

Judicial Communications Office

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COURT FINDS THAT CHIEF CONSTABLE HAS NOT DEMONSTRATED PRACTICAL INDEPENDENCE ON THE PART OF THE PSNI LEGACY INVESTIGATIONS BRANCH

Summary of Judgment

The Court of Appeal today delivered its judgment in an appeal by Margaret McQuillan who was seeking a declaration that the proposed *further* investigation by the Legacy Investigation Branch of the PSNI into the death of her sister, Jean Smyth, on 8 June 1972, conflicts with the requirements of Article 2 ECHR on the basis that the LIB lacks the requisite independence required to perform an Article 2 compliant investigation into the death. The appeal involved consideration of the Article 2 independence of the PSNI as the institution responsible for reviews of, and where credible evidence exists, further investigations into legacy cases.

Background

Mrs Jean Smyth (“the deceased”) was a passenger in a car which was stationary on the Glen Road, Belfast when she was fatally wounded by a bullet striking her head. The initial police investigation conducted by the RUC formed the opinion that the deceased was killed by a bullet which entered the car through the rear window in the door behind the driver’s door and travelling at an angle towards the front passenger seat, struck the deceased in the head, shattering on impact. The report added that “nothing else of significance was noted other than the fact that no other holes or bullet strike marks were found on the outside or inside of the car”.

An inquest was held on 9 November 1972 and an open verdict was recorded.

On 22 October 1973, the Belfast Telegraph published an article entitled “Was Jean Smyth Shot by Mistake?” The article included a suggestion that it was the UVF which had been shooting as well as a theory that the incident concerned the Military Reaction Force (“MRF”). The article also stated that a unit of the Provisional IRA may have fired on the car thinking it was carrying Army personnel.

In 1975, the police received “an intelligence report” which touched upon the death. It put forward that two named members of the Provisional IRA were responsible for the deceased’s death. It stated that they were supposedly conducting vigilante patrols in the area when shots were fired from a car on the Glen Road. This report led to no further action on the part of the police.

The PSNI’s Historical Enquiries Team (“HET”) carried out a review of the death of the deceased between 2006 and 2008. The work culminated in the publication to the family of a Review Summary Report (“RSR”). It recorded that it was suggested that only one round had been fired, that it had not proved possible to identify the type of weapon used and that no new forensic opportunities had been identified. It also recorded that there was no intelligence prior to the incident which would have prevented the death. Overall, the death was described as a random killing.

On 13 June 2014, a researcher found a number of military logs in the National Archives at Kew in London which took the form of recording radio traffic. The logs provided a measure of support for

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the view that there may have been military involvement in the deceased's death. A decision was made by the PSNI in December 2015 that the death should be further reviewed within the LIB (referred to below as "the *further* investigation").

Previous judicial decisions

The trial judge, on 3 March 2017, declared that "the proposed investigation by the LIB ... conflicts with the requirements of Article 2 ECHR as the LIB lack the requisite independence required to perform an Article 2 compliant investigation in respect of this death". On 6 December 2017, the Court of Appeal heard that it remained "the position of the PSNI that they will conduct the review in this case, they will conduct the review into this death, and are intending to do so by Article 2 compliant standards". The Court of Appeal remitted the proceedings back to the trial judge who, on 13 April 2018, concluded that Article 2 was not engaged as a matter of domestic law, that the PSNI were not bound by any form of procedural legitimate expectation, that there is no parallel obligation to Article 2 existing at common law so that there is no breach of the common law and that the Chief Constable had not acted irrationally or unreasonably in the exercise of discretion concerning the future conduct of any investigation into the death. The trial judge withdrew the declaration made on 3 March 2017 as it was based on the premise that Article 2 was engaged.

Court of Appeal's Conclusions

The applicant appealed against the order made on foot of the trial judge's second judgment. In Part Five of its decision (paragraphs [128] – [139], the Court of Appeal sets out the issues in relation to the application of Article 2 ECHR. Part Six (paragraphs [140] – [176]) sets out the legal principles as to investigatory independence. Part Eight (paragraphs [193]- 201]) considered whether the PSNI and/or LIB lack the necessary element of independence to enable it to pursue the issue of *further* investigations into the death of the deceased.

The Court of Appeal reached the following overall conclusions:

- The military logs constituted new evidence coming to light and Article 2 ECHR applies to the further investigation. The Court allowed the applicant's appeal against that part of the trial judge's second judgment;
- The further investigative measures are subject to the Article 2 procedural obligation so that those responsible for carrying them out are required to be independent from those implicated in the events;
- As the Article 2 procedural obligation has been revived there is an obligation on the Chief Constable to proceed promptly. That obligation of promptness includes the obligation to put in place suitable arrangements for practical independence and those arrangements should be transparent;
- Consideration of the independence of LIB should be directed to a consideration of the hierarchical, institutional or practical independence of the institution concerned and also should focus on whether the investigators have the *capacity* to be practically independent;
- The trial judge did not decide that the PSNI or the LIB was hierarchically or institutionally connected to the RUC or to the military;
- The trial judge concluded that there was a lack of practical independence of the part of the LIB. The Court of Appeal concluded that at this time the Chief Constable has not demonstrated *practical independence* on the part of the LIB so that it has the *capacity* to carry out an investigation into the death of the deceased;

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- The Court of Appeal dismissed the applicant's appeal from those parts of the trial judge's second judgment which held that the PSNI were not bound by any form of procedural legitimate expectation, that there was no parallel obligation to Article 2 existing at common law so that there is no breach of the common law and that the Chief Constable had not acted irrationally or unreasonably in the exercise of discretion concerning the future conduct of any investigation into the death;
- The Court of Appeal granted declarations that:
 - The Chief Constable is obliged to conduct the further investigations into the death of Jean Smyth in a way which satisfies the State's procedural obligation under Article 2 ECHR; and
 - The Chief Constable is bound to promptly take steps to secure the practical independence of the investigators so that they have the capacity to carry out an Article 2 compliant effective investigation into the death of Jean Smyth.

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk