is an extremely important one and has properly aroused the interest of the public at large. When converting the Inquiry to one constituted under the Inquiries Act 2005, the Secretary of State had declared:

> "It remains a strong wish of both the Government and the Hamill Inquiry that the full facts in relation to the death of Robert Hamill should be established and I am confident that the Inquiries Act will provide an effective framework for achieving this."

The recognition of the importance of this Inquiry has been a thread running through the exchange of correspondence between the SOS and all the other parties in this case.

[14] It was my view on a perusal of the papers that the issue that now comes before the court, namely whether or not the terms of reference should be extended to ensure that the Inquiry will be able to fully pursue its task, was a matter of such public importance as to merit leave being granted in this instance irrespective of the arguability test. Consequently I invited counsel at the outset to address this issue. Mr McCloskey QC, who appeared on behalf of the Secretary of State, acknowledged the public importance of this matter. Whilst asserting that the application would be robustly defended at the substantive hearing, he did not seriously dispute the strength of the proposition that this application came within that genre of cases which warranted a substantive hearing without the need to resort to the arguability test.

[15] I therefore found it unnecessary in this case to require counsel to address me on the concept of arguability or to make any comment on the strength or weakness of the application. It is sufficient at this stage for me to have determined that in light of the importance of the issue, leave should be granted and a substantive hearing fixed in the near future.

[16] I further direct that the Director of Public Prosecution Service should be made a notice party and have a copy of the papers furnished to him. I shall entertain any application from the Director as to the nature of his participation in these proceedings should he wish to make such application

before me. I have also granted leave to the Inquiry to be a notice party in this case and to participate accordingly.