Judicial Communications Office

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Court Of Appeal Delivers Judgment In Glenanne Report Challenge

Summary of Judgment

The Court of Appeal[1] today upheld a decision that the brother of Edward Barnard had a procedural legitimate expectation that an overarching report would be carried out by an independent police team but concluded that there was no enforceable duty under Article 2 ECHR given the passage of time since the death. The Court declined to direct the Chief Constable how the independent officers should proceed but noted that if he unduly delays appointing the officers he would be at risk of further proceedings challenging such a failure.

This was an appeal by the Chief Constable ("the appellant") from an order made by Mr Justice Treacy on 27 November 2017 where he:

- Declared that the failure/refusal on the part of the PSNI Historical Enquiries Team ("the HET") to complete and publish an overarching thematic report regarding the linked Glenanne Gang cases was unlawful and in breach of Article 2 ECHR; and
- Made an Order of Mandamus to compel the appellant to expeditiously honour its enforceable public commitment to provide an overarching report into the Glenanne Gang group of cases.

The notice of appeal lodged by the appellant raised four main issues:

- Whether Edward Barnard ("the respondent" and brother of Patrick Barnard) is entitled to rely on ECHR rights, in particular Article 2, introduced into domestic law through the Human Rights Act 1998 ("the HRA 1998") since the death with which this case is concerned occurred on 17 March 1976;
- Whether the appellant made clear and repeated promises to the respondent sufficient to ground a substantive legitimate expectation;
- Whether the PSNI Legacy Investigation Branch ("the LIB") is sufficiently independent in the matter required by Article 2 to conduct an investigation into the death of Patrick Barnard; and
- Whether it was appropriate to make the Order of Mandamus.

Background

Patrick Barnard was murdered aged 13 by a bomb placed by the UVF outside the Hillcrest Bar in Dungannon on 17 March 1976. James Francis McCaughey, Andrew Joseph Small and Joseph Kelly were also killed in the attack. On 8 December 1980, Garnet James Busby was arrested for the bombing. During interview he admitted to his involvement in the Hillcrest Bar bombing and to his membership of the UVF. During his interviews, he also admitted his involvement in the murders of Peter and Jane McKearney on 23 October 1975, the placing of a car bomb outside O'Neill's bar,

[1] The Lord Chief Justice delivered the judgment of the Court. The panel was the Lord Chief Justice, Lord Justice Stephens and Mrs Justice Keegan.

Dungannon on 16 August 1973 and the placing of a car bomb at Quinn's public house, Dungannon on 12 November 1973. On 23 October 1981, Busby was convicted of a total of 14 offences including the Hillcrest bar bombing. He was sentenced to life imprisonment for the murders and concurrent sentences for other offences. He was released on life licence in February 1997.

Busby named three other UVF members as being involved in the Hillcrest bombing. The first person was arrested in 1980 and convicted of involvement in a series of UVF murders committed in the 1970s in County Down and County Tyrone. He was sentenced to life imprisonment. The second person was arrested in 1976 and admitted his involvement in a series of terrorist murders and offences. He was convicted and sentenced to life imprisonment. The third person was interviewed in 1980 and 1981 and denied any involvement in the Hillcrest bar bombing. In the mid-1970s he served a term of imprisonment for possession of explosives and firearms offences. The Court of Appeal commented that it was common case that the three persons named by Busby "were highly likely to have been part of the bomb gang".

The McKerr Group of Cases

On 4 May 2001, the European Court of Human Rights ("ECtHR") gave judgment in McKerr v UK and a number of related cases concerning the form of the effective official investigation required by Article 2 ECHR when individuals have been killed as a result of the use of force. The ECtHR stated that the essential purpose of such an investigation was to secure the effective implementation of the domestic laws which protected the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The kind of investigation that will achieve those purposes may vary according to the circumstances however the authorities must act of their own motion once the matter has come to their attention. The judgment was transmitted to the Committee of Ministers ("CM") to supervise its execution. The UK Government set in train a "Package of Measures" to remedy the identified breaches of the Article 2 procedural obligation which included as part of the obligation an effective investigation and the requirement to secure the independence of its investigators. This led to the establishment in the UK of a number of investigative units, the development of which was set out in the Court of Appeal's decision in Re McQuillan [2019] NICA 13.

The HET

The unit with which this judgment is concerned is the HET which was established in September 2005. The HET adopted three main objectives:

- To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to "the Troubles" between 1968 and the signing of the Belfast Agreement in April 1998;
- To re-examine all deaths attributable to "the Troubles" and to ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a matter that satisfies the PSNI's obligation of an effective investigation as outlined in the PSNI's Code of Ethics;
- To do so in a way that commands the confidence of the wider community.

Originally, the HET was set up with two teams: a team of police officers seconded from police forces outside NI and another staffed by a mix of police officers and civilian staff recruited from both the PSNI and externally. Between 2006 and 2007, a third team was established ("the White Team")

which was based in England and whose function was largely analytically driven and directed towards examining issues of collusion between terrorism and members of the security forces and police officers[2]. For that purpose the HET had established a substantial Analytical Database ("HEAD"). These arrangements were reviewed by the CM who signed off their supervision on 19 March 2009. The UK government represented that the HET would act in as compliant a manner with Article 2 as possible. The NI Court of Appeal in McQuillan accepted that the arrangements secured practical independence in the conduct of investigations for the purposes of Article 2.

As part of this process the HET produced a Review Summary Report ("RSR") for each family which engaged with it. The respondent did not engage but the families of the other three deceased in the Hillcrest bombing did engage and each received an RSR. In some cases amended reports were produced as a result of queries raised by the families. Those reports indicated that there was no evidence of collusion in the Hillcrest bombing which had been detected by the review team but that the HET would continue to assess the Hillcrest case and other cases as part of its ongoing investigations into the "Glenanne Series". That was a reference to a significant number of murders and other serious terrorist crimes committed by the mid-Ulster UVF which were to be the subject of consideration by the White Team through the HEAD. Some of these murders were linked by personnel or weapons and in some of cases there was direct evidence of the involvement of security forces and police personnel. The families were advised that they would be updated of any developments.

Many of the families, including the respondent, also liaised with the Pat Finucane Centre ("PFC") which carried out a study of 51 separate murders and serious crimes committed in South Armagh between 1972 and 1978. In May 2004 the PFC published its case study report which contained four central allegations:

- A "pseudo-gang" operating out of a farm in Glenanne comprising of members of the Royal Ulster Constabulary ("RUC") and Ulster Defence Regiment ("UDR") had colluded with loyalist paramilitaries. This loose gang had carried out approximately 18 attacks in the border counties resulting in the deaths of 58 people.
- The activities of the Glenanne group were well known to security and intelligence agencies and had those organisations taken the appropriate action, a number of loyalist paramilitaries would not have gone on to commit other murders.
- Clear evidence existed of collusion between loyalist paramilitaries and security force personnel, predominantly in south Armagh, in that they were directly involved in attacks or failed to investigate or prosecute those responsible.
- The true scale of the gang's activities, including a number of convicted RUC officers, was hidden from the public by the deliberate misuse of the justice system.

Following on from this in 2006 the PFC arranged for the conduct of an investigation by the Centre for Civil and Human Rights, Notre Dame Law School, USA. In 2009 there were a series of meetings between the PFC and the Director of the HET. The respondent had been advised by the PFC of the content of these meetings as the HET had indicated that it was going to look at each case individually then do a larger thematic report which would put things in context. At a meeting on 6 October 2009 the Director of the HET indicated that he felt that the Glenanne Report could be started

[2] Collusion was defined by the HET as where a member of the security forces commits with any other a person an offence that amounts to either murder; serious offence (including attempted murder, causing an explosion, intimidation, shooting and kidnap); misfeasance in public office; or conspiracy to commit acts of terrorism.

because enough was now known to start doing a rolling report. There was a further meeting on 20 October 2009 when the HET met representatives from the PFC and set out the structure of the HET thematic RSR which was going to be published including consideration of the wider issue of collusion. At a meeting on 15 June 2011 between the PFC and the HET it was indicated that substantial work had been done on the thematic report and it was believed that it may be possible to complete it by the end of 2011.

In the course of these proceedings disclosure was made of a draft unfinished report entitled "South Border Security Situation Report" ("SBSSR") which introduced itself as the HET overarching report into its reviews of a number of terrorist-related deaths in the south border area of Northern Ireland between 1972 and 1978. The introduction to the report records that "associated with many of the deaths are allegations of collusion in that they were caused by loyalist terrorists, who included among their numbers serving police officers and soldiers of the British Army. A number of security force personnel were convicted of involvement in some of the deaths and that there was collusion in those cases is indisputable. There are also a number of cases where due to weapons links, associations or similar method, collusion is believed to have played a part in the deaths." The draft report was concerned with 89 incidents comprising 46 murder cases involving a total of 80 deaths, 22 non-fatal bombings, 13 attempted murders, seven non-injury intimidation shootings and one abduction and false imprisonment. The Hillcrest bombing was not included in the list but the explanation for this was that the final RSR in respect of one of the families was still outstanding at the time of the draft report which it is believed was prepared at the end of 2010. Once completed the Hillcrest bombing would have been added to the incidents. The Hillcrest incident was also linked through the convicted murderer, Busby, to other killings in which he was involved and through the weapon used in another case in which he was involved to further terrorist incidents. The identity of two others highly likely to have been involved in the Hillcrest bombing had been established and their involvement in other terrorist offences had also been documented. This information was tabulated in a spreadsheet prepared within the papers.

The HET was subject to an HMIC inspection which reported in July 2013. It raised issues about the independence of the provision of intelligence to the HET but also dealt with other criticisms relating to the HET approach to military personnel. The Chief Constable decided in September 2013 to suspend any further work by the HET and it was disbanded the following year. Its work has now been transferred to the Legacy Investigations Branch ("LIB") of the PSNI. In McQuillan the Court of Appeal concluded that the LIB did not have practical independence in respect of the conduct of legacy investigations for the purposes of Article 2.

The decision under challenge

On 11 March 2014 the respondent's solicitors wrote to both the Chief Constable of the PSNI and the HET asking for confirmation that the Hillcrest investigation had been linked to all other relevant incidents and seeking access to the investigative end product undertaken as a result of analysis of the HEAD. A response from the Crime Operations division within the PSNI stated that the draft SBSSR was massively incomplete and not fit for publication. It noted that although there had been attempts made to draw together pieces of individual cases no overarching report detailing the chronology of the Glenanne Series had been prepared by the HET and concluded that producing such a report was a massive undertaking well beyond the current capacity of the HET. In his affidavit to the first tier court, the then Deputy Chief Constable Harris noted that neither he nor the Chief Constable had given any active consideration to the question of whether an overarching report into the Glenanne Series should be completed but concluded that there would be no investigative

benefit to be derived from preparing such a report and that such reports were not used in contemporary policing practice in the United Kingdom in the conduct of murder investigations. He referred to the issue of resources but later in his affidavit stated that resources was not a defining factor (and that was confirmed in submissions of the appellant before the Court of Appeal). Deputy Chief Constable Harris replied to the respondent's solicitors on 12 June 2014 in those terms and that is the "impugned decision". At that time the work of the HET had been suspended by the Chief Constable and was subsequently taken over in January 2015 by the LIB.

Treacy J's decision

Treacy J ("the trial judge") noted the repeated representations to the families of the Hillcrest victims and to the PFC that the Glenanne Series would be separately analysed and that a report would be completed. He said these created a substantive legitimate expectation that a thematic report including the examination of collusion in the Glenanne Series would be provided by the HET. He said the decision not to produce the overarching report was a dismantling of the protections upon which the CM relied when signing off the supervision of the McKerr cases and concluded "that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgments in the McKerr series and with the package of measures."

The parties agreed an order quashing the impugned decision. There was disagreement, however, over whether the court should make an Order of Mandamus. In a further judgment on remedy the trial judge noted that the ground on which relief was sought included breach of the respondent's common law legitimate expectation that the thematic report would be completed and published as well as breach of Article 2 and thereby section 6 of the HRA. The trial judge relied on the observation that where a legitimate expectation is established the court will require the promise to be honoured unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. He noted that the Chief Constable failed to appreciate that such a commitment had been generated and there was no evidence before him to discharge the burden of showing good proportionate reasons for resigning from that public commitment and made an Order of Mandamus.

Consideration

Legitimate expectation

The principles relating to the law on legitimate expectation, which were recently reviewed by both the Privy Council and the UK Supreme Court, are broadly based on the proposition that where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. In order to found a claim based on the principle, the statement in question must be "clear, unambiguous and devoid of relevant qualification". The principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty and however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. The justification, where the expectation arises in the context of procedural fairness is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was

made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from interested parties and as a general rule that is correct.

The approach where the legitimate expectation is procedural was considered by the UK Supreme Court in Re Geraldine Finucane [2019] UKSC 7. Lord Kerr reviewed the case law and concluded: "From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown fair to do so. The court is the arbiter of fairness in this context. "

The Court of Appeal had to determine in this case whether there was a "clear and unambiguous undertaking devoid of relevant qualification". The trial judge had concluded that the promise made in this case amounted to the following:

- An independent police team comprising officers who had not served in Northern Ireland or been members of the security forces and having the practical independence equivalent to that required under Article 2 of the Convention would analyse the cases referred to as the Glenanne Series through the HEAD.
- The precise identification of the composition of the Glenanne Series was for that independent police team to establish having regard to the purpose of the analysis but in any event it included the Hillcrest bombing.
- The purpose of the analysis was to consider whether the review of the cases as a whole suggested that there were wider issues of collusion beyond those already established in the individual cases.
- The outcome of the analysis was to be published.
- The commitment to carry out the analysis on this basis was communicated to the Committee of Ministers in its review of the McKerr cases as part of the fulfilment of the commitment by the United Kingdom government to carry out a review and investigatory process that was as Article 2 compliant as possible.

The Court of Appeal said it was satisfied that the trial judge was correct to conclude that the representation was clear and unambiguous without any relevant qualification. It recognised that there was a degree of uncertainty around the precise contours of the Glenanne Series and the precise process of the analysis but was satisfied that there was clarity as to the function.

Counsel for the appellant argued that it was fair to disappoint the expectation as the investigation into the Hillcrest incident on its own had not found any evidence of collusion. The Court of Appeal considered that this argument missed the point that the proposed analysis was on a wider scale involving linked cases and designed to assess whether there were additional strands of collusion. Counsel's second argument was based on the conclusion of the relevant PSNI officers that no purpose was to be served by pursuing this approach. The Court said, however, that there was nothing to indicate that those who came to the conclusion had any access to the HEAD and none of those officers reported to have carried out any form of evaluation based on the analytical database. Further, it was critical to the representation that the officers carrying out the analysis of collusion were independent in the sense that they had not served with the police in Northern Ireland and had not been members of the security forces:

> "In those circumstances the conclusions reached by officers of the PSNI in the absence of any evaluation of the relevant materials leading to the defeat of the expectation contradicted the underlying purpose of the original commitment. There was never any

> suggestion that the underlying purpose should be defeated in that way and no explanation was offered to explain why the need for independence was no longer appropriate. We accept that the representation in this case amounted to a procedural legitimate expectation. We do not consider that the appellant has shown that it was fair to disappoint the expectation and accordingly we agree that the learned trial judge was entitled to conclude that the respondent was entitled to rely upon it."

Article 2

Patrick Barnard died on 17 March 1976, some 24 years prior to the coming into force of the HRA. The temporal jurisdiction of the separate obligation to carry out an effective investigation by virtue of Article 2 was considered by the ECtHR where the court concluded that there had to be a genuine connection between the investigation and the death. Further examination by that court identified three limitations on the jurisdiction to examine pre-ratification claims: the duty arose only in relation to procedural acts which were capable of discharging the investigative duty; the genuine connection between the death and the critical date was primarily a temporal one and should not exceed 10 years; and that in exceptional circumstances it may be justified to extend the time limit further into the past on condition that the requirements of the Convention values test have been met. The Court of Appeal said that despite the submissions of the respondent, it was clear from the judgment of Lord Kerr in Finucane that these tests apply also to any proceedings seeking to enforce the investigatory duty in respect of a death which occurred prior to the commencement of the HRA.

The Court of Appeal said that the difficulty in this case was that the trial judge did not deal with the temporal aspect despite the fact that extensive supplementary submissions on this issue were made by both parties. It said there clearly had been a substantial part of the investigation which occurred between 1976 and 1981 as a result of which Busby was convicted. This therefore was not a case in which it could be said that the vast bulk of noteworthy inquiry into the death had taken place since the HRA came into force and that the exercise conducted by the HET largely consisted of the rehearsing of materials that were already available: "The promise in this case relates to an analysis of the material which had been generated as a result of the investigation of the other cases rather than some fresh investigative material."

The Court of Appeal concluded that it was difficult to see any proper basis upon which the genuine connection test could be established in relation to this death which occurred more than 24 years prior to the commencement of the HRA. It was submitted that the Convention values test was engaged in this case. The Court, however, referred to case law from the ECtHR which indicated that the Convention values test was engaged where the triggering event amounted to the negation of the very foundations of the Convention, examples being serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments. The Court of Appeal said it did not consider that this test was met in this case and accordingly we conclude that there is no Article 2 duty enforceable in domestic law in this case.

Remedy

The Court of Appeal said it must follow from its finding on Article 2 that the terms of the declaration must change and made a declaration in the following terms:

> "It is declared that the impugned decision breached Mr Barnard's legitimate expectation that independent police officers would analyse the Historical Enquiries

> Analytical Database to assess whether the analysis pointed to wider collusion between terrorists and the security forces in the Glenanne Series than that identified in the examination of the individual cases."

It found that the legitimate expectation generated was procedural and commented that this will require a fresh approach by independent officers determining the appropriate response to the expectation generated. The Court said it was not its function to direct how those independent officers should proceed:

> "The Chief Constable's task is to appoint independent officers who should then determine how to respond to the expectation. We do not consider that this is an appropriate case for an Order of Mandamus since we can give very limited meaningful direction to the independent team so appointed. If, however, the Chief Constable unduly delays in appointing independent officers he would be at risk of further proceedings challenging such a failure."

Conclusion

The Court of Appeal concluded:

- The respondent cannot rely on Article 2 of the Convention because of the passage of time;
- The respondent had a procedural legitimate expectation that an analytical report on collusion would be carried out by an independent police team;
- The LIB is not sufficiently independent for the purpose of carrying out such a report; and
- An Order of Mandamus is not appropriate.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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