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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY KATHLEEN GRAHAM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Dessie Hutton KC and Aidan McGowan (instructed by Harte Coyle Collins) for the Applicant
Tony McGleenan KC and Laura Curran (instructed by the Crown Solicitor's Office) for the proposed Respondent

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HUMPHREYS J

Introduction

[1] On 17 September 1976 Rosaleen O'Kane died in her flat at Cliftonpark Avenue in Belfast. She was just 33 years old. Her body was discovered by members of the fire brigade who attended the scene in the early hours of the morning as a result of the report of a fire at the premises.

[2] An autopsy carried out by Dr Carson, Deputy State Pathologist, failed to reveal the cause of death but noted a number of unusual features, viz:

(i) There was more than one fire in her property;

(ii) Her body was badly charred but there was no evidence of any clothing remnants;

(iii) There was no evidence of carbon monoxide poisoning or sooty material in the air passages which would have been consistent with death in a fire.

[3] These, taken together, gave rise to a strong inference that the death did not arise due to natural causes nor was it is occasioned by an accidental fire. The overwhelming probability must be that Ms O'Kane was a victim of crime.

[4] The applicant for leave to apply for judicial review is the sister of the deceased and she seeks to challenge the "ongoing failure" on the part of the PSNI to properly investigate the death.

The Grounds for Judicial Review

[5] The applicant contends that the PSNI has breached its obligation, arising both at common law and pursuant to section 32 of the Police (Northern Ireland) Act 2000 ('the 2000 Act') to detect crime and bring offenders to justice.

[6] It is also alleged that the failure to investigate the death is irrational insofar as it is asserted that there are no current credible investigative opportunities.

The Test for Leave

[7] 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

[8] The applicant has sworn an affidavit which documents the history of events surrounding the death and the steps which have been taken to investigate it:

(i) Initial reports were that the police believed the fire to have been accidental;

(ii) Just after the funeral, the family was visited by two police officers who indicated that Rosaleen had been murdered and, bizarrely, that 'black magic' may have been involved;

(iii) At the inquest in October 1977 an open verdict was delivered but it was made clear that the police were treating the case as one of murder;

(iv) On 20 January 2002 the applicant, her family and legal advisers met with police who informed them that the investigation was still open, that one man had been interviewed after caution and a statement had been provided to the police from a man stating that he and others had started a fire in the area on that date. A re-investigation was being conducted and DCI Armstrong and Superintendent Brannigan would be in touch within four weeks;

(v) Three items of correspondence followed from DCI Armstrong in 2002 pursuing certain lines of inquiry but these appear to have been unanswered;

(vi) In August 2003 the applicant's solicitor wrote to the Chief Constable, the Coroner, the DPP and the Secretary of State complaining of the lack of any article 2 compliant investigation into the death. The NIO replied, stating that the procedural obligations imposed by article 2 do not apply to deaths predating the coming into force of the Human Rights Act 1998 ('the 1998 Act') on 2 October 2000;

(vii) In July 2004 further correspondence issued to the Chief Constable seeking certain information and documentation. On 12 October 2004 the PSNI informed the applicant's solicitor that the Serious Crime Review Team ('SCRT') had been established earlier that year and was carrying out a preliminary case assessment into the death;

(viii) On 20 June 2005 the PSNI provided documentation including inquest depositions, photographs and medical reports;

(ix) In October 2006 Detective Inspector Nicholl was appointed to further investigate the death;

(x) However, by July 2007, the matter had fallen into the workload of the Historical Enquiries Team (HET). A meeting took place between HET investigators and the family on 16 July 2008;

(xi) In November 2010 the investigation was passed back by HET to SCRT as a result of the need for 'further clarification' regarding forensic issues;

(xii) A meeting took place on 15 March 2011 with DCI Agnew of the SCRT. He explained that HET deemed the death not to be Troubles related;

(xiii) At a further meeting on 13 September 2011 PSNI stated that a report was being written which would make a number of recommendations and this would be forwarded to the Retrospective Murder Investigation Team ('REMIT') to consider arrest or voluntary attendance of the person who had made the previous statement;

(xiv) Despite this, it would appear that the family were not informed of any progress until 2016 at which time an application was made to the Attorney General for the holding of a fresh inquest;

(xv) Eventually, by letter dated 11 August 2016, the family were told that a number of recommendations had been made by SCRT in 2011 and the case transferred to REMIT. By that time, responsibility for legacy cases, including the death of Rosaleen O'Kane, had passed to the Legacy Investigation Branch

('LIB') of the PSNI. They were informed that the LIB caseload extended to over 1000 cases and they would be advised when work was to commence on this particular death;

(xvi) On 31 August 2017 the Attorney General declined the request for a fresh inquest;

(xvii) On 16 October 2017 the applicant's solicitors wrote a pre-action protocol letter to the LIB, asserting that the failure to investigate and pursue reasonable lines of inquiry was unlawful, in reliance on article 2 and section 32 of the 2000 Act;

(xviii) By a response dated 1 November 2017 the PSNI stated that the SCRT review "did not identify any credible investigative opportunities but did make recommendations … these recommendations have not yet been carried out." It also rejected the claimed basis for judicial review on the grounds that article 2 was not in play and that the application was out of time;

(xix) A second pre-action letter was sent on 6 December 2017, again rejecting the police claim that there were no credible investigative opportunities;

(xx) A complaint was made to the Police Ombudsman on 11 January 2018 but was rejected as being outside the 12 month time limit for such complaints;

(xxi) The Attorney General refused a further request for a fresh inquest on 25 May 2018;

(xxii) A further pre- action protocol letter was sent to the PSNI on 15 September 2021 and, ultimately, these proceedings were commenced on 1 March 2022.

[9] I will address the legal merits of this application in due course, but I pause for a moment to reflect that, on the evidence currently available, there is a prima facie case that the applicant and her family have been treated appallingly by those charged with the investigation of the death of their loved one. At every step they have been pushed from pillar to post and met with inactivity, delay and a want of basic communication. These comments are, of course, provisional in light of the fact that the proposed respondent has not, as yet, adduced any evidence.

The Obligation to Investigate Crime

[10] In *Commissioner of the Police of the Metropolis v DSD* [2018] UKSC 11, the Supreme Court held that the police failures in relation to the investigations into the offending of the notorious rapist John Worboys constituted a breach of a victim's rights under article 3 ECHR. The police had argued that whilst a duty to investigate crime exists, this was owed to the public at large and not to individuals. The court held that an individual had a right to claim compensation against the state where there had been a breach of article 3 rights. It mattered not that the police generally

enjoyed an immunity from suit in respect of common law negligence since the juridical basis for such claims was quite different.

[11] In light of the decision of the Supreme Court in *Re McQuillan* [2021] UKSC 55, the applicant accepts that the rights created by the ECHR and incorporated into domestic law by the 1998 Act are not in play. Rather, it is asserted that the police have a duty to investigate crime which arises both at common law and under statute, and which is actionable by a private individual as a matter of public law.

[12] In *Rice v Connolly* [1996] 2 QB 414 the Divisional Court in England & Wales was concerned with a conviction for wilfully obstructing a police constable in the due execution of his duty. The appellant argued that refusing to answer questions from a constable did not constitute the offence. The Lord Chief Justice stated, obiter:

> "It is also in my judgement clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice." (at 419)

[13] This case is undeniably authority for the proposition that wilful obstruction of a constable whilst he or she is engaged in the prevention of crime is a criminal offence. Whether it supports the contention that the police are under a legal duty, enforceable by private citizens, to detect crime and bring offenders to justice is much less clear.

[14] In *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, the Supreme Court held:

> "Turning to consider specifically the position of the police, Lord Toulson JSC explained in *Michael's case [2015] AC 1732*, paras 29–35 that the police owe a duty to the public at large for the prevention of violence and disorder. That public law duty has a number of legal consequences. For example, the police cannot lawfully charge members of the public for performing their duty (*Glasbrook Bros Ltd v Glamorgan County Council* [1925] AC 270), and a police officer who wilfully fails to perform his duty may be guilty of a criminal offence: *R v Dytham* [1979] QB 722. Some members of the public may have standing to enforce the duty, for example in proceedings for judicial review (*R v Comr of Police of the Metropolis, Ex p*

> *Blackburn* [1968] 2 QB 118), but in doing so they are not enforcing a duty owed to them as individuals." [para 43]

[15] The case referred to in *Robinson*, *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, is authority for the established principle that the duty of the police to preserve the peace is owed to the public at large and does not, of itself, give rise to a private law duty of care.

[16] Section 32 of the 2000 Act provides:

> "(1) It shall be the general duty of police officers—
>
> (a) to protect life and property;
>
> (b) to preserve order;
>
> (c) to prevent the commission of offences;
>
> (d) where an offence has been committed, to take measures to bring the offender to justice."

[17] The Supreme Court stated, in *DB v Chief Constable of the PSNI* [2017] UKSC 7 that this statutory duty confirmed the position at common law that the police owed a "fundamental duty" to, inter alia, prevent the commission of offences (see Lord Kerr at para [10]). In the analysis that follows, therefore, I do not seek to differentiate between the common law and statutory duty.

[18] In *Re McQuillan*, the court was concerned with a death which occurred in Belfast in 1972 and it was held that no article 2 investigative obligation arose. On the issue as to whether a similar obligation existed at common law or under statute, the Supreme Court stated:

> "The submission that there is an equivalent common law investigative obligation was decisively rejected by the House of Lords in *In re McKerr* [2004] 1 WLR 807 and again by this court in *Keyu [2016] AC 1355*. In the present appeals the court has not been taken to any authority to support the submission; nor has any substantive argument been addressed to us which could call in question the correctness of those decisions on this point. We are not persuaded that there is any reason to revisit those previous rulings, let alone overrule them pursuant to the 1966 Practice Statement (*Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234). It is not necessary to say anything more about this part of the case …

> Neither Maguire J nor the Court of Appeal considered that section 32 imposes an obligation of independence equivalent to that which arises under the article 2/3 investigative obligation with respect to any investigation the PSNI might undertake. We agree. Section 32 imposes a general obligation on the officers of the PSNI to undertake the usual functions to be expected of a police force across the whole range of their activities in investigating crime. It is not drafted so as to refer to any distinct standard of independence in relation to investigations they might undertake, let alone to the particular standard of independence which arises under the article 2/3 investigative obligation. Nor can such an obligation of independence be implied. As explained above, no such obligation exists at common law, so one cannot say that such an obligation is implicitly imported into section 32 for that reason; there is no other foundation for identifying such an implied obligation." [paras 215-217]

[19] In the same case the Court of Appeal commented in relation to section 32:

> "This general duty is subject to the accountability provisions in the Act with a central role being played by the Policing Board and the ultimate power to require the Chief Constable to resign. We do not consider that it enables the courts to impose Article 2 compliant standards on or to micro manage investigations." [para 139]

[20] Both in *Re McKerr* [2004] UKHL 12 and, more recently, in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, the highest courts have rejected claims that there is a common law principle equivalent to the article 2 investigative obligation imposed upon the state. The rationale for this was expressed as follows:

> "Parliament has expressly provided for investigations into deaths (i) through the coroners' courts in the Coroners and Justices Act 2009, and its predecessors, and (ii) through inquiries in the 2005 Act, and its subject-specific predecessor statutes. It has also effectively legislated in relation to investigations into suspicious deaths through the incorporation of article 2 in the 1998 Act. In those circumstances, it appears to be quite inappropriate for the courts to take it onto

> themselves, through the guise of developing the common law, to impose a further duty to hold an inquiry, particularly when it would be a duty which has such potentially wide and uncertain ramifications, given that it would appear to apply to deaths which had occurred many decades – even possibly centuries – ago." [para 117]

[21] These cases concerned the obligation to investigate deaths but there is a read across into the area of police investigations into crime.

[22] The question then resolves to this – can a breach of the duty imposed by section 32 be relied upon in public law proceedings by an individual affected by the alleged breach?

[23] In *Re E's Application* [2004] NIQB 35, the case arising out of the police's handling of the Holy Cross protests, the judge at first instance, Kerr LCJ, was not satisfied that any breach of section 32 had been made out on the facts. He did not, however, find that this legislative provision could not be relied upon by the applicant for judicial review. On appeal, before the House of Lords [2008] UKHL 66, it was argued that the police had failed to give effect to the article 3 rights of parents and children when complying with the section 32 obligation. This was unsuccessful by reason of the finding that there had been article 3 compliance, not because section 32 could not be invoked by the applicant.

[24] In *Re DB* [supra], the applicant argued that the police were in breach of their obligations, including under section 32, by failing to take steps to prevent so-called 'flag protests' from taking place. Ultimately, the case was decided on the basis that the police had failed to properly comprehend the powers available under the parades legislation but, notably, it was not argued that the applicant could not rely on section 32. Indeed, at first instance Treacy J [2014] NIQB 55 made an express finding that there had been a breach of the section 32 obligation. The Court of Appeal noted that in *Re E* the courts had emphasised the importance of recognising the operational discretion which must be afforded to police when determining appropriate levels of response. None of the judges concerned found that the applicant was unable to rely upon section 32.

[25] I am conscious that this is an application for leave to apply for judicial review. The analysis which I have conducted of the various authorities in this field leads clearly to the conclusion that it is arguable that the proposed respondent in this case has breached the duties which it owes, both at common law and under section 32, to investigate the crime.

Contravention of the Rule of Law

[26] The applicant contends that the failings on the part of the police are such as to offend the fundamental principles of the rule of law. It is difficult to see what the

invocation of this constitutional principle can add to the case advanced by the applicant based on the common law and statutory duty to investigate crime.

[27] No authority has been cited to me in support of the contention that the rule of law can be relied upon in a challenge to alleged inactivity on the part of the police. I fully accept that public authorities must adhere to this principle but fail to see what this adds to the applicant's challenge grounded on the common law and statutory duty. I therefore refuse leave on this ground.

Irrationality

[28] The rationality challenge arises from the assertion on the part of the proposed respondent that there are "no current credible investigative opportunities" which is said to be unsustainable in light of the recommendations made by the SCRT.

[29] The answer to this put forward by the PSNI rests with the Case Sequencing Model adopted by the LIB. The Court of Appeal recently stressed in *Re Frizzell's Application* [2022] NICA 14 that the ambit of any judicial review challenge to the operative workings of a police investigatory process must necessarily be limited. There are over 1,000 cases resting within the workload of the LIB and the reality is this will take many years to work through.

[30] Properly understood, the failure to act on the SCRT's recommendations is at the core of the applicant's case and falls squarely into the breach of duty claim. The operational discretion permitted to the PSNI in terms of its investigations makes the bar for any irrationality claim a high one. I am not satisfied it is arguable in this case and again, therefore, I refuse leave on this ground.

Delay

[31] Delay is an issue in many of the applications for leave to apply for judicial review arising out of investigations into legacy issues. Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 requires that such an application be made within three months of the date when the grounds for the application first arose unless the court considers there is good reason for extending time.

[32] I have found that there is an arguable case that the police have breached the common law or statutory duty to investigate the crime which led to the death of Ms O'Kane. The death itself occurred in 1976 but when did the grounds first arise?

[33] I dealt with a similar issue in *Re Armstrong's Application* [2022] NIQB 32 when the applicant contended that the state had breached the article 2 investigative obligation as the PSNI lacked the necessary qualities of institutional and practical independence. The applicant believed this to be the case from at least 2012 and I held that the grounds to bring judicial review proceedings first arose at that time or,

at the latest, in 2014. No application having been made for an extension of time, the application was dismissed.

[34] The applicant in this case seeks to distinguish *Armstrong* on the basis that the alleged want of independence was a single act, with continuing consequences, whilst the complaint in this case relates to a series of acts comprising a course of conduct over an extended period of time. This analysis draws some support from the Court of Appeal in England and Wales in *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199:

> "Unlawful legislation is not a continuing unlawful act in the sense that the time limit for challenging it by way of judicial review rolls forward for as long as the legislation continues to apply. If that were the test, there would effectively be no time limit for challenging primary or secondary legislation or for that matter administrative conduct which continues to affect a claimant unless or until the action is withdrawn or revised. The Appellants rely on *O'Connor v Bar Standards Board* [2017] UKSC 78, [2017] 1 WLR 4833 to argue that this is a case of continuing illegality. In that case the Supreme Court held that the time limit for bringing a claim in respect of disciplinary proceedings brought by the Bar Standards Board started to run only from the end of the proceedings when the claimant's appeal against the decision was allowed and not from the start of the proceedings when the BSB decided to pursue the case against her. That case does not in our judgment assist the Appellants. What the Court was looking at there was a series of acts comprising a course of conduct occurring over an extended period of time, not the continuing effect of a single act. There is no continuing series of acts here. The adoption of each Pensions Act affecting the Appellants' pension age was a single act which was completed for this purpose at the latest when the legislation was brought into effect." [para 124]

[35] As in all applications of this nature, it is important to consider the evidence carefully in order to ascertain when the grounds to apply for judicial review first arose. There are a number of candidates:

(i) Some time after 1976 when the initial police investigation concluded;

(ii) In or around 2002 when DCI Armstrong's 'reinvestigation' came to nothing;

(iii) Some time in 2003 when the applicant's solicitor was alleging failures in the investigation;

(iv) By 2007 when the matter had passed to the HET;

(v) Post September 2011 when the recommendations of the SCRT were not implemented;

(vi) Around August 2016 when the family was informed the recommendations had not been carried out but the matter passed to the LIB;

(vii) By October 2017 when the applicant's solicitors wrote the first pre-action protocol letter;

(viii) In November 2017 when the PSNI asserted that no credible investigative opportunities had been identified;

(ix) By January 2018 when the complaint was made to the Police Ombudsman;

(x) On the applicant's analysis, each day that the investigation is not properly progressed.

[36] The affidavit evidence filed on behalf of the applicant and the Order 53 statement, taken together, demonstrate that the focus of this challenge is on the failure to take any steps on foot of the SCRT recommendations in 2011. The applicant herself says:

> "Another ten years has passed since they made their recommendations and still nothing has happened."

[37] The pre-action correspondence from the applicant's solicitor dated 6 December 2017 states:

> "We take issue with your determination that there are no credible investigative opportunities and submit that the findings and recommendations of SCRT in this regard present PSNI with reasonable lines of enquiry which should be pursued forthwith."

[38] The assertion that the SCRT did not identify any credible investigative opportunities but did make recommendations which had not been carried out is found in the correspondence from Mr Roche, solicitor to the PSNI, dated 1 November 2017. I am satisfied that, properly analysed, this was the date when the grounds to apply for judicial review first arose. In terms, nothing has changed since then since the case remains within the workload of the LIB and has not, as yet, been subject to investigation.

[39] The three month time limit to commence judicial review proceedings is founded on a clear public policy that challenges to administrative action ought to be brought promptly. Any analysis to the effect that where there is a 'course of conduct' no such time limit applies will always be carefully scrutinised by the court since it would serve to defeat the aims of the policy – see the judgment of Lady Dorrian in *O'Neill v Scottish Ministers* [2021] CSIH 66.

[40] The next question which arises is whether good reason for the delay has been established so as to entitle the applicant to an extension of time. It is well established that evidence must be adduced to account for all periods of delay – see, for example, *Re Laverty's Application* [2015] NICA 75. The affidavits from the applicant's solicitors contain a number of averments about the progress of events. It is clear that various steps were taken in relation to the Attorney General and the Police Ombudsman in order to explore alternative avenues of investigation. However, both these options were closed down by May 2018. The applicant's solicitor states that she then worked to collate information in relation to other killings in Belfast in the 1970's with a view to making a further application to the Attorney General for a fresh inquest.

[41] For over a year work on the file was delayed by the Covid-19 pandemic, then there was a delay between November 2021 and February 2022 whilst legal aid was awaited.

[42] Taken alone, I would not be satisfied that the reasons proffered for the inactivity between February 2018 and February 2022 were sufficient to provide a good reason to extend time.

[43] In *S v Scottish Ministers* [2021] CSOH 23, Lady Poole commented that where an application was out of time, but the impugned decision continued to have an effect, this may be relevant to the question of whether an extension of time should be granted.

[44] In *Laverty*, the Court of Appeal confirmed that 'good reason' within Order 53 rule 4 may encompass the public interest in allowing the application to proceed and/or the importance of a point of law raised by the proceedings.

[45] I am satisfied that there is an important point of law to be resolved, namely whether and to what extent an applicant in public law proceedings can seek to impugn an alleged failure to investigate a crime by the police, in reliance on the common law and/or statutory duty, in circumstances where neither article 2 nor 3 is engaged. The alleged failings in police investigations is a theme running through many legacy judicial reviews and there is also a public interest in having this issue determined.

[46] The proposed respondent makes the case that there is little practical utility in proceeding with the case since the limited resources of the LIB will continue to restrict the ability to investigate cases even if relief is ultimately granted. I am not satisfied, on the material available at the moment, that this is a reason either to refuse leave or to refuse to grant an extension of time. This question can, of course, be revisited at the full hearing.

[47] In light of this, and the fact that it is alleged the failures on the part of the PSNI have a continuing effect, I am persuaded that there is good reason to extend time and I therefore exercise my discretion to allow the application to proceed to a full hearing.

Conclusion

[48] For the reasons outlined, I grant leave to apply for judicial review and I will hear the parties in relation to directions towards the substantive hearing.