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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **26/10/2023**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOHN McEVOY FOR JUDICIAL REVIEW

Tony McGleenan KC with Ben Thompson BL (instructed by Crown Solicitor's Office) for the Appellant
Hugh Southey KC with Malachy McGowan BL (instructed by Phoenix Law Solicitors) for the Respondent

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Before: Keegan LCJ, Horner LJ, Kinney J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from a judgment of Mr Justice Humphreys ("the trial judge") of 31 March 2023. The court awarded the respondent damages in the sum of £10,000 against the Chief Constable of the Police Service of Northern Ireland, ("PSNI") ("the appellant") for breach of articles 2/3 of the European Convention on Human Rights ("ECHR") in relation to his failure to ensure a prompt, effective investigation into a shooting incident in 1992 of which the respondent was a victim.

Background

[2] The factual background is set out judgment of Humphreys J delivered on 7 October 2022 wherein he found a breach of articles 2/3 of the ECHR. That finding has not been appealed. In addition, a formal declaration was agreed in the following terms:

> "The Respondent has not carried out an investigation in accordance with Articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms

into the incident on 19 November 1992 at the Thierafurth Inn."

[3] In broad summary, the claim concerns a fatal shooting incident which occurred on 19 November 1992. The circumstances were that loyalist gunmen carried out an attack at the Thierafurth Inn, Kilcoo, Co Down, in which one man, Peter McCormack, was killed. The applicant John McEvoy was working at the bar at the time and narrowly escaped injury or death.

[4] In 2016 a report from the Police Ombudsman of Northern Ireland ("PONI") into the Loughinisland shootings also addressed the events at the Thierafurth Inn. The 1992 attack was investigated by an RUC officer identified as 'Police Officer 4.' In the PONI report he is recorded as having told investigators that the Thierafurth Inn was frequented by "bad people", founded on a belief that it was associated with republican paramilitaries. The PONI report comments that this was suggestive of a lack of objectivity on the part of Police Officer 4.

[5] The report states inter alia:

> "My investigation established that in mid-1993 police received intelligence implicating Persons A, M, K and I in the conspiracy to murder Peter McCarthy … That intelligence was marked 'NDD/Slow Waltz.'
>
> Police Officer 4 states that he did not receive such intelligence and my investigation has seen no evidence that it was shared with him.
>
> The UVF unit was not the subject of a policing response sufficient to disrupt their attacks. The failure to disseminate information to investigators was, in my view, an attempt to protect the sources of that information. This clearly undermined the investigations."

[6] On 9 June 2016 PONI investigators travelled to the Thierafurth Inn and met with the survivors of the attack and explained their findings. The applicant describes himself as having been shocked by these revelations and says he was previously unaware that suspects had been identified within a year of the attack. He expected there to be a fresh police investigation into the shooting and/or arrests of the suspects concerned.

[7] Thereafter, in August 2016 the applicant instructed solicitors to write to the PSNI asking when an effective and independent investigation would take place. No substantive response was received to that correspondence and a pre-action protocol letter was sent on 3 April 2017. On 25 April 2017 a reply was received denying that

any investigative obligation arose pursuant to either article 2 or article 3 ECHR. Thereafter, judicial review proceedings were commenced in 2017.

[8] In addition to the PONI report the applicant also relies on a documentary film entitled 'No Stone Unturned' made by the renowned director Alex Gibney and which premiered in 2017. This documentary named the suspects in both the Thierafurth Inn and Loughinisland shootings. It also suggested that the security forces were aware in advance that the attack was to take place. The film refers to a phone call made to a confidential line and an anonymous letter, written to a local politician, both of which named the gunmen in the Thierafurth Inn and Loughinisland attacks, including Person A. The letter purports to be from an individual who was involved in the planning of the murders. Those interviewed for the film state that the individual was Person A's wife, who worked as a civilian for the RUC, and she was brought in for questioning by Police Officer 4 but never charged. The documentary also includes an interview with a former police officer, Jimmy Binns, who states that when Person A was arrested, the detective who interviewed him spent most of the time persuading the suspect to shoot and kill an IRA member.

[9] No police investigation has taken place since the publication of the above information in 2016 and 2017. There had been a review instigated by the Historical Enquiries Team ("HET"), but it was not completed prior to its disbandment in 2014. The case now lies within the remit of the Legacy Investigation Branch ("LIB") of the PSNI.

[10] In an affidavit filed in February 2023 by the appellants some investigative steps which were taken are explained. This information was apparently overlooked in evidence in the original judicial review. In the affidavit, the temporary deputy head of the LIB, refers to a wider thematic review into nine incidents suspected to be linked to the murders at Loughinisland. She says that the review commenced in 2011 and confirmed that intelligence regarding the identity of the attackers was shared with the Loughinisland Investigation Team on 6 July 1994. She further confirmed that the PSNI were aware that the letter referenced in 'No Stone Unturned', and indeed the names of the suspects shared within that letter, were known to that same investigative team.

[11] The affidavit states that regarding the Thierafurth Inn attack the thematic review made two express recommendations. These were:

> "(a) that a decision relating to the fingerprint and/or DNA examination of the spent cases in respect of this incident should be the subject of careful consideration and that the subsequent decision and accompanying rationale should be recorded in policy; and

(b) that an intelligence request should be submitted regarding the intelligence document dated 18 June 1993."

[12] The context of this case is also that it is connected to other legacy cases which arose at the time. It was case managed in a group of eight cases dealing with the claim that the PSNI were not sufficiently independent to investigate. That issue was determined by the Northern Ireland Court of Appeal ("NICA") in *McQuillan* [2019] NICA 3 which made a finding that the PSNI was not sufficiently independent. However, on appeal, the Supreme Court reversed that decision – [2021] UKSC 55.

Chronology of key events

[13] The full chronology of key events which the parties agreed is as follows. This chronology is informative as to the various stages in the history including the court proceedings associated with this case.

19 November 1992	Attack that led to judicial review claim.
9 June 2016	Police Ombudsman ("PONI") report into the killings in Loughinisland published.
August 2016	Applicant instructed solicitors to write to the PSNI.
3 March 2017	Judgment given by High Court in *McQuillan* [2017] NIQB 28.
3 April 2017	Judicial review pre-action letter written.
25 April 2017	Reply received to pre-action letter denying investigative obligation pursuant to articles 2/3.
6 July 2017	Judicial review proceedings lodged.
8 September 2017	Leave granted to apply for judicial review.
30 September 2017	Documentary film entitled *No Stone Unturned* premiered.
21 September 2018	Hearing delisted and adjourned for review due to *McQuillan & McGuigan* appeals: [2018] NIQB 76, pp.15-21.
12 October 2018	Permission to appeal case management order refused by McCloskey J [2018] NIQB 76.
June 2019	Stay order made by McCloskey LJ.
17 January 2020	Stay order maintained by Sir Ronald Weatherup.
12 February 2020	Stay order maintained by McCloskey LJ.
13 May 2020	Stay order maintained by McAlinden J.
5 June 2020	Applicant files notice of appeal against stay order.
25 June 2020	Permission to appeal against stay refused by McCloskey LJ.

18 November 2020	Permission to appeal against stay refused by Court of Appeal.
14-16 June 2021	Supreme Court hears appeals in *McQuillan, McGuigan & McKenna.*
15 December 2021	Judgment given by Supreme Court in *McQuillan, McGuigan & McKenna* [2021] UKSC 55.
16 December 2021	Permission granted to appeal to Supreme Court in *Re Dalton*.
2 February 2022	Applicant's Order 53 statement amended.
3 February 2022	Stay lifted.
March-May 2022	Parties exchange further correspondence and evidence before hearing.
22 June 2022	Substantive hearing. Judgment reserved.
7 October 2022	Substantive judgment delivered. Judicial review allowed. Indication given that court minded only to make declaratory relief. Further time allowed for consideration of remedies.
22 November 2022	Written submissions provided by applicant regarding damages.
9 December 2022	Written submissions provided by PSNI regarding damages.
21 December 2022	PSNI notify the court that an issue had arisen. Time requested to obtain instructions.
21 December 2022	Court issues e-mail advising that decision on remedy would be deferred until it has heard from the parties.
17 February 2023	CSO writes advising that instructions had been received and that further investigative steps had been undertaken which were not previously known to the legal team. PSNI seeks to file affidavit in accordance with obligations to the court.
3 March 2023	PSNI affidavit filed describing the investigative steps taken. CSO covering letter advises that leave is sought to admit the evidence.
7 March 2023	Review hearing at which PSNI indicates: (a) it was not seeking to reopen the judgment; and (b) damages could be assessed on the basis of the written submissions already made.
31 March 2023	Damages judgment delivered.
12 May 2023	Notice of appeal lodged (damages only).
7 June 2023	Case management order of the Court of Appeal.

Legal framework

[14] Section 8 of the Human Rights Act 1998 provides:

> "(2) … damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that act,
>
> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining—
>
> (a) whether to award damages, or
>
> (b) the amount of an award,
>
> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

[15] The wording of the above statute dictates our approach. Put simply, section 8 means that independent of any finding of Convention non-compliance a court considering damages must conduct a further enquiry as to the necessity of same to afford just satisfaction. It is not an automatic award.

[16] The legal principles in play were not controversial between the parties and so we simply summarise them as follows. In the domestic law sphere the Supreme Court case of *R (Faulkner) v Secretary of State for Justice* [2013] 2 AC 254 held that in assessing damages for a breach of human rights, quantum was a matter of judgment, but the courts were to be guided by any clear and consistent practice of the European Court of Human Rights ("ECtHR"), applying *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. It further decided that the amount of any award had to broadly reflect the level of awards made by the ECtHR in comparable cases originating in the United Kingdom or other countries with a similar cost of living.

This can include compensation for frustration and anxiety connected to the breach, see para [13].

[17] The legal principles to be applied were also summarised by the NICA in *Re Jordan* [2019] NICA 61 as follows in a case concerning a breach of article 2 ECHR:

> "19. The application of the principles on the award of damages for breach of Convention rights was considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14. That was a case where the issue arose in the context of Article 6 breaches but the House was able to give general guidance:
>
> (i) Domestic courts when exercising their power to award damages under section 8 should not apply domestic scales of damages.
>
> (ii) Damages did not need ordinarily to be awarded to encourage high standards of compliance by member states since they are already bound in international law to perform their duties under the Convention in good faith.
>
> (iii) The court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and it follows that an award of damages should be just and appropriate.
>
> (iv) Section 8(4) of the HRA required a domestic court to take into account the principles applied by the ECHR under Article 41 not only in determining whether to award damages but also in determining the amount of the award.
>
> 20. *Greenfield* was considered in *R (Faulkner and Sturnham) v Secretary Of State for Justice and Another* [2013] UKSC 23 which was a case concerned with breaches of Article 5. Lord Reed, giving the majority judgment, provided some further guidance at [39]:
>
> > '39. Three conclusions can be drawn from this discussion. First, at the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be

> guided, following Greenfield, primarily by any clear and consistent practice of the European court. Secondly, it should be borne in mind that awards by the European court reflect the real value of money in the country in question. The most reliable guidance as to the quantum of awards under section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living. Thirdly, courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so.'"

[18] In *Jordan* the court also explained at para [21] that:

> "There is an important structural difference between a claim for damages pursued in the ECtHR and such a claim arising in domestic law. Whereas under the Convention liability rests upon the state, the HRA has devised a procedure broadly similar to that in tort claims where liability falls directly upon the public authority which the court finds has acted unlawfully. In a claim based on delay that can lead to a circumstance where two public authorities are each responsible for the same period of delay or alternatively each is responsible for separate periods of delay."

[19] The NICA further found that the "unlawful breach of Article 2 for which the PSNI was responsible" consisted of a period of 14 months "from March 2007 until May 2008 when the relevant documents were provided" by PSNI to the inquest (para [26]). It determined that it was (a) appropriate to award the damages for that period, and (b) determined that the award should be £5,000 thereby adjusting the £7,500 awarded at first instance.

[20] More recently, in the ongoing *Finucane* litigation, the appellant was ordered by the Northern Ireland High Court, pursuant to an agreed order of Mr Justice McAlinden to pay the applicant the sum of £7,500 "by way of damages for breaching article 2 by reason of excessive delay" in relation to the "excessive" delay, "incompatible with the applicant's article 2 ECHR right to promptness and reasonable expedition in the investigation into her husband's murder; and in breach of section 6 of the Human Rights Act 1998." The period of delay in question concerned a period of less than two years relating to the failure by the appellant to act on the decision of the Supreme Court in the case on 27 February 2019. Mr Justice Scoffield awarded a further sum of £5,000 in a decision reported at [2023] NIKB 42.

[21] At para [16] of that decision Scoffield J referred as follows:

> "I have no doubt that the applicant in this case experienced feelings of frustration, anxiety and distress occasioned by the additional delay to which the respondent's decisions (which I have found to be unlawful) gave rise. Indeed, these feelings were frequently evident and expressed on her behalf by her legal representatives in correspondence and case management review hearings throughout the course of the proceedings. Such sequelae can properly be assumed in a case of this type (see *Jordan* [2014] NIQB 71, at paras [26]-[27], approved on appeal at [2015] NICA 66, para [12]) but I am entirely satisfied that there is an evidential basis for them in this case."

These awards are currently under appeal.

[22] Moving briefly to the Strasbourg jurisprudence; in *Molla Sali v Greece* (2020) 71 EHRR SE3 the Grand Chamber of the ECtHR reiterated some general principles as follows at para [33] of that judgment:

> "33. The Court further reiterates that there is no express provision for non-pecuniary or moral damage. In *Varnava v Turkey* (16064/90) ECHR 2009 at [224] and *Cyprus v Turkey* (25781/940) ECHR 2014 at [56], the Court confirmed the following principles, which it has gradually developed in its case-law. Situations where the applicant has suffered evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity can be distinguished from those situations where the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is an appropriate form of redress in itself. In some situations, where a law, procedure or practice has been found to fall short of Convention standards this is enough to put matters right. In other situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its

> guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage (see *Sargsyan v Azerbaijan* (no. 40167/06) 12 December 2017 at [39]):
>
> > 'the investigation into the death of a close relative impacts on the next of kin at a fundamental level of human dignity. It is obvious that if unlawful delays occur in an investigation that this will cause feelings of frustration, distress and anxiety to the next of kin.'"

Conclusion

[23] The first point to make concerns the procedure adopted in this case. We have been told that both sides agreed that the issue of damages could be dealt with on written submissions. The trial judge proceeded on that basis. However, that approach has ultimately proved problematic through no fault of the trial judge. That is because the appellant did not fully articulate the argument now made that there was no or reduced culpable delay as the case had been stayed pending the *McQuillan* judgment.

[24] On one reading given what we have said as to the appellant's actions we could simply dismiss this appeal for non-compliance with proper practice. However, as this is a Convention case, we have an obligation to act in a Convention compliant way and so whilst we are not happy at how the case has progressed since it was heard at first instance we must deal with the issue. Lord Kerr made this point in *Finucane* [2019] UKSC 7, at para [152].

[25] We proceed by making the following preliminary observations. First, damages claims of this nature are a separate consideration from the substantive case. Second, they should involve a short oral hearing unless it is clear there is little or no controversy. A short hearing will not take so much additional time or effort to render it disproportionate to the overriding objective.

[26] Turning to the substantive case, the trial judge has properly applied the legal principles in relation to the establishment of a claim for damages. We see no good reason why we should interfere with the exercise of his judgement on the point of principle which was the primary focus of this appeal. The judge had a full knowledge of the history of this case and made findings of fact which were not appealed. He was

entitled to consider and award damages once the issue of just satisfaction for delay was raised. We discern no error of law in his analysis.

[27] The trial judge cannot be faulted either for the extent of the reasons he gave for his decision given the extent of the written arguments he received. He could be forgiven for thinking that the appellant did not take any issue with the specifics and were only concerned with the principle of damages in this case.

[28] In any event, it is clear, that in this case there was a period of six years delay during which no investigative steps were taken. It is also clear that the breach of article 2/3 was directed towards one public authority, namely the police. However, we can also see that court proceedings were ongoing between 2018-2022 and during that time there was a live question as to what the senior courts might say about the independence of the PSNI to investigate.

[29] That point has now belatedly taken centre stage and is stressed by Mr McGleenan on appeal although it was not argued in any substance at first instance. Notwithstanding our strong criticism of how this has now arisen on appeal we must consider the point and the fact that the court proceedings were stayed pending appellate adjudication in a complex area.

[30] We do not think that the affidavit evidence filed late in the day by the PSNI adds to this consideration in any material respect. Specifically, it cannot absolve the appellant of all liability.

[31] However the litigation context is a material consideration in reaching an equitable solution to this case. We do not think this absolves the appellant of liability altogether. The question then becomes what is the period of culpable delay? Understandably, the judge did not deal with this point directly in his damage's judgment, but at para [31] of the substantive judgment, he indicated that "[t]he material relied upon, when taken together, casts real doubt on the ability of the original RUC investigation to bring those responsible to justice." Thus, for the judge, it was the cumulative effect of the PONI report and the 'No Stone Unturned' documentary that triggered delay warranting damages.

[32] The period for which no justification can be offered is from the PONI report in 2016, for two years or so. The period of inactivity after the 'No Stone Unturned' documentary is one year from 2017-2018. We must take 2018 as a threshold as it was then that the case was stayed along with others dealing with PSNI independence. The trial judge was not directed to these issues, and we feel if he had been he would have awarded compensation for a reduced period.

[33] We have considered all the circumstances of this case. It follows on the point of principle that damages should be awarded to reflect the distress and anxiety occasioned from the delay in investigating this case over a 1-2 year period. With the benefit of the submissions we have received, we assess the extent of damages at £5,000.

We will simply alter the original award to that effect whilst affirming the principle that damages were necessary to afford just satisfaction in this case. We will hear the parties as to costs.